

**THE CONSTITUTIONALIZATION OF THE RIGHT TO SOCIAL  
SECURITY: A COMPARATIVE ANALYSIS BETWEEN JAPAN AND  
MEXICO**

by

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# Abstract

This dissertation analyzes three hypotheses that are often advanced in the literature regarding social rights in a comparative scenario.

The first of such hypotheses states that the inclusion of social rights in a given constitution makes them justiciable (constitutionalization hypothesis). The second of such hypotheses states that making them justiciable will, in turn, improve social rights enforcement (justiciability hypothesis). The third of such hypotheses states that when both of the suppositions from the previous hypotheses are met, a general improvement in welfare will ensue (welfare hypothesis).

To test the aforementioned hypotheses, this dissertation delimited the vast category of social rights to focus on the right to social security (RSS), and the vast category of possible countries to focus on the cases of Japan and Mexico. After the pertinent analysis, this dissertation will conclude that, in the two cases compared herein, the three aforementioned hypotheses are wrong. More importantly, this dissertation will intend to explain why such hypotheses are wrong for the cases compared.

# **Lay summary**

This dissertation compares the right to social security in two countries with very different economies but with similar social and legal problems: Japan and Mexico. Some of the critical elements identified in both countries included the subordination of international human rights law to domestic law, a passive and conservative judiciary, and a society averse to litigation. It will be argued that the sum of the aforementioned elements, independently of other cultural or economic explanations, determine the constitutional status and validity for the right to social security.

# Preface

This dissertation is an original, unpublished, independent work by the author, Fernando Villaseñor Rodríguez.

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# List of abbreviations and acronyms

<b>ACLA</b>	Administrative Cases Litigation Act
<b>AFORE</b>	Retirement Funds Administrators (for its original acronym in Spanish)
<b>C102</b>	ILO's Convention of 1952
<b>CCT</b>	Conditional Cash Transfers
<b>CEDAW</b>	International Convention on the Elimination of all Forms of Discrimination against Women
<b>CESCR</b>	United Nations Committee on Economic and Social Rights
<b>CLB</b>	Cabinet Legislation Bureau
<b>CNDH</b>	National Commission of Human Rights (for its original acronym in Spanish)
<b>COIDH</b>	Interamerican Court of Human Rights (for its original acronym in Spanish)
<b>CONEVAL</b>	National Council for Evaluating Welfare and Development Policies (for its original acronym in Spanish)
<b>CONSAR</b>	Retirement Funds Supervisory Commission (for its original acronym in Spanish)
<b>CPR</b>	Civil and Political Rights
<b>DIF</b>	National System for the Integral Development of the Family (for its original acronym in Spanish)
<b>DPJ</b>	Democratic Party of Japan
<b>DR</b>	Dependency Rate
<b>EEOL</b>	Equal Employment Opportunity Law
<b>ESCR</b>	Economic, Social and Cultural Rights
<b>FSA</b>	Food Supply Act
<b>GC19</b>	General Comment No. 19
<b>GDP</b>	Gross Domestic Product
<b>HRB</b>	Human Rights Bureau
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICPPR</b>	International Covenant on Civil and Political Rights

<b>ILO</b>	International Labor Organization
<b>IMSS</b>	Mexican Institute of Social Security (for its original acronym in Spanish)
<b>INFONAVIT</b>	National Fund for Labor Housing (for its original acronym in Spanish)
<b>ISSSTE</b>	Institute of Social Security for the Public Workers (for its original acronym in Spanish)
<b>JFBA</b>	Japanese Federation of Bar Associations
<b>LDP</b>	Liberal Democratic Party
<b>MOJ</b>	Ministry of Justice
<b>NCSSR</b>	National Committee on Social Security Systems Reform
<b>NHIA</b>	National Health Insurance Act
<b>NHRI</b>	National Human Rights Institutions
<b>NHRR</b>	New Human Rights Reforms
<b>NPO</b>	Non-Profit Organizations
<b>OECD</b>	Organization for Economic Cooperation and Development
<b>OHCHR</b>	United Nations Human Rights Office of the High Commissioner
<b>PROGRESA</b>	Program of Education, Health and Nutrition (for its original acronym in Spanish)
<b>PRONASOL</b>	National Solidarity Program (for its original acronym in Spanish)
<b>PRI</b>	Institutional Revolutionary Party (for its original acronym in Spanish)
<b>RSS</b>	Right to Social Security
<b>SEDESOL</b>	Social Welfare Secretariat (for its original acronym in Spanish)
<b>SCAP</b>	Supreme Commander of the Allied Powers
<b>SCJ</b>	Supreme Court of Japan
<b>SCM</b>	Supreme Court of Mexico
<b>SPF</b>	Social Protection Floors
<b>SSA</b>	Secretariat of Health (for its original acronym in Spanish)
<b>SSL</b>	Social Security Law
<b>TFR</b>	Total Fertility Rate
<b>UDHR</b>	Universal Declaration of Human Rights
<b>WWII</b>	World War II

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## **PART I THEORETICAL FOUNDATION**

# **Chapter 1 Introduction**

“Most accounts of socio-economic rights focus on the constitutional or jurisprudential aspects of such rights. However, such rights are not constituted, interpreted, or implemented in an institutional, ideological, or political vacuum.”

—Ran Hirschl, 2011<sup>1</sup>

*The intention of this chapter is to explain the objective of this dissertation and to postulate the questions that it intends to solve. This chapter also includes an explanation regarding the focus of analysis, the reasons behind the selection of the two countries to be compared, and details of the scope and relevance of this dissertation. The methodology will be explained, along with arguments in favor and against it, and a defense that justifies its choosing. Lastly, the organization of this dissertation will also be outlined to offer a common understanding of the route to be followed.*

## **1.1 Objective**

Not all countries include the right to social security<sup>2</sup> (RSS)<sup>3</sup> as part of their constitutional text, but should they?

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<sup>1</sup> Evan Rosevear & Ran Hirschl, “Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities” in Tom Campbell, K.D. Ewing, and Adam Tomkins, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011) at 228.

<sup>2</sup> The right to social security (RSS) will be thoroughly analyzed and explained in Chapter 5.

<sup>3</sup> With various degrees of recognition, protection and justiciability the ILO lists the Constitutions of: Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Estonia, Latvia, Lithuania, Ukraine, Bulgaria, Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Russian Federation, Belgium (for Europe); Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic Ecuador, El

Various authors<sup>4</sup> (such as Fabre<sup>5</sup> and Young<sup>6</sup>) argue that including social rights (in general) and the RSS (in particular) in the constitution automatically makes them justiciable, **understanding justiciability for this moment as being capable of review and adjudication<sup>7</sup> by a court of law<sup>8</sup>** (constitutionalization hypothesis). Most of such authors, in addition, consider that making social rights justiciable also improves their actual enforcement by courts (justiciability hypothesis). Finally, most authors also consider that an increase of justiciability due to constitutionalization will also lead to improved welfare conditions (welfare hypothesis). The underlying assumption in all three hypotheses is the positive transformative power that the courts may have when being able to review cases and adjudicate social rights. In such regard, Argentina<sup>9</sup>, Bangladesh<sup>10</sup>, Chile<sup>11</sup>, Colombia<sup>12</sup>, Peru<sup>13</sup>, Serbia<sup>14</sup>, South Africa<sup>15</sup> and Venezuela<sup>16</sup>, are often cited as cases in which constitutionalizing social rights improved the living conditions of their residents.<sup>17</sup>

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Salvador, Guatemala, Honduras, Nicaragua, Panamá, Perú and Venezuela (for America); Bangladesh, Cambodia, China, India, Indonesia, Japan, Nepal, Pakistan and Sri Lanka (for Asia) as constitutions that have an explicit recognition of the RSS. ILO Global Study, *The Right to Social Security in the Constitutions of the World: Broadening the moral and legal space for social justice* (Geneva: International Labor Organization, 2016) and Global Health and Human Rights Database, available at: <http://www.globalhealthrights.org/constitutions/chr/crtss/>.

<sup>4</sup> All the scholars mentioned in this Chapter will be thoroughly analyzed in Chapters 3 and 4.

<sup>5</sup> Cecile Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford: Oxford Scholarship Online, 2003).

<sup>6</sup> Katharine Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012).

<sup>7</sup> Adjudication will be understood in its common connotation: "the act of resolving a dispute or deciding a case". Nolo's Plain-English Law Dictionary, available at: <https://www.law.cornell.edu/wex/adjudication>.

<sup>8</sup> William J. Steward, *Justiciable* (Palo Alto: Collins Dictionary of Law, 2006). For the time being this will be understood as a right being "justiciable". An ampler definition and a proper discussion will be provided in the next subsection.

<sup>9</sup> Constitución de la Nación de Argentina [Const.] art. 14bis. August 23, 1994 (Argentina).

<sup>10</sup> Constitution of the Peoples Republic of Bangladesh. [Const.] Chapter 15. November 4, 1972 (Bangladesh).

<sup>11</sup> Constitución Política de la República de Chile. [Const.] art. 18. October 21, 1980 (Chile).

<sup>12</sup> Constitución Política de Colombia [Const.] art. 6. Julio 7 de 1991 (Colombia).

<sup>13</sup> Constitución Política del Perú [Const.] arts. 10, 11 and 12- December 29, 1993 (Perú).

<sup>14</sup> Constitution of the Republic of Serbia [Const.] art. 97. September 30, 2006 (Serbia).

<sup>15</sup> Constitution of the Republic of South Africa [Const.] art. 27. September 6, 1996 (South Africa).

<sup>16</sup> Constitución de la República Bolivariana de Venezuela. [Const.] art. 80. December 15, 1999 (Venezuela).

<sup>17</sup> See for example Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (New York: Routledge, 2016).

Nevertheless, another group of scholars (including Cross<sup>18</sup>, Gearty<sup>19</sup>, Menaut<sup>20</sup>, Gabel<sup>21</sup>, and Portugal<sup>22</sup>) has denounced that the aforementioned hypotheses are false.<sup>23</sup> Such scholars either deny the “positive transformative power of the courts”, or consider that granting social rights a constitutional status doesn’t imply better protection or more judicial enforcement, and that it is more probable for other factors to make a difference.<sup>24</sup>

Trying to solve this debate, the objective of this dissertation is to test the aforementioned three hypotheses in a comparative scenario. In doing so, this dissertation will also highlight the importance of non-constitutional variables which are underrepresented in the aforementioned discussion.

This dissertation will compare the protection and enforcement of the RSS in Japan and Mexico. These countries were chosen because, notwithstanding their more apparent differences, they share scant judicial enforcement of the RSS despite the fact that such right is included in their constitutions. In this sense, although this dissertation will begin by comparing the text of the constitutions of Japan and Mexico, it will be demonstrated that a series of elements beyond such texts is actually what determines how social rights work in practice.

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<sup>18</sup> Frank B. Cross, “The Error of Positive Rights” (2011) 48:4 *UCLA Law Review* 857.

<sup>19</sup> Connor Gearty, “Against Judicial Enforcement” in Connor Gearty & Virginia Mantouvalou, *Debating Social Rights* (Oxford: Hart Publishing, 2010).

<sup>20</sup> Antonio Carlos Pereira-Menaut, “Against Positive Rights” (1988) 22:2 *Valparaiso University Law Review* 359.

<sup>21</sup> Peter Gabel, “A Critique of Rights: The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves” (1984) 62 *Texas Law Review* 1581.

<sup>22</sup> Carlos Portugal Gouvêa, “Social Rights against the Poor” (2013) 7 *Vienna Journal on International Constitutional Law* 454.

<sup>23</sup> Sunstein at one time was also among the main authors against positive rights as can be seen in his Chapter “Against Positive Rights” in András Sajó, (ed.), *Western Rights? Post-Communist Application* (Amsterdam: Kluwer Academic Publishers, 1996). Nevertheless, in more recent works Sunstein has seemed to change such original position. More specifically, after the *Grootboom* decision in South Africa in 2000, Sunstein seems to take an opposite view when he states that: “The distinctive virtue of the Court’s approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met. The approach of the Constitutional Court stands as a powerful rejoinder to those who have contended that socio-economic rights don’t belong in a constitution”. Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001) at 221-237.

<sup>24</sup> See Christian Bjørnskov and Jacob Mchangama, *Do Social Rights Affect Social Outcomes?* (Copenhagen: Paper presented in September 9, 2013), available at: <https://ssrn.com/abstract=2323539>.



With such purpose, the dynamic between constitution, judicial review and social attitudes will be described, along with the effect that such dynamic has regarding legal outcomes in RSS litigation for Japan and Mexico. The importance of the RSS and the possible special status that including such right in the constitution may provide will be inquiries at the core of this dissertation.

This dissertation will also analyze cases of judicial review to show the similar reasoning of the courts in both countries herein compared. Finally, this dissertation will argue that in the case of the RSS, and pertaining Japan and Mexico, neither constitutionalization, nor justiciability of such right improve welfare conditions.

## **1.2 Focus: constitutionalization and justiciability**

This dissertation will focus and analyze the relationship between two concepts: constitutionalization and justiciability (with the implied importance of courts).

### **a) Constitutionalization**

Black's Law Dictionary Online defines a constitution as:

“the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers”.<sup>25</sup>

However, in this dissertation Joseph Raz's definition will be used, due to its comprehensiveness and since, as will be discussed in Parts II and III, it is applicable

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<sup>25</sup> *Black's Law Dictionary, 2d ed.* (St. Paul: West Publishing, 1910), available at: <http://thelawdictionary.org/>.

to both of the constitutions herein compared. In such regard, Raz has described the constitution as an entity with the following features:

1. it is constitutive of a legal system;
2. it is stable, at least in aspiration;
3. it is written
4. it is superior law;
5. it is justiciable;
6. it is entrenched, i.e., more difficult to change than other law;
7. it is expressing a common ideology.<sup>26</sup>

Regarding constitutionalization, three common connotations include the action: **1) To provide with or make subject to a constitution; 2) To incorporate into or sanction under a constitution; or 3) To treat as being subject to constitutional law.**<sup>27</sup> In this dissertation the three connotations are applicable and thus, the constitutionalization of the RSS will be understood as: *the incorporation of the RSS into the constitution which makes it constitutional law.*

#### b) Justiciability and the importance of courts

This dissertation will give special importance to Raz's fifth feature (justiciability)<sup>28</sup>, making the relationship between RSS as a justiciable right and its actual enforcement by the courts essential to evaluate the three aforementioned

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<sup>26</sup> Joseph Raz, "On the Authority and Interpretations of Constitutions. Some Preliminaries" in Larry Alexander (ed.), *Constitutionalism. Philosophical Foundations* (Cambridge: Cambridge University Press, 1998) at 153.

<sup>27</sup> *American Heritage Dictionary of the English Language* (Boston: Houghton Mifflin Harcourt Publishing Company, 2016).

<sup>28</sup> Although in a strict sense a number of traditional constitutions (e.g. the Swiss Constitution) do not rely on judicial review by a Supreme Court, in both of the countries herein compared the seven elements are (at least formally) applicable.

hypotheses. In such regard, it is important to identify which claims may be solved by judicial as opposed to political means:

“Justiciability...defines the boundaries between our legal and political systems. By delineating the scope of judicial adjudication of disputes, courts determine what matters are appropriate for legal determinations, and what matters must be left for political resolution...A finding that a matter is non-justiciable may immunize certain government actions and laws from judicial review and may deny parties wronged by government action a judicial remedy.”<sup>29</sup>

On this train of thought, Peter Gordon Ingram firstly distinguishes justiciability depending on what matters are *proper* to be analyzed by a court of law.<sup>30</sup> Should the matter be improper (if it is not a legal matter or if it is clearly reserved to the legislative or executive for being a political matter), the court should defer its competence to the appropriate instance. This establishes boundaries over what can and what cannot be reviewed by courts (*i.e.* strictly moral and ethical issues, rules of etiquette, political matters, etc.). *Thus, a court can be either properly or improperly deciding upon a matter.*

Secondly, Ingram considers that the meaning of justiciability also refers to whether a matter is *capable* of being decided by a court of justice.<sup>31</sup> Whereas in the first definition the solution is straightforward and binary (to accept or deny competence); in this second consideration of justiciability, there is a gray area. It is not enough that a matter should be justiciable by the courts; “it is also necessary to ensure that it is capable of being adjudicated in regular fashion by the courts when it is formally within their remit.”<sup>32</sup> *Thus, a court must have the capacity (including fact-finding powers,*

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<sup>29</sup> Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Casswell, 1999) at vi.

<sup>30</sup> Peter Gordon Ingram, “Justiciability” (1994) 39 *American Journal of Jurisprudence* 353.

<sup>31</sup> *Ibid.* at 355.

<sup>32</sup> *Ibid.*

*democratic support, knowledge of budgetary and social policies, and necessary guarantees) to enforce their decision regarding a right.*<sup>33</sup>

In this dissertation both meanings of the term justiciability will be thoroughly scrutinized when studying the role of courts regarding matters and rights that are both proper, and which are capable of being decided by them. Having explained the previous considerations for the term, a more satisfactory working definition of **justiciability** that will be used in this dissertation is ***the quality for a matter or a right of being properly decided by a capable court of justice.***

Moreover, in order to evaluate the three hypotheses, it is not sufficient for a right to be justiciable. To give substance to such right it must also be enforceable. As Jackbeth Mapulanga declares:

“Distinguishing justiciability from enforceability is crucial to the debate on the justiciability of ESCR because enforceability is wrongly equated with justiciability. The enforcement of human rights deals with the identification of the entitlements and duties created by the legal regime, which have to be maintained and executed. Justiciability, on the other hand, presupposes the existence of a review mechanism to determine non-compliance with the terms of the legal regime. Although they are two different concepts, a close relationship exist between justiciability and enforceability, as the former is a direct follow up of the latter.”<sup>34</sup>

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<sup>33</sup> Regarding its practical application, David Wiseman also provides a classification of justiciability by two types of arguments considered by the courts: **The first type of arguments are those addressing the issue of whether the claim is available for adjudication**, as opposed to some other form of social decision making. According to such arguments, if there is not a specific protection for a right, there can be no claim available for adjudication by courts. As a result, such claims can be pursued only in alternative social decision-making institutions, such as legislatures. **The third type of arguments are those about whether a claim is suitable for adjudication.** Such arguments are oriented to the institutional capacity and legitimacy of the courts. Some examples of such arguments include arguments that address the redundancy, abstractness, complexity, or political sensitivity of a claim. David Wiseman, “The Charter and Poverty: Beyond Justiciability” (2001) 41:4 *The University of Toronto Law Journal* 425.

<sup>34</sup> Jackbeth Mapulanga-Hulston, “Examining the Justiciability of Economic, Social and Cultural Rights” (2002) 6:4 *The International Journal of Human Rights* 29.

Needless to say, there can be no rights enforcement by the courts unless they have previously been considered justiciable and therefore subject to their review and (should the case be) adjudication.”<sup>35</sup>

Therefore, and returning to the three aforecited hypotheses, this dissertation will first determine if the constitutionalization of the RSS makes it justiciable. This dissertation will then evaluate if such right, by becoming justiciable, is more frequently invoked by plaintiffs and reviewed by courts. Then, this dissertation will evaluate if such review leads to an increased enforcement by such courts. Finally, if an increase in enforcement of the RSS in fact occurs, this dissertation will evaluate if such increase is correlated with a betterment in welfare.

**As can be seen, each hypothesis is conditional and directly interconnected with the others, and all have in common the role of the courts in making the RSS viable; this is the reason why the relationship between constitution, social rights, litigation and courts will be at the center of this research.**

In such regard, the recent cases of social rights challenged by marginalized groups and adjudicated in Indian,<sup>36</sup> and more recently in South African courts<sup>37</sup>, have shown an important mechanism for achieving equality, poverty relief, and positive social transformation via the national courts.<sup>38</sup> Thus, the focus on justiciability and the

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<sup>35</sup> Nevertheless, as will be explained in Chapter 3, there are some cases in which a constitutional right doesn't need to be justiciable in order for it to be enforceable. Examples of non-justiciable but enforceable rights include declaratory rights and directive principles.

<sup>36</sup> Ajay Verma, “The Experience in India” in Roger Blanpain (ed.), *Law in Motion* (The Hague: Kluwer Law International, 1997).

<sup>37</sup> Peris Jones and Kristian Stokke (eds.), *Democratising Development: The Politics of Socio Economic Rights in South Africa* (Leiden: Martinus Nijhoff, 2005).

<sup>38</sup> Although there is a debate about the practical results of justiciable social rights in both India and South Africa. For examples of both sides on such debate see Madhav Khosla, “Making social rights conditional: Lessons from India” (2010) 8:4 *New York University School of Law Journal* 739 and Marius Pieterse, “Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience” (2004) 26 *Human Rights Quarterly* 882.

courts has become relevant in social welfare studies due to their possible role as “enablers of social transformation”, understanding social transformation as “the altering of structured inequalities and power relations in society in ways that reduce the weight of morally irrelevant circumstances, such as socio-economic status/class, gender, race, religion or sexual orientation”<sup>39</sup>.

With the previous considerations, courts may contribute to social transformation **directly**:

- By providing an arena in which concerns of marginalised groups can be raised as rights based claims (with social rights litigation as the paradigmatic case).<sup>40</sup>
- By serving as a barrier against erosion of existing pro-poor institutional arrangements that not necessarily involve welfare rights entitlement.<sup>41</sup>

Courts may also contribute to social transformation **indirectly**:

- By enabling marginalised groups to more effectively fight for social transformation in other arenas by securing their effective rights of political participation, rights to information, collective action, and fundamentally, by securing the integrity of the democratic political system as such.
- By “passively” serving as a public platform where claims can be articulated. As a focal point for mobilization and publicity this may have important political effects even in the absence of a judgment acknowledging the claim.<sup>42</sup>

**In this dissertation the focus of analysis will be limited to the direct effects of claims based in the RSS. Accordingly, this dissertation intends to answer if**

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<sup>39</sup> Roberto Gargarella, “Theories of Democracy, the Judiciary and Social Rights” in Roberto Gargarella, *supra* note 17.

<sup>40</sup> *Ibid.*

<sup>41</sup> This is particularly relevant in countries formerly pursuing some form of socialism, where state subsidies for social priorities (pensions, welfare benefits, education, health, basic foods) have been discontinued or reduced, due to ideological change and/or financial strain resulting in the introduction of structural adjustment policies and liberalisation of the economy. András Sajó (ed.), *Western Rights? Post-Communist Application* (Holland: Kluwer Academic Publishers, 1996).

<sup>42</sup> Siri Gloppen, “Courts and Social Transformation: An Analytical Framework” in Roberto Gargarella, *supra* note 17, at 37.

**Japanese and Mexican courts act as enablers of social transformation. To answer such question, this dissertation will focus on how including the RSS in the constitution might make it explicitly justiciable and thus enable courts to produce social transformation.**

In sum, this dissertation will first analyze if including the RSS in the constitution of each compared country may increase the number of cases invoked by the population due to its hierarchy as “constitutive and superior law”. Secondly, this dissertation will determine if making the RSS justiciable translates in more instances where such right is reviewed, adjudicated and enforced. Thirdly and finally, this dissertation will determine if the previous two conditions lead to welfare betterment of both the plaintiffs and the overall population of each country compared.

### **1.3 Comparing Japan and Mexico**

Having established the objective and focus of this dissertation, it is important to justify the selection of Japan and Mexico as compared countries in order to evaluate the aforementioned hypotheses. An ideal comparison would require two countries that would allow evaluating the three hypotheses. In such regard, even though both Japan and Mexico have included the RSS in their respective constitutions, there are many distinctive elements in its wording and its actual practice which provide an interesting case suitable for comparison. More specifically, the comparison between Japan and Mexico is relevant: a) Regarding the three hypotheses previously established and, b) Regarding the viability of the comparison itself.

a) Regarding the three hypotheses previously established

i) Constitutionalization hypothesis:

Mexico was the first country to include social rights in its 1917 constitution, and also among the first to mention the RSS as a product of the Mexican Revolution. Japan has a more recent constitution dating to 1947 which, regarding social rights, can be considered both a product of the Occupation Army, and of the New Dealer's ideology. But although Mexico has a longer constitutional tradition regarding social rights, it has a very succinct and limited provision regarding the RSS, which contrasts with the detailed, ample and progressive wording of such right by the Japanese constitution. Moreover, the RSS as included in Article 25 of the Japanese constitution would at first glance appear as universal and unconditional, whereas the same right established by Article 123 Paragraph XXIX of the Mexican constitution would appear to be limited to affiliated workers and their families<sup>43</sup>. **Such contrasts enable an assessment of the constitutional RSS with different origins, traditions, details and scope in order to evaluate the constitutionalization hypothesis.** *This dissertation will evaluate the RSS in its constitutional provision and practice to demonstrate that, in the two countries herein compared, the constitutionalization hypothesis is false.*

## ii) Justiciability hypothesis

Mexico has a longer tradition regarding social rights litigation, a higher number of lawyers, and almost the double number of judges *per capita* when compared to Japan, which would suggest more ease of access to justice.<sup>44</sup> Nonetheless, even though the Mexican judiciary has been very active in a number of issues including other social rights such as education and labor disputes, it has been very reluctant to assert the RSS as a justiciable right without a previous labor relationship. In the case of Japan, the RSS can be evaluated independently of labor but the judicial practice has severely limited the content of such right, and in almost no cases has it

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<sup>43</sup> As will be properly explained in Part III, this has recently changed with the New Human Rights Reform of 2013 by virtue of which now Mexico recognizes a right to social security that needn't be labor dependant.

<sup>44</sup> The exact numbers and their analysis will be compared in Chapters 8.5 for Japan, and 12.5 for Mexico.



enforced it. **Such contrasts allow for an assessment regarding justiciability and enforcement of the RSS independent of constitutionalization, and as such, offer a compelling contrast to evaluate the justiciability hypothesis.** *This dissertation will provide such assessment and demonstrate that, in the two countries compared, the justiciability hypothesis is false.*

### iii) Welfare hypothesis

Both Japan and Mexico guarantee the right of access to justice (Article 32 of the Japanese constitution, and Article 17 of the Mexican constitution)<sup>45</sup>, and both explicitly recognize the court's powers to adjudicate and enforce their decisions (Article 81 of the Japanese constitution, and Article 17 of the Mexican Constitution)<sup>46</sup>. Therefore, at least in theory, the welfare hypothesis could be considered feasible since the population of both countries may claim the RSS in court, and such court has the formal powers to acknowledge, adjudicate and enforce such right. However, the real question for both countries is if the judiciary is capable and willing to enforce the RSS, and if there is evidence that such enforcement has generated better levels of welfare not only for the plaintiffs, but also for the general population.<sup>47</sup>

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<sup>45</sup> Japan: Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov3, 1946, art. 32. No person shall be denied the right of access to the courts.

Mexico: Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 17. All people have the right to enjoy justice before the courts under the terms and conditions set forth by the laws. The courts shall issue their rulings in a prompt, complete and impartial manner. Court's services shall be free and judicial fees are prohibited.

<sup>46</sup> Japan: Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov3, 1946, art. 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

Mexico: Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 17: ...Federal and local laws shall provide the necessary means to guarantee the independence of the courts and the full enforcement of their rulings.

<sup>47</sup> Posed in such way it is rather difficult to adequately evaluate an increase in general welfare. First, because such increase must have a strict correlation with the enforcement of the RSS by the courts, and do not take into consideration other factors such as non-litigious ways of improvement inspired or based in the RSS. Secondly, because such increase is based in two previous conditional arguments: that the RSS has been constitutionalized, and that by being constitutionalized it increased its possibility of being claimed by plaintiffs and reviewed by courts. Thirdly, because determining "better levels of welfare for the general population" may be a subjective endeavor in itself if the previous correlations have not been clearly demonstrated.

In such regard, this dissertation acknowledges that there are other ways of increasing welfare rights by litigating using arguments apart from the constitutional entitlement to the RSS. Moreover, there are various non-judicial processes for achieving welfare for particularly vulnerable groups. Nonetheless, the hypothesis to be evaluated by this dissertation is restricted to the transformative powers of the courts by making a constitutional RSS justiciable. **Therefore, this dissertation will analyze the judicial decisions regarding the RSS in both countries and determine if any of them generated a welfare betterment for the plaintiffs and society at large.** *This dissertation will show that the judicial decisions regarding the RSS have no significant impact in welfare betterment and that, in the two countries compared, the welfare hypothesis is false.*

b) Regarding the viability of the comparison

After having done the preliminary research, no constitutional comparisons between both countries could be found. A gap in the existing literature might merit a dedicated analysis but only if such analysis is possible. In other words, the main question to answer when proposing this research was if comparing Japan and Mexico was a viable endeavor for this purpose.

Regarding the first question, both objects of comparison must possess a significant level of similarity but with enough differences as to not being identical. This quality is known as the *tertium comparationis* and represents the commonality necessary to perform any type of comparison.<sup>48</sup> In the two countries compared relevant similarities include:

- 1) Having a constitution with all seven elements included in Raz's definition.
- 2) Having a civil law tradition which implies that:

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<sup>48</sup> For an analysis of the term and a critique see Esin Örüçü, "Methodology of Comparative Law" in J.M. Smits, *Elgar Encyclopedia of Comparative Law* (Northampton: Edward Elgar Publishing Limited, 2006).

- i. its core principles are codified into a referable system which serves as the primary source of law;
- ii. the judge's role is to establish the facts of the case and to apply the provisions of the applicable code;
- iii. the judge is usually the main investigator, and the lawyer's role is to advise a client on legal proceedings, write legal pleadings, and help provide favorable evidence to the investigative judge; and
- iv. the legal system has a very limited use for judicial precedents.<sup>49</sup>

As will be further elaborated in the chapters pertaining Japan and Mexico, having a civil law tradition is closely related to the dynamics between the executive, legislative and judicial powers which tends to undermine the latter. Since in civil law countries the basic principles are contained in an enacted code, such is the source of the law, which leaves the judiciary with a more limited freedom for decision-making when compared to common law countries.<sup>50</sup>

- 3) Having provisions regarding the RSS since the enactment of their current constitutions (since 1917 in Mexico, and since 1947 in Japan).
- 4) Having a strong executive power.
- 5) Having almost undisputed single-party governments: Partido Revolucionario Institucional (PRI) for Mexico, and Liberal Democratic Party (LDP) for Japan.
- 6) Having the institution of judicial review both for statutes and government actions.
- 7) Having roughly the same population (127 million as of the 2015 census).

All the aforementioned similarities provide a similar background pattern regarding social rights adjudication and enforcement. Such pattern includes a passive judiciary which, although having constitutional provisions for the RSS, seldom acknowledges it by judicial review, and is often deferential to the legislative and executive branches lead by single-party governments. Such pattern also makes comparing Japan and

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<sup>49</sup> What is the Civil Law? - *LSU Law Center*, available at: <https://www.law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/>.

<sup>50</sup> As will be discussed later, such line of reasoning severely limits the role of the courts as "social transformers" in contrast to common law countries.

Mexico both relevant and viable regarding the three hypotheses previously established.

## 1.4 Methodology

Being the most common theoretical tool for constitutional comparisons, functionalism was chosen as a starting point to develop the proper methodology for this dissertation. Functionalism is a comparative legal methodology which considers every society has a legal solution for similar issues; this is considered the “function of the norm”. Yet, the forms of these legal solutions are not always equal; these are considered the “legal institutions.” While the functions are similar in every legal system, the institutions tend to be different. Thus, the advantage of this method lies in the comparison of institutions that may appear to have a different form, but actually accomplish a very similar function<sup>51</sup>.

Functionalism can be divided in three main phases.<sup>52</sup> In the **first phase**, it **identifies** two similar functions within two or more normative systems and the institution or institutions used to develop such function. In the **second phase**, functionalism **compares and evaluates** the legal institution vs. its actual function to determine if there is an opportunity for the improvement of an institution in order to better comply with an expected function. Finally, in the **third phase** functionalism usually **proposes** suggestions for improvement in one or both of the compared institutions.

### a) Merits of the Functionalist Approach

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<sup>51</sup> Max Rheinstein, “Teaching Comparative Law” (1938) 5 *University of Chicago Law Review* 615, at 615-618.

<sup>52</sup> Ralf Michaels, “The Functional Method of Comparative Law” in *Oxford Handbook Of Comparative Law* (Oxford: Mathias Reimann & Reinhard Zimmermann eds., 2006) at 346.

Mary Ann Glendon has written an analysis of functionalism as a viable methodology for comparative law. Glendon gives praise to functionalism which begins by a close inspection of the text, and then proceeds to the consideration of purpose both in the light of history, and in the light of circumstances as they exist at the time of the comparison.<sup>53</sup> In such manner, the constitutional text is used as the first and most important reference from which the other elements of comparison are derived, and limits such elements to the extent that they remain relevant to understand such text.

Thus, **one first merit of functionalism** over other methods of legal comparison is its **logical structural analysis beginning by the institution/norm as it is in the legal text and then following with the contextualization**. This has the virtue of avoiding relativism by having the legal text as the main reference, and giving a firm point of entry to the comparison at hand.

On this same regard Hent Kalmo praises functionalism for taking **whole institutions** (instead of simple concepts), as a basic integrated unit of meaning. For example, if a normative system is deconstructed to their bare concepts, the analysis of the function as a whole might be ignored. This is the failure generally known as “atomic jurisprudence”, which functionalism is designed to avoid.<sup>54</sup>

A **second merit of functionalism** thus is **having a clearly defined unit of comparison**. In such way, it is possible to ascertain that the concept to be contrasted and evaluated doesn't end up forming a totally different legal structure which renders analyses unreliable.

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<sup>53</sup> Mary Ann Glendon, “Comparative Law as Shock Treatment” (1993) 11:2 *Method* 137.

<sup>54</sup> Hent Kalmo, “How Comparable are Legal Concepts? The Case of Causation” (2006) 1 *Juridica International* 45.

On other point of view, David Gerber notes the necessity of having accessible and transmissible information, a foundational stone for any comparative science. He considers functionalism is able to provide a common language with scalable scenarios (meaning they can be used as bases for more thorough or similar studies), and transferable information with clarity, usefulness and scientific rigor.<sup>55</sup>

A **third merit** of functionalism thus is its **scalability**, understood as the **capacity of using its analyses and conclusions as units of knowledge with the capacity to be scientifically transferable**. For practical purposes, this means the possibility for other social studies to use the terminology, method and results of functionalist comparisons for their own disciplines.

## **b) Criticisms against functionalism**

Criticism against functionalism can be divided into fundamental criticisms and minor criticisms.

### **Fundamental criticisms:**

**The first of the fundamental criticisms argues that it is unfeasible to achieve a proper comparison.** Pierre Legrand explains that there are cases where the foreign law does not have a comparable institution, does not address the same issue, or gives an institution a completely different function than the domestic law. According to Legrand, as long as functionalism “remains driven by the entrenched urge to confine its analytical framework to the identification of ‘sameness’ in the formulation of statutes or the outcome of judicial decisions across jurisdictions, comparative legal

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<sup>55</sup> David J. Gerber, “System Dynamics: Toward a Language of Comparative Law” (1998) 46:4 *American Journal of Comparative Law* 719.

studies has little to offer legal theory other than the pseudoscientific respectability connected with institutional fetishism".<sup>56</sup>

**The second of the fundamental criticisms refers to the use of comparative law as a way to force harmony or unification.** Once again, Legrand states that "being desperate in its search for similarities, functionalism leads to the instrumental dissolution of specific cultural forms into generic strategic effects".<sup>57</sup> The postmodern legal scholar Esin Örüçü agrees that harmonization is a valid goal for law reform, but only when harmony is achieved by cultivating and acknowledging diversity and not by eliminating it.<sup>58</sup> However, according to Örüçü and Günther Frankenberg that is not the case since functionalist comparatists work within the dichotomies of comparative law. Such dichotomies include: universalism v. relativism; east v. west; parent v. derivative legal traditions and; developed v. developing normative cultures. According to Frankenberg, such dichotomical reasoning leads to impoverished, partial, and dangerous comparisons.<sup>59</sup>

### **Minor criticisms:**

**Among the less fundamental criticisms is the one that states that the comparatist is unable to truly understand foreign law as a foreigner would.** Frankenberg in this matter is skeptical about the idea of a legal comparatist truly understanding foreign legal cultures, as a native would.<sup>60</sup> Frankenberg even refers

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<sup>56</sup> Pierre Legrand, "Comparative Legal Studies and the Matter of Authenticity" (2006) 1:2 *Journal of Comparative Law* 360, at 367.

<sup>57</sup> Pierre Legrand, "Paradoxically, Derrida: For a Comparative Legal Studies" (2005) 27 *Cardozo Law Review* 631, at 705

<sup>58</sup> Esin Örüçü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* (Deventer: Kluwer, 1999).

<sup>59</sup> Günther Frankenberg, *Comparative Law as Critique* (Cheltenham: Edgar Elgar Press, 2016).

<sup>60</sup> The term legal culture refers to multiple different ideas, which are not always sufficiently separated. Legal culture often describes merely an extended understanding of law and is thus synonymous with "living law" (Eugen Ehrlich) or "law in action" (Roscoe Pound). Sometimes, the term legal culture is used interchangeably with the term legal family or legal tradition. Legal sociologists especially understand legal culture as the values, ideas

to this problem as the “dilemma of the tragic comparatist” being such person “well aware of the limits and defects of her home law and her intellectual situation. Confined to the borders of a national legal regime and the parochial nature of the corresponding legal education, the tragic self dresses casually and bemoans a state of “consecrated ignorance” of foreign laws and of her own alienation”.<sup>61</sup>

**A second minor criticism** is described by Edward McWhinney who admonishes that, when comparing institutions **it is difficult, and sometimes impossible, to determine which value system should be used.**<sup>62</sup> Thus, the comparatist applies its own values to a legal system which may have a diverse axiological base. Since values are intertwined in normative systems, this may lead to inaccurate comparisons.

**A third common but minor criticism refers to functionalism limitations according to the classical canon of comparative law** (*a.k.a.* “Country and Western tradition of Comparative Law”<sup>63</sup>). This canon implies analyzing from the same Eurocentric and dialectical fashion which constitutes its theoretical foundation. According to such critique, each comparison will be directly affected by the bias, ideology, terminological and conceptual limitations of each western comparatist.

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and attitudes that a society has with respect to its law (Lawrence M. Friedman, James Q. Whitman). Sometimes legal culture itself is seen as a value and placed in opposition to the barbarism of totalitarianism (Peter Häberle); here, legal culture is used synonymously with the rule of law. Others understand culture as certain modes of thinking; they speak of episteme or mentalité (Pierre Legrand), legal knowledge (Annelise Riles) and collective memory (Niklas Luhmann), law in the minds (William Ewald) or even cosmology (Rebecca French, Lawrence Rosen). In addition, an anthropologically influenced understanding exists of legal culture as the practice of law (Clifford Geertz). See Ralf Michaels, *Forthcoming in Oxford Handbook of European Private Law* (Oxford: Oxford University Press).

<sup>61</sup> Günther Frankenberg, “Stranger than Paradise: Identity and Paradise in Comparative Law” (1997) 2 *Utah Law Review* 259, at 266.

<sup>62</sup> Many questions arise in this matter. Should effectiveness be measured in economic or moral terms? Should rule of law be preferred to a non legal institutional system? See Edward McWhinney, “Operational Methodology and Philosophy for Accommodation of the Contending International Legal Systems” (1964) 50:36 *Virginia Law Review* 345.

<sup>63</sup> William Twining, “Comparative Law and Legal Theory: The Country and Western Tradition” in Ian Edge, (ed.), *Comparative Law in Global Perspective* (New York: Transnational Publishers Ardsley, 2000).



### c) In defense of functionalism

Many of the previous criticisms against legal functionalism are actually misconceptions of the methodology itself. To begin with the fundamental criticisms, it is true that functionalism looks for similarities, and it is true that Konrad Zweigert infamously stated that “if the comparatist finds no functional equivalent in a foreign legal order, he should ‘check again whether the terms in which he posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough’.”<sup>64</sup> But such phrase has been taken out of context and overused. In such sense, as Ralf Michaels argues “the presumption of similarity must be placed in its historical context. It was formulated after a war had been fought on the allegation of insurmountable differences.”<sup>65</sup>

More importantly, the modern understanding of functionalism uses functional equivalence which implies “finding that institutions are similar in one regard (namely in one of the functions they fulfill) while they are (or at least may be) different in all other regards—not only in their doctrinal formulations, but also in the other functions or dysfunctions they may have besides the one on which the comparatist focuses—”<sup>66</sup>. Thus, it is not that contemporary functionalism forces “sameness” at all levels of comparison, but only uses it as a first possible approach between two institutions, and always acknowledging that such similarity is limited both by the other possible formulations of such institution, and by the implicit bias of the comparatist. Acknowledging the previous limitations doesn’t undermine the endeavor of comparing two legal systems, on the contrary, it allows for other scholars to build on

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<sup>64</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1998) Introduction at 40.

<sup>65</sup> Ralf Michaels, “The Functional Method of Comparative Law” in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2012) at 369.

<sup>66</sup> *Ibid* at 371.

such knowledge from different perspectives for the same institutions. That is indeed one of the purposes of any scientific discipline.

Regarding the criticism of mishandling cultural specificities by trying to feign harmony, this is another misunderstanding. Maybe during the WWII and shortly afterwards functionalism tried to overemphasize harmony due to the events that had recently unfolded, but most of the contemporary understandings of functionalism place an undisputed importance on cultural, economic and political contextualization. Furthermore, “rightly understood, functionalist comparative law assumes that legal rules are culturally embedded... What distinguishes functionalists from culturalists is not the degree of attention to culture, but the kind of attention. What critics call acultural is the functionalists’ resistance to adopting an insider’s view, their unwillingness to limit themselves to culture as such, and of course their reconstruction of culture as functional (or dysfunctional) relations.”<sup>67</sup> Thus, it is not that functionalists deny the importance of culture for law, but rather that they try to maintain, as much as possible, an observer’s distance with the culture that contains the analyzed legal system in order to be as neutral in their comparisons as possible.

The previous intention of neutrality also addresses the minor criticism that a functional comparatist cannot understand the foreign law as a foreigner would. Indeed, not only does the functionalist comparatist accept this as a fact, but also tries as much as possible to avoid pretending any “nativeness” to the compared legal system. However, instead of falling for the “dilemma of the tragic comparatist”, the contemporary legal functionalist tries to overcome the gap in knowledge from the foreign system with as much contextual information as possible. Such information includes judicial reasoning and decisions, economic and political considerations for the enforcement of rights and cost/benefit analysis for lawmaking and adjudication, among others. In addition, what the critics may consider gross reductionism is just

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<sup>67</sup> *Ibid* at 365.

the contrary, since most contemporary functionalists “focus on the complex interrelatedness of societal elements, creating a picture not less but more complex than that created by the participants in a legal system”.<sup>68</sup>

Regarding the criticism about imposing the comparatist’s value system into the object of comparison, the contemporary comparatist tends to balance this problem by rooting its comparison not only on the theoretical but also on the practical elements of a legal system and avoid too much dependence on abstract rules. In fact, “contemporary functionalism explicitly ask that comparatists look not only at legal rules (‘law in books’), nor only at the results of their application (‘law in action’), but even beyond at non-legal answers to societal needs”.<sup>69</sup>

Finally, the Western Canon criticism is very frequently invoked. Once again, this is a strawman fallacy in which the criticism is aimed at an outdated version of functionalism. It is true that the Western Canon was used as an imperialistic worldview, and that both during WWII and even during the postwar era it was used for legitimation and imposition of “superior” legal systems to colonies and defeated nations alike. However, such logic is clearly incompatible with today’s globalized world in which trying to impose value systems and normative standards have been elusive at best and impossible at worse.

Even from its design, most contemporary legal functionalism has abandoned its pretenses of universalism and of being capable of “finding some essence or the ultimate truth of legal institutions”.<sup>70</sup> Thus, not all versions of functionalism intend to “determine the better law”, “unify the law” or “critique other legal orders standing on the superiority of their own”. For this dissertation, for example, such objectives of the functionalist methodology will neither be evaluated nor pursued.

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<sup>68</sup> *Ibid* at 364.

<sup>69</sup> See Konrad Zweigert and Hein Kötz, *supra* note 64, at 38.

<sup>70</sup> Michele Graziadei, “The Functionalist Heritage” in Pierre Legrand and Roderick Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) at 27.

As can be seen, many of the criticisms against functionalism miss its target due to misunderstandings, outdated perspectives, or approaches which have already been updated, balanced and corrected. Having defended functionalism against most of its common criticisms, in the next sub-section the specific use of functionalism in this dissertation will be established.

#### **d) The use of functionalism in this dissertation**

In this dissertation, due to its clarity, and flexibility for improvement, functionalism was used as a starting point to identify the first inquiry to be answered. Such inquiry consisted in determining if the constitution was a viable institution for performing the functions of promoting, protecting and realizing the RSS. In such manner, according to functionalism's first phase, the function identified as relevant for this research was the protection of the RSS, and the institution identified to perform such function was each country's constitution. Regarding the second phase, both Article 25 of the Japanese constitution and Article 123 Par. XXIX of the Mexican constitution were evaluated regarding their fulfillment of the RSS when judicial review was performed by the courts of each country. Regarding the third phase of functionalism, this dissertation proposes other ways of protecting the RSS which do not require their constitutionalization or justiciability, and suggests further research in non-judicial approaches.

Although the fundamental criticisms against functionalism have been countered, regarding the minor ones:

- i) This dissertation intends to go beyond the "dilemma of the tragic comparatist". To do so, instead of obviating possible cultural differences, **specific chapters dedicated to the historical, cultural and legal**

**framework of both countries** are included along with the legal institutions compared.

- ii) To avoid the classical canon criticisms, this dissertation specifically chose **countries that are not classic representatives of such canon**. Moreover, **this dissertation will explicitly deny the east vs. west paradigm as applicable to the two countries compared and regarding the three hypotheses evaluated**.
- iii) This dissertation not only analyzes similarities along with differences, but most importantly, will conclude that a similar pattern within rights, litigation and the courts renders very similar results in the two countries. However, **this dissertation avoids forcing sameness by providing a detailed account of the contextual elements for the institutions compared**. Moreover, to specifically address the problem of comparing different value systems within the law, **this dissertation has specifically included a qualitative analysis of the courts regarding their independence in both countries**.
- iv) Finally, with the intention to **avoid forcing harmonization by eliminating diversity, this dissertation includes not only the institutional, policy and law-maker perspectives, but also very importantly, the general attitudes towards law and litigation in both countries**. This approach reduces the risk of simplifying legal cultures by including the dynamics between the three branches of power and the general population regarding social rights in general, and the RSS in particular.

Thus, this dissertation's version of functionalism is very similar to most of its contemporary accounts (or at least to what Ralf Michaels denominates equivalence functionalism).<sup>71</sup> Such version of functionalism has surpassed its fundamental criticisms, and has taken into consideration the minor ones for balance and

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<sup>71</sup> See Ralf Michaels, *supra* note 65, at 356-363.

correction. More importantly, functionalism understood in the aforesaid terms is compatible with the evaluation of the three main hypotheses of this dissertation: the constitutionalization, justiciability and welfare hypotheses.

## 1.5 Relevance of this research

Having reviewed the corresponding literature, a series of problems were identified. The first problem is that, although there are sources supporting contrasting visions of social rights, they all remain too general and rarely delve into specific countries.<sup>72</sup> Thus, it is uncommon to find case studies, and even less common to find comparative analyses between Japan and Mexico.

In such reasoning, a second problem lies in the fact that, although there are some constitutional comparisons between Japan and other Asian countries<sup>73</sup>, and some constitutional comparisons between Mexico and other Latin American countries<sup>74</sup>, no constitutional comparison between Japan and Mexico could be found. For the two countries compared, the previous fact implied working without comparative references for the case of constitutional social rights in general, and the constitutional RSS in particular.

A third problem, closely related to the previous one, is that both comparative constitutional and social security literature, tend to equate Mexico to Latin America, or a developing economy.<sup>75</sup> In a similar fashion, Japan is oversimplified as either

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<sup>72</sup> See Robert Cox, "The Consequences of Welfare Reform: How Conceptions of Social Rights are Changing" (1998) 27:1 *Journal of Social Policy* 16.

<sup>73</sup> See Rosalind Dixon & Tom Ginsburg, *Comparative Constitutional Law in Asia* (Cheltenham: Edward Elgar, 2014).

<sup>74</sup> See Giancarlo Rolla, "La evolución del constitucionalismo en América Latina y la originalidad de las experiencias de Justicia Constitucional" (2012) 16 *Anuario iberoamericano de justicia constitucional* 329.

<sup>75</sup> See José Luis Cordeiro, "Constitutions around the World: A view from Latin America" (2008) *IDE Discussion Paper* No. 164.

East Asia or within the cluster of developed economies.<sup>76</sup> Therefore, from this standpoint, the many particularities of each system are usually overlooked based solely on regional or economic considerations.

Having identified these three main problems, and based on the previously mentioned methodology, this dissertation aims to provide an accurate framework for a comparative study that evaluates the impact of constitutional provisions in welfare. This dissertation will also demonstrate that both developed and developing countries, as are Japan and Mexico, have common problems with social rights that go beyond wealth. Understanding these other problems along with the classic economic analysis might be relevant for the scholars, policymakers and legal activists that want to improve welfare in both countries.

Finally, this dissertation intends to identify specific elements in social rights practice that might interact with constitutional provisions. The identification and appraisal of such elements might be useful for the study of social rights practices in other countries. In this regard, this dissertation may be relevant as a starting point for further comparative analysis (both in law and other social sciences).

## **1.6 Main arguments of this dissertation**

After conducting the pertinent research, in the countries herein compared no evidence was found to support the constitutionalization hypothesis or the justiciability hypothesis. It was also found that in both countries, making the RSS justiciable did not generate substantial increase in the living conditions for the population it intends to protect (contrary to the welfare hypothesis). This dissertation, therefore, surmises that both Japan and Mexico might be exceptions to the three hypotheses.

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<sup>76</sup> See Yeh Jiunn-Rong & Chang Wen-Chen, "The Emergence of East Asia Constitutionalism: Features in Comparison" *Asian Law Institute, Working Paper Series* No. 6 (August 2009) 34.

It will also be established that both in Japan and Mexico: a) the civil law legal tradition, single-party rule and strong and interventionist executive power; b) the relationship between international and domestic law; c) the role of the judiciary in social rights review and enforcement and; d) the social attitude towards law and litigation, have more relevance to determine the value of the RSS than its constitutionalization.

Regarding point a), both countries have a historical tradition of civil law which implies a stronger power for statutes than that for judicial decisions. It will be demonstrated that the civil law tradition along with single-party rule and a strong executive power enables shaping, nullifying and even overturning judgments that advance and acknowledge social rights. Additionally, the executive in the countries herein compared can designate members of the judiciary, undermining in this way both the judicial independence and the separation of powers.

Regarding point b), in both countries compared signing more international treaties has by no means improved enforcement of social rights. It will be argued that Japan and Mexico have failed to take international human rights protections to federal and municipal laws, leading to very low levels of enforcement. Moreover, various cases will be exposed in which the judiciary has used domestic legislation to impede compliance with international law protecting the RSS.

Regarding point c), a qualitative analysis of cases in both countries shows a passive and conservative judiciary. It will be argued that these attitudes were ingrained in the judiciary system in order to promote compliance with the *status quo*. Moreover, in both cases, it will be proven that the judicial branch has frequently served as a legitimizing device for the government, confirming policies and decisions, as opposed to exercising judicial review to protect human rights.



Finally, regarding point d), there is a shared negative attitude towards law and litigation. However, the reasons for this discontent are different in each country. In the corresponding chapters, it will be revealed that whereas in Japan there is a traditional preference for nonlegal agreements and conciliation, in Mexico inequality and corruption, both real and imagined, are the main cause for avoiding legal remedies (albeit less so than in the case of Japan).

In this dissertation it will be argued that the sum of the previous four elements creates, both in Japan and Mexico, a legal culture in which including the RSS in the constitution and making it justiciable doesn't necessarily increase its adjudication or enforcement.

## **1.7 Organization of the dissertation**

This dissertation is divided into V Parts each with its corresponding Chapters and, when applicable, Sections and Subsections.

**Part I** is the **Theoretical Foundation** for this dissertation (which will be applied to the cases discussed in Parts II and III).

**Chapter 1** includes the objective and focus of this dissertation, the justification for the countries compared and its relevance, as well as a brief discussion of the methodology chosen and main arguments made.

**Chapter 2** includes the discussion on the background, the transition from the liberal state to the welfare state, and the development of social rights in international law.

**Chapter 3** includes general considerations regarding the constitutionalization of social rights. The different methods of constitutional inclusion are considered, and the arguments for and against such constitutionalization are presented.

**Chapter 4** includes a detailed discussion regarding justiciability for social rights and enforceability. The chapter then provides arguments for and against the justiciability of social rights.

**Chapter 5** analyzes the RSS, including its lack of an official or common definition. The RSS is then discussed from its development in international law to the domestic obligations it generates. A contemporary distinction between social security, social assistance and social insurance is also provided.

**Part II studies the case of Japan.**

**Chapter 6** recounts the Japanese welfare state from its origins to its modern concept. The key moments for such state are highlighted along with its current problems of low fertility, an aging population and the subordinated role of women.

**Chapter 7** overviews social rights in Japan, including the problems of international versus domestic law, and the problems regarding social rights in law and practice.

**Chapter 8** describes, explains, and discusses the Japanese judiciary, judicial review, and the ideological and social problems for litigating social rights.

**Chapter 9** builds upon the general analysis of social rights and delves into the right to social security (RSS) as defined in the Japanese constitution's Article 25.

**Part III studies the case of Mexico.**

**Chapter 10** develops the history of the Mexican welfare state from its origins to its modern concept. The chapter ends with a general perspective on the current situation for welfare in Mexico.

**Chapter 11** is dedicated to the study of social rights. The particularity of social constitutionalism is clarified along with its legacy for the Mexican social programs which generate a *sui generis* notion of welfare protection in Mexico.

**Chapter 12** is dedicated to the analysis of the Mexican judiciary and judicial review. The chapter evidences the intervention of the executive branch and the president which, along with inequality, corruption, and lack of trust, are important reasons for poor enforcement of social rights in Mexico.

**Chapter 13** is dedicated to the specific analysis of the right to social security (RSS) in Mexico. An important distinction between theory and judicial practice will be made by comparing the constitutional RSS, as provided in Article 123 Par. XXIX, to its actual interpretation by Mexican courts up to this day.

**Part IV** establishes closing arguments and offers alternative solutions.

**Chapter 14** recounts the arguments to demonstrate that ***both in Japan and Mexico, including the RSS in the constitution, doesn't automatically renders it justiciable, and neither has it increased its judicial enforcement or welfare betterment for the respective populations.***

**Chapter 15** briefly refers to better options to realize social rights other than justiciability.

In **Part V, Chapter 16** closes this dissertation with a recapitulation and some brief conclusions that include the main findings, limitations, and lessons learned with this research. Some perspectives for future research are also suggested.

## Chapter 2 From the welfare state to domestic social rights

*This chapter will examine social rights with the purpose of understanding their transition from the liberal state to the welfare state. The origin of social rights, as opposed to civil and political rights, will also be explained due to the problematic interpretations they generate at the international and domestic levels. Finally, a recapitulation of the international documents comprising social rights will be made, along with an analysis of the problems that derive from the application in any given state of such legal dispositions. The previous background will allow a detailed analysis of the domestic regulation of social rights in Parts II and III.*

### 2.1 The rise of the welfare state and of social rights

In Europe, at the turn of the XIXth Century, the liberal promise of interminable progress<sup>77</sup> clashed with poverty, famine, inequality of living and disparity in working conditions.<sup>78</sup> Up to the XIXth Century the responsibility regarding personal risks was of an individual nature, but with the industrial revolution workers and their families became unable to cope with such risks generated by industrialized labor.

Although the process induced by the industrial revolution would come to affect many countries to different extents (including Japan and Mexico), one of the first groups affected was England's working class.<sup>79</sup> Indeed, England was one of the first countries in which some interventions to alleviate those in need (e.g. the "Poor Law

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<sup>77</sup> See Sidney Pollard, *The Idea of Progress: History and Society* (London: Penguin Books, 1971).

<sup>78</sup> See Edward Palmer Johnson, *La formación de la clase obrera en Inglaterra* (Madrid: Capitán Swing Libros, 2012) Preface.

<sup>79</sup> Karl Polanyi, *La Gran Transformación* (Mexico City: Fondo de Cultura Económica, 2011).

of 1834”)<sup>80</sup>, and regulation of working conditions (e.g. the Factory and Workshop Act of 1878)<sup>81</sup>, were enacted.

A similar circumstance occurred in Otto von Bismarck’s Prussia. Bismarck was inspired by the postulates of Lorenz von Stein, a German scholar who claimed that in order to stop the revolutionary tendency of the lower worker class, it was necessary to improve the living standard of the poor.<sup>82</sup> With such goal in mind, the following laws were enacted: a) Sickness Insurance Law of 1883,<sup>83</sup> b) Accident Insurance Law of 1884,<sup>84</sup> and c) Pensions and Disability Insurance Law of 1889.<sup>85</sup> Such three laws promised to “socialize the risk” and create institutional mechanisms that might help workers facing “need” (e.g. unemployment benefits, widowhood, incapacity and old-age pensions and healthcare), and “unfortunate conditions” (e.g. work-related accidents).<sup>86</sup>

As will be discussed in the corresponding chapters, the social security model of Prussia followed suit by other countries from Europe, Latin America,<sup>87</sup> and Asia.<sup>88</sup>

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<sup>80</sup> An Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales. Citation: 4 & 5 Will. 4 c. 76, Territorial extent: England and Wales. Dates: Royal assent: 14 August 1834. See also William P. Quigley, "Five Hundred Years of English Poor Laws, 1349–1834: Regulating the Working and Nonworking Poor" (1996) 30 *Akron Law Review* 73.

<sup>81</sup> The Factory and Workshop Act 1878 (41 & 42 Vict. c. 16) consolidated the aforementioned Acts. See Beatrice Leigh Hutchins & Amy Harrison, *A History of Factory Legislation* (London: Scholar's Choice, 2015).

<sup>82</sup> Wibawa Samodra, *Learning from the Lorenz Von Stein's Idea of Social State* (Munich: German University of Administrative Sciences, 2009).

<sup>83</sup> Gesetzliche Krankenversicherung (GKV) *Act on the Sickness Insurance Law*, adopted in June 15, 1883. (RGBl. 1883 P. X. Applicable for the German Empire).

<sup>84</sup> Unfallversicherungsgesetz (UVG) *Accident Insurance Act*, adopted in July 6, 1884 (RGBl. 1884. P. 69. Applicable for the German Empire).

<sup>85</sup> Gesetz betreffend die Invaliditäts- und Altersversicherung (IaVG) *Invalidity and Old Age Insurance Act*, adopted in January 1, 1889. (RGBl. 1889. P. 97 Applicable for the German Empire).

<sup>86</sup> Francisco José Contreras Peláez, *Defensa del Estado social* (Sevilla: Universidad de Sevilla, 1996) at 22. Nevertheless, the reality was that Bismarck Laws, usually praised as the foundation of the social security and social assistance systems, were actually an opportunistic gambit to disenfranchise the socialists and gain the trust of the working class. See Carlos Ochendo Claramut, *El Estado de bienestar. Objetivos, métodos y teorías explicativas* (Barcelona: Ariel, 1999) at 28.

<sup>87</sup> See for example Juan Fernando Silva Henao, "Evolución y Origen del Concepto de "Estado Social"" (2012) 7:14 *Revista Ratio Juris* 141.

<sup>88</sup> See Marius B. Jansen, *The Cambridge History of Japan* (Cambridge: Cambridge University Press, 1989) Volume 5, 705.

After the Great Depression of the 1930s and the end of World War II, the popularity of social security and welfare increased steadily to the point that the welfare state was a concept acknowledged by most nations.<sup>89</sup>

Although there is a much larger discussion to be had regarding the differences and similarities between the liberal state and the welfare state, as well as regarding the multiplicity of definitions that such discussion generates, this dissertation will rely upon Esping-Andersen's definition.<sup>90</sup> Esping-Andersen defines the welfare state as "a State that acknowledges responsibility for securing some basic modicum of welfare for its citizens".<sup>91</sup> Janine Brodie explains, that the economic inequalities generated by unregulated market forces were deemed as being unjust, establishing a new critical distinction which, in turn, demanded redistribution of collective resources by society as a whole, and most obviously through the state. Such new distinction is essential to the welfare state and also "prescribed that all citizens could make claim to a measure of equality, social security, and collective provision as a right of citizenship, independent of their status in the market or their personal character".<sup>92</sup> Thus, this dissertation will postulate that, in the two countries herein compared, the welfare state was the required element for the development of social rights.

Indeed, unlike civil and political rights which have their origin in the liberal state, social rights came precisely as a response and are considered essential elements of the welfare state.<sup>93</sup> One influential scholar which helped to propagate such notion was the British sociologist T.H. Marshall. According to Marshall, all citizens of a given

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<sup>89</sup> See May Hofman Öjermarck, "De Bismarck a Beveridge Seguridad Social para Todos" (2009) 67:12 *Revista Trabajo OIT* 2.

<sup>90</sup> Esping-Andersen's definition is subject to various criticisms applicable and analyzed for the specific cases of Japan and Mexico which will be discussed in Chapters 6 and 10.

<sup>91</sup> Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990) and Gøsta Esping-Andersen, "Hybrid or Unique? The Japanese Welfare State between Europe and America" (1997) 7:3 *Journal of European Social Policy* 179.

<sup>92</sup> Janine Brodie, "Reforming Social Justice in Neoliberal Times" (2007) 1:2 *Studies in Social Justice* 93.

<sup>93</sup> *Ibid.*

community are equal with respect to the rights and duties which their status endows. From among such rights, Marshall described three types:

- a) The first type comprises civil rights, which protect individual freedom among a given society.
- b) The second type comprises political rights, which protect the democratic rights of participation.
- c) *The third type comprises social rights, which protect a minimum standard of welfare and income.*<sup>94</sup>

In a similar reasoning and regarding the duty which social rights create for the state, Jackbeth Mapulanga specifies that the main objective of social rights is “to put a state under legal obligation to utilize the maximum amount possible of its available resources in order to redress social and economic imbalances and inequalities”.<sup>95</sup> With the previous notions some common elements for social rights include:

- a) A duty usually attributed to the state.
- b) The objective of such duty is to overcome the unbalances in the quality of life generated by liberal markets.
- c) Such duty requires state expenditure financed by public taxes.

Therefore, and even though there is no formal or legal definition of social rights, this dissertation will use Frank Michelman’s definition which understands them as “rights

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<sup>94</sup> “The idea behind civil rights is to mitigate the impact of force and violence in relations between people, the idea behind political rights is to ensure that power is not confined to an elite, and the idea behind social rights is to provide minimum standards to correct market processes that lead to gross inequalities of distribution”. Thomas H. Marshall, *Citizenship and Social Class, Class, Citizenship and Social Development* (New York: Doubleday, 1964) at 71-73.

<sup>95</sup> Jackbeth Mapulanga-Hulston, *supra* note 34.

to the meeting of basic needs that are essential to human welfare”.<sup>96</sup> This definition was chosen as it does not tend to every need, but limits itself only to the needs considered as indispensable for living. In such fashion, this definition incorporates a safeguard against poverty, rather than the idea of providing a life in luxury and is grounded in more realistic expectations.<sup>97</sup>

## 2.2 Social rights in international law

In general terms, it can be argued that the notion of social rights originated first in international law and developed in such realm before being included in domestic legislation. As will be explained in the next subsection, the international origin of social rights is relevant to understand the specific problems regarding how such rights should be understood in their domestic jurisdictions. Pertaining social rights, it is important to consider that the most influential among such international documents was the draft of the United Nations Charter of 1945, in which various proposals to promote and protect employment and social welfare were made.<sup>98</sup>

Three years later, in the Universal Declaration of Human Rights (UDHR) ratified on December 16th, 1948, a comprehensive range of what would be later considered as civil, cultural, economic, political and social rights was enunciated. This was done in a single international human rights instrument without establishing any distinction between such rights.<sup>99</sup> Social rights were not branded as a particular category that required a differentiated concept; all social rights were considered as human rights.

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<sup>96</sup> Frank I. Michelman, “On Protecting the Poor through the Fourteenth Amendment” (1969-1970) 83 *Harvard Law Review* 7.

<sup>97</sup> Virginia Mantouvalou, “The Case for Social Rights” in Conor Gearty & Virginia Mantouvalou, *Debating Social Rights* (Oxford: Hart Publishing, 2010) at 157.

<sup>98</sup> Leland Goodrich, *Charter of the United Nations: commentary and documents* (Boston: World Peace Foundation, 1946).

<sup>99</sup> Office of the United Nations, High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33 at 5, available at: <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.



Nevertheless, the Cold War divided the new world order, and such division permeated the area of international law, and the concept of human rights itself. For social rights, there was a lack of accord in what should be understood as “the basic needs essential for human welfare”. Capitalists and communists had diametrically different views on such issue, and in order to accommodate both interpretations, human rights were split into two United Nations Covenants, which were adopted in 1961 and entered into force in 1966: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>100</sup>

The split of covenants wasn't a mere terminological difference. While in the UDHR all rights were granted equal status and the duties for each state were uniform, in the new covenants such obligations were not included in the same terms. Therefore, different standards of compliance and remedies were created between civil and political rights on one hand, and economic, social and cultural rights on the other.

Regarding wording, civil and political rights were drafted in an imperative manner: they could and should be immediately protected. Socio-economic rights, in contrast, appeared in a progressive manner: they required resources and could not be realized immediately by all states and neither in equal measure.<sup>101</sup> Moreover, even if a country had enough resources, the standards of compliance themselves were based on non-specific concepts at best or indeterminate at worst.<sup>102</sup>

Although there is no consensus or official definition of what are social rights in international law, according to the ICESCR such rights comprise:

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<sup>100</sup> *Ibid.* at 4.

<sup>101</sup> *Ibid.* at 5.

<sup>102</sup> The contextual dependency will be further analyzed as one of the arguments against constitutionalizing social rights in Chapter 3.

- a) **The right to social security (Article 22).**
- b) The right to work and correlated rights and freedoms (Article 23).
- c) The right to rest, leisure and enjoy paid vacation (Article 24).
- d) **The right to a standard of living adequate for health and wellbeing which includes food, clothing, housing, medical care, the necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood beyond one's individual control (Article 25).**
- e) The right to education (Article 26).<sup>103</sup>

In sum, after being separated in the ICESCR, the notion that social rights were “different in kind,” and required “differences in implementation”<sup>104</sup> gained predominance. As if the international schism between CPR and ESCR was not problematic enough, there are still other layers of uncertainty in the incorporation of the ICESCR to domestic law that will now be explained.

## 2.3 Incorporating international social rights to domestic law

Although the aspiration of international law is to be applicable and binding by itself, some of its declarations, covenants, and pacts include the duty for each of the ratifying states to incorporate them into their national law.<sup>105</sup> This duty is necessary to balance the respect for national sovereignty with the newly agreed international obligations. Another reason for this requirement is to adapt domestic law with new standards which are usually higher or more detailed.

In this regard, the Preamble of the UDHR states:

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<sup>103</sup> ICESCR (**emphasis added**).

<sup>104</sup> Katharine Young, *supra* note 6, at 63.

<sup>105</sup> Some examples of treaties and conventions with such mandate that will be analyzed in this dissertation include the ICESCR, CEDAW and GC19.

**“...every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”<sup>106</sup>**

As a resolution from the General Assembly of the UN, the Declaration is usually only binding via customary law. Moreover, it does not explicitly impose a duty to create or adapt domestic legislation to international standards. However, the ICESCR is a treaty that creates legal obligations on all the states that ratify it, and explicitly orders in Article 2 that:

**“1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”<sup>107</sup>**

In this case, the duty of legislative incorporation is clear. Whereas the UDHR stated the general obligation of taking steps to progressively achieve the rights and freedoms recognized, the ICESCR makes a very specific statement on the adoption of legislative measures to do so. Nonetheless, in order to determine what type of legislative measures will be adopted in each state, it is necessary to know their domestic legal systems and the status they give to international law. Academically, such relationship is defined as either *dualism* or *monism*.<sup>108</sup>

Dualist states are those in which, neither the constitution nor any statute, grant special status to treaties. Accordingly, in such states, the treaties, along with their

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<sup>106</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble.

<sup>107</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, (ICESCR) 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 8 June 2016] Article 2.

<sup>108</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007).

rights and duties, have no effect in domestic law (unless special legislation is promulgated). In contrast, Monist states are those in which a treaty may become part of domestic law once it has been concluded in accordance with the constitution, or other high ranking statute. Accordingly, in such states, the treaties, along with their rights and duties, may enter into force without requiring special legislation.<sup>109</sup>

Although it may be argued that in practice no state satisfies the dualist or monist categories in their purest form, there is usually a tendency towards one approach over the other. Therefore, the key distinguishing feature of monist legal systems, as defined, is that at least some treaties are incorporated into the domestic legal order without the need for any legislative act<sup>110</sup> (other than the act authorizing the executive to conclude the treaty).<sup>111</sup>

Having made the previous distinction, it is important to understand that although in theory the state *as a whole* is obligated by international treaties, in practice the incorporation of international law is done by different branches of government. Each of these branches, depending on their role, will usually give diverse interpretations to the obligations specified by the treaties creating conflicting and even contradictory results. In the countries herein analyzed, these branches can broadly be divided in:

a) The Legislative Branch (Diet/Congress), which recognizes the international treaties pertaining human rights and creates the respective amendments (on the constitution or national legislation depending on the case). In addition, this branch is

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<sup>109</sup> *Ibid.* at 187.

<sup>110</sup> As will be further explained Japan is usually considered a monist country, however courts tend to recognize such status only to treaties which are clearly self-executing. As a result, some of the rights protected by these covenants and conventions are directly applicable but others are not. In the case of Mexico, it was clearly a dualist state until the New Human Rights Reforms of 2013 which specifically recognize the immediate validity of human rights treaties signed by the Executive as binding constitutional law.

<sup>111</sup> David Sloss, *Domestic Application of Treaties* (Santa Clara: Santa Clara Law Digital Commons, 2011) at 5, available at: <http://digitalcommons.law.scu.edu/facpubs/635>.

in charge of establishing taxes and preparing the national budget (financing and spending), directly related to the economic sustainability of promoting, protecting and realizing ESCR.

b) The Executive Branch<sup>112</sup> (Prime Minister and Ministers/President and Secretaries of State), which designs and executes public policies regarding ESCR, and at the same time coordinates the specific agencies regarding such rights (health, pensions, social security, education, etc.) in their respective provinces or municipalities. The executive branch should be staffed by specialists in their respective area and therefore may provide a more accurate perspective of the social rights in everyday practice.

c) The Judicial Branch, which provides remedies when laws establishing social rights are infringed. This branch is responsible for specifying the content of each right based on the actual cases and their context. Although in certain countries they can investigate the violation of rights and provide remedies by their own, in Japan and Mexico they require the claim of a private or public person to begin their process. More importantly, such claim must be directly based on a specified right that pre-exists in domestic legislation or, in some rare cases, international law.<sup>113</sup>

d) National Human Rights Institutions (NHRI) are not one of the three classic branches of government, but still may provide important protection and defense for human rights. Domestically, NHRI may be known as ombudsmen, national human rights commissions, or human rights agencies and are usually third parties, independent of both government and private interests. Depending on each state, NHRI can protect and promote ESCR in a variety of ways, such as handling

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<sup>112</sup> In both Japan and Mexico, the executive branch is especially powerful. This characteristic will be explained in Parts II and III.

<sup>113</sup> The requirement of an actual case to decide as a requisite for justiciability will be explored in Chapter 14.

complaints in cases of violations, undertaking investigations, monitoring implementation of relevant international human rights treaties, advising the government on the domestic application of international treaties, recommending policy changes, and providing training and public education.<sup>114</sup>

Since the aforementioned branches and the NHRI have different roles, each of them provides different interpretations of social rights. Regarding the judiciary for example, it is essential to note that international human rights institutions acquire jurisdiction only once domestic remedies have been exhausted. This particular requirement is known as “jurisdictional subsidiarity”.<sup>115</sup> The reason for this subsidiarity is the respect for the sovereignty of each state and that, in principle, each state may solve its internal conflicts in accordance with the signed treaty. According to the foregoing, **domestic judicial interpretations tend to be preferred, giving a secondary status to social rights based in international law.**

## 2.4 The problem with social rights

As has been explained, in their origin ESCR were simply human rights,<sup>116</sup> but after the separation of rights in the ICCPR and the ICESCR, a distinction without a clear definition arose. In practice, since ESCR are expressed differently from one international instrument to the other and from one constitution to the next, a clear definition of such rights does not exist.

If this line of reasoning is followed, it is clear that for this type of rights, the state cannot fulfill its duty by mere abstention. In such regard, those authors against ESCR

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<sup>114</sup> United Nations Human Rights Office of the High Commissioner, *Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?*, available at: <http://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.asp>.

<sup>115</sup> Samantha Besson, “Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation” in Rowan Cruft, Matthew Liao & Massimo Renzo, *Philosophical Foundations of Human Rights* (Oxford: Oxford Scholarship Online, June 2015) at 292.

<sup>116</sup> Virginia Mantouvalou, *supra* note 97.

consider that the “positive” conduct required by the state, contrasts with its “negative” or “passive” role in regards to “classical rights”. According to this perspective:

“A positive right is a claim to something...while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim.”<sup>117</sup>

Some scholars have expressed the advantages of the inclusion of ESCR in domestic constitutions. Other scholars, however, have a fundamental objection to this inclusion. *This objection stems from the understanding of ESCR as positive rights.*

Indeed, from this understanding of ESCR, a series of arguments have been advanced against positive rights in what is generally known as “The Problem with Social Rights”. Such arguments are that ESCR:

- a) Are vague and inappropriate for judicial enforcement.
- b) Require positive action and significant expenditure for their enjoyment.
- c) Are “secondary” both in history and relevance to civil and political rights. <sup>118</sup>

However, on recent times the High Commissioner’s Office (as part of the United Nations Human Rights Office (OHCHR)), has countered these arguments stating that:

- a) While not all ESCR are defined clearly in all human rights treaties, neither are the civil and political rights.
- b) Although many ESCR sometimes require high levels of investment —both financial and human— to ensure their full enjoyment, civil and political rights, also require investment for their full realization.

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<sup>117</sup> Charles Fried, *Right and Wrong* (Cambridge: Harvard University Press, 1978) at 110.

<sup>118</sup> Maurice Cranston, “Human Rights, Real and Supposed” in David D. Raphael (ed.), *Political Theory and the Rights of Man* (London: Macmillan, 1967) at 51.

- c) In practice, the enjoyment of all human rights is interlinked. For example, it is often harder for individuals who cannot read or write to find work, to take part in political activities, or to exercise their freedom of expression. Similarly, famines are less likely to occur when individuals are able to exercise political rights, such as the right to vote.<sup>119</sup>

Although the OHCHR has formulated an apparently conclusive rejection of the division between civil, political and social rights, and even though such rejection has already been established as definitive by the Vienna Declaration,<sup>120</sup> the detractors of social rights consider that such type of rights have not managed to solve the problem of resource scarcity satisfactorily. In such regard, they assert that positive rights are necessarily dependent on resources, whilst negative rights are not.<sup>121</sup> In his book about such matter, Charles Fried stated that: "Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim."<sup>122</sup>

The conceptualization and enforcement of ESCR as positive rights is nowadays not so much a problem for international, but rather for domestic law. In this regard: "The disparity in the protection of social rights at an international level has been mirrored at a domestic level most of the times. Even if social rights are featured in a legally enforceable document of higher status than ordinary legislation, such rights seem to bear a somewhat secondary role in civil and political rights."<sup>123</sup> Although this phenomenon varies across jurisdictions, it will be demonstrated that in the two countries herein compared, the legislative branch considers social rights as of

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<sup>119</sup> United Nations Human Rights Office of the High Commissioner: Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?, available at: <http://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx>.

<sup>120</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 in Vienna, UN doc. A/CONF.157/23.

<sup>121</sup> Octavio Luiz Motta Ferraz, "Harming the Poor Through Social Rights Litigation: Lessons from Brazil" (2011) 89:1 *Texas Law Review* 1643.

<sup>122</sup> Charles Fried, *supra* note 117, at 110.

<sup>123</sup> Virginia Mantouvalou, *supra* note 97, at 6.



secondary status to domestic law, and the judiciary's examination of such rights is also limited by such secondary status when interpreting them.

Due to the foregoing, and although it should have been solved definitively by the aforementioned Vienna Declaration, this distinction is relevant in the cases of Japan and Mexico. To this day, in both countries, both academia and the judiciary are still strongly influenced by the discussion of positive and negative rights. Such influence can be seen in the judicial reasoning of the cases to be analyzed in Chapters 9 and 13.

*This chapter explained the origin of the welfare state as a concept that would gain importance and a particular connotation after World War II. From such context, social rights emerged and were developed first in international law and then incorporated in the domestic legislation of various countries. Two main problems regarding social rights were highlighted: 1) the secondary status of international social rights' when compared to domestic law, and 2) their alleged nature as positive and costly rights. Even though the OHCHR and the Vienna Declaration have denied that such issues constitute a problem, it was posited that they remain so within the realm of domestic law.*

# Chapter 3 General considerations regarding social rights constitutionalization

*This chapter will provide different ways in which social rights have been included by the states in their domestic constitutions. Moreover, arguments both in favor and against the constitutionalization of social rights will be advanced. Such arguments contain the basis for the discussions that will be herein analyzed for the specific cases of Japan and Mexico in Parts II and III.*

## 3.1 Possible ways of constitutionalizing social rights

Neither the Preamble of the UDHR, nor Article 2 of the ICESCR, establish a specific mandate to include social rights in the domestic constitutions of state members. Nonetheless, due to the alleged problem of social rights as positive rights, and the distortions that ESCR suffer in domestic practice, some scholars believe that having such rights in the constitution might give them more certainty and relevance. There can be several ways in which constitutional rights relate with the courts, the government, and society at large. The previous relationships will be described based on the classification proposed by Mark Tushnet in his text “Weak Courts, Strong Rights”.<sup>124</sup>

### 3.1.1 Non-justiciable or (merely) declaratory rights

A constitution can enumerate social rights, but exempt them from judicial enforcement. These types of constitutionalized rights are known as “non-justiciable rights”. Non-justiciable rights may also be known as “directive principles”, and can

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<sup>124</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2009) at 227-247.

be used to interpret ambiguous statutes. In addition, non-justiciable rights can be invoked to explain the courts' refusal to recognize other rights, in the cases where such recognition would impair the government's ability to implement costly or untenable rights.<sup>125</sup>

### **3.1.2 Weak substantive rights**

Unlike non-justiciable rights, weak substantive rights can be judicially enforced but leave ample discretion to the judiciary or executive branches regarding compliance. Not only can such rights be judicially acknowledged, but usually when they do, they point towards the responsible authority, and give it a general warning to attend the issue as it sees fit. In this way, the judiciary does not violate the separation of powers (at least not ostensibly), but neither does it remain idle.

Constitutions can recognize weak substantive rights that are judicially enforceable, but that give legislatures an extremely broad range of discretion regarding their fulfillment. In a similar fashion, weak substantive rights may be stated in order to oblige courts' deference to legislative judgments. Finally, weak substantive rights may also be used by the executive as directives for implementing welfare policies.

### **3.1.3 Strong substantive rights**

Social welfare rights can also be considered as strong, in the sense that courts will enforce them fully and without giving substantial deference to the legislative branch.

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<sup>125</sup> An example of non-justiciable rights and directive principles can be found in the Irish Constitution. In the part headed "Directive Principles of Social Policy" in its opening paragraph includes the following: "The principles of social policy set forth in this Article are intended for the general guidance of the [Parliament]. The application of those principles...shall not be cognizable by any Court under any of the provisions of this Constitution." See Fiounnuala Ni Aolain & Grainne McKeever, "Thinking Globally, Acting Locally. Enforcing Socio-Economic Rights in Northern Ireland" (2004) 2:2 *European Human Rights Law Review* 158.

This is the most controversial type of social rights constitutionalization since many scholars argue that it violates the principle of separation of powers by imposing its own criteria.<sup>126</sup> Not only has this type of rights been rarely (or at all) enforced, it is essentially unenforceable in civil law countries in which every judgment must be based on constitutional or secondary provisions and as such remains limited by the constraints of legislation, instead of having ample interpretive powers as in common law countries. Since Japan and Mexico are both civil law tradition countries, this dissertation will not elaborate further on this matter.

After having referred to the three main possible ways in which social rights might be included in a constitution, in the next sections the arguments for and against doing so will be compared.

## **3.2 Arguments for constitutionalizing social rights**

This section will present three arguments in favor of including social rights in the constitution.

### **3.2.1 The entitlement argument**

According to this argument, by being able to demand, rather than beg, and being considered right-holders rather than panhandlers, entitlement gives marginalized groups better chances of social progress.<sup>127</sup> Although this argument can be seen as one regarding the recognition of a right, it has been used by the constitutionalization advocates under the premise that it distinguishes the rights discourse from charity, benevolence, or self-interest,<sup>128</sup> and by doing so limits the government's agenda that

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<sup>126</sup> *Ibid.* at 245-246.

<sup>127</sup> Cecile Fabre, *supra* note 5, at 24.

<sup>128</sup> Katharine Young, *supra* note 6, at 15.

may negatively impact the right to be claimed. The reason for this limitation is that in their origin, such rights are a property of the citizen which the government must respect.

In opposition, the defendants for such notion argue that should no entitlement exist, the government's agenda may provide the guidelines by which the right will be fulfilled, and even decide if such right will be fulfilled at all. In this second scenario, the government's handling of social rights would be closer to charity than to entitlement and therefore impede any mandate of compliance. The lack of a constitutional right thus would allow for a less strict protection of social rights.

### **3.2.2 The aspirational constitutionalism argument**

Some authors consider the constitution not just as a catalog of the rights and duties of the here and now, but also as a document that contains the coordinates and aspirations for a better future as a nation. An aspirational constitutionalism thus implies that "a constitution should be a tool to guide towards the utopia or ideal sought to be reached."<sup>129</sup> Being the most important legal instrument, the constitution has an intrinsic appeal of enabling a country's social transformation.<sup>130</sup> **As can be seen, this argument underlies the three hypotheses to be evaluated in Japan and Mexico since it relates to the transformative power of constitutional rights and courts.**

The aspirational argument considers that even should the first results of constitutional inclusion be moderate, an environment of respect towards the included

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<sup>129</sup> *Ibid.*

<sup>130</sup> See the case of South Africa analyzed by Charles Fombad, "An Overview of the Constitutional Framework of the Right to Social Security: With Special Reference to South Africa" (2013) 21:1 *African journal of International and Comparative Law* 1.

rights will eventually rise, usually first within civil society and then upwards to the state itself.<sup>131</sup> In this regard, the incorporation of certain ambitious constitutional clauses might be an investment on the future, and when the conditions that block the practical implementation of a right change, it would be easier for constitutionalized rights to be lobbied and enforced compared to statutory rights due to its entrenched and superior status. Thus, both judges and social movements can use the aspirational constitution as a blueprint for the expansion of social rights.<sup>132</sup>

In this same line of thought the constitutionalization of social rights can help to identify groups of the civil society with similar interests, broadening their base, and providing clearer demands to protest against the state. Moreover, having a clear and institutionalized interest can also help to establish bonds with intergovernmental organizations, NPOs, Think-Tanks and Foundations which promote, protect and defend social rights.<sup>133</sup> The reason for this is that constitutional rights are easier to identify both locally and internationally due to their status as supreme law of the country.

### **3.2.3 The constitutionalization favors litigation argument**

In her study of social rights in developing countries, Siri Gloppen<sup>134</sup> refers to social rights litigation. She argues that the most important factor affecting a court's transformative potential is whether social rights are rendered directly justiciable by a given constitution. **As can be seen this argument underlies the three hypotheses**

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<sup>131</sup> The notion of constitutional inclusion generating progressive results is called incrementalism. See Jeff King, *Judging Social Rights* (London: Cambridge Studies in Constitutional Law, 2012) at 289.

<sup>132</sup> Ilias Trispiotis, "Socio-economic Rights: Legally Enforceable or Just Aspirational?" (2010) 182:8 *Opticon* 1.

<sup>133</sup> German López Daza, "Constitutionalisation and Judicial Protection of Social Rights - An Approach to the Latin American Case" (2014) 8:12 *International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering* 4019.

<sup>134</sup> Siri Gloppen, "Social Rights Litigation, Social Rights and Social Policy" in Anis Ahmad Dani & Arjan de Haan (eds.), *Inclusive States: Social Policy and Structural Inequalities* (Washington: The World Bank, 2008) at 345.

**to be evaluated in Japan and Mexico since it relates to the transformative power of constitutional rights and courts.**

Gloppen's hypothesis was tested by Robert Sajó in selected Eastern European countries, and by Roberto Gargarella in selected Latin American countries.<sup>135</sup> Gloppen's theoretical framework applied to Sajó's and Gargarella's cases seem to indicate that in the countries of analysis, courts with the best track records for enforcing ESCRs are those invoking constitutional provisions that allow specific (as opposed to abstract) entitlement to social rights, and on the basis of entrenched rights (as opposed to directives to state policies).<sup>136</sup> Gloppen's argument has been widely endorsed by scholars who defend the specific form of strong rights constitutionalization of social rights, **including those whose hypotheses will be evaluated for the cases in Japan and Mexico since it relates to the transformative power of constitutional rights and courts.**<sup>137</sup>

From the perspective of public interest litigation<sup>138</sup> for example, "the aim is to transform the situation not only for the litigants but also for all those similarly situated".<sup>139</sup> Litigation in such way becomes a tool for transforming rights from theory to practice, and from the plaintiff to a wider social group. **Thus, this argument underlies the welfare hypothesis.**

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<sup>135</sup> See Andras Sajó and Roberto Gargarella in *Ibid.*

<sup>136</sup> *Ibid.* Gloppen identifies four components that determine the success or failure of social rights litigation: voice (the ability of the marginalized groups to voice their claims), responsiveness (the willingness of courts to respond to their concerns), capability (the ability of judges to give legal effect to social and other rights in meaningful ways) and compliance (the extent to which these judgments are politically authoritative).

<sup>137</sup> See Francisco José Contreras Peláez, *supra* note 86, at 22.

<sup>138</sup> Public interest litigation is understood as the use of litigation, or legal action, which seeks to advance the cause of minority or disadvantaged groups or individuals, or which raises issues of broad public concern. See The PILS Project, "About Public Interest Litigation", available at: <http://www.pilsni.org/about-public-interest-litigation>.

<sup>139</sup> See Siri Gloppen, *supra* note 134, at 344.

Another line of reasoning explores how judgment of social rights litigation can be used to formulate and reformulate public policy. This can be done directly (via remedies, supervision and sanctions for non-compliance), or indirectly (by stimulating social activism and mobilization, fomenting advocacy, bringing social rights to the public media, and creating a unified discourse). Constitutionalized rights enforcement can thus provide an alternative for adequating public policy with current needs of a given society.<sup>140</sup>

### **3.3 Arguments against constitutionalization of social rights**

This section will present two arguments against the inclusion of social rights in the constitution.

#### **3.3.1 The vagueness and specificity arguments**

The vagueness argument refers to the imprecise phrasing of social rights which provides uncertainty for the interpretation or enforcement of such rights.<sup>141</sup> Even though a constitutional provision should be general in order for it to be applicable extensively, if it is too vague there is a high risk of indeterminacy and thus, of the uncertainty of effects and contents.

Vagueness would, a) render a provision inapplicable in practice, b) allow conservative groups and governments to articulate regressive aims and policies and, c) allow any government to claim to satisfy social rights due to their uncertain standards of compliance. Furthermore, Michelman denounces that, d) the social

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<sup>140</sup> Siri Gloppen, "Public Interest Litigation, Social Rights and Social Policy" (Arusha Conference Paper, December 12-15, 2005) at 25.

<sup>141</sup> Cecile Fabre, *supra* note 5, at 154-168.



rights tendency towards abstraction may remove the focus of litigation from the concrete experiences of deprivation that belong at its center.<sup>142</sup>

On the opposite side lies the specificity argument. According to such argument, it is inadvisable to constitutionalize social rights because their phrasing may be *too specific*. Herman Schwartz states that “particularistic provisions tend to be outdated very quickly and become a hindrance, requiring constant amendment. These amendments, in turn, are often very technical and incomprehensible to most”.<sup>143</sup> Thus, the inclusion of too many details, references, and technical provisions render a constitution as useless as vague social rights provisions do.

### 3.3.2 The populism argument

The populism argument explains that regarding social inequality, the constitution may be used to distort and hide precisely such inequality.<sup>144</sup> This is achieved by emphasizing the constitutional norms that suppress conflicts, and dismissing those that address them. In such reasoning, the ruling power may even incorporate formal constitutional remedies in order to demobilize citizen protests or cover the inactivity of public agencies by emphasizing the enactment of constitutional rights without actually respecting them.<sup>145</sup>

A very good analysis of the aforementioned phenomenon can be found in Peter Gabel’s<sup>146</sup> work. Gabel explains that in many developing countries rights are typically articulated in abstract and indeterminate terms, precisely **so that they may**

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<sup>142</sup> Frank I. Michelman, *supra* note 96, at 7-8, 13-14 and 33-39.

<sup>143</sup> Herman Schwartz, “Economic and Social Rights” (1993) 8:2 *American University International Law* 551.

<sup>144</sup> Gerardo Pisarello, “Los Derechos Sociales en el Constitucionalismo Democrático” (1988) 92 *Boletín Mexicano de Derecho Comparado* 440.

<sup>145</sup> *Ibid.*

<sup>146</sup> Peter Gabel, *supra* note 21, at 156.

**simultaneously embody the goals of social transformation and deny the means for their achievement.** As such, “rights-discourse is easily strategically employed by agents of the *status-quo* in order first to co-opt and ultimately to deflate and defeat the demands of those intent on its transformation”.<sup>147</sup>

Gabel states:

“[w]hen state officials subsequently begin to recognize the movement's specific demands in the form of rights-victories, they do so with the hope that the movement will “trick itself into equating these victories with its own internal ends”. Thereafter, agents of the *status quo* use legal processes of rights-interpretation so as over time to reconcile the movement's demands with the *status quo* and to “distinguish these victories from their true social origins in the intent of the movement.”<sup>148</sup>

In such cases, **the governmental agencies involved, consider that the demands made by social activists were met by enacting amendments, and fails to acknowledge their responsibility for enforcing them.** The rights discourse is therefore just an illusion that helps the authorities to present an appearance of progressivism.

*In this chapter, a distinction was made between declaratory rights, weak substantive rights, and strong substantive rights in order to provide a classification of how social rights have been constitutionalized in various countries. Arguments both for and against the constitutionalization of social rights as means of adoption were explained, in order to posit the possible answers to one of this dissertation's main questions: Not all countries include the right to social security as part of their constitutional text, but should they?*

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<sup>147</sup> Marius Pieterse, “Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited” (2007) 29:3 *Human Rights Quarterly* 796.

<sup>148</sup> Peter Gabel, *supra* note 21, at 159.

## Chapter 4 General considerations regarding social rights justiciability

*This chapter aims to provide a more detailed analysis and discussion about justiciability pertaining its particular relation to ESCR. This deeper examination is necessary before presenting the arguments for and against justiciability of such rights. The previous discussions and arguments will be building blocks when evaluating the second hypothesis of this dissertation (justiciability hypothesis), and as such are essential for the comparison of the RSS to be performed in Parts II and III of this dissertation.*

### 4.1 Justiciability pertaining ESCR

Up to this point a working definition of justiciability, and a more nuanced one based on Peter Gordon Ingram's insight have been referred to for practical purposes. Nevertheless, justiciability, as a concept, with specific regard to ESCR, has some particularities and a very transcendental role that deserves further scrutiny and discussion.

In its recent article regarding justiciability of ESCR, Avitus Agbor acknowledges a plurality of meanings for the concept of justiciability. Agbor admits that the concept of justiciability, as such, includes, but is not limited to: a) The legal concept of standing (or *locus standi*), which is used to determine whether the party bringing a suit is an appropriate party to establish whether an actual adversarial issue exists. b) The determination of whether a court possesses the ability to provide adequate resolution of a dispute invoked by such party, c) The resolution in certain cases that

either a matter is not subject to the court's scrutiny or that such court can not offer a final determination on it.<sup>149</sup>

Nevertheless, instead of choosing between the aforecited plurality of meanings, Agbor, builds upon his colleague Takele Soboka Bulto's succinct definition of justiciability: "denoting the suitability of a case for judicial scrutiny"<sup>150</sup> and complements it with Agbor's own three fundamental pillars for making ESCR justiciable. Such pillars are: the claim, the setting and the consequence.

The first pillar in achieving justiciability of socioeconomic rights is the claim: this refers to the substantive content of the right that is violated which must be supported by a particular legal regime. To fulfill this duty, each country must enact legislation that sets out the rights, the normative and directive principles in the interpretation of these rights, the appropriate judicial and quasi-judicial bodies to adjudicate violations, and the consequences of such claims, that is, the remedies available to victims. Justiciability according to this first pillar thus requires that the ICESCR is domesticated through the enactment of domestic legislation.

The projected outcome of the previous process is that the rights contained in the ICESCR become in practice a piece of domestic law. As such, its implementation and enforcement becomes much easier. In this regard, if ESCR become justiciable, they also generate effective implementation and enforcement in day to day practice. Moreover, according to Agbor, by doing all these, the state builds its own institutional and normative framework, makes these rights accessible, resolves legal issues that relate to ESCR, and further infuses these rights into the socio-legal and political contexts of the country.

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<sup>149</sup> Avitus Agbor, "Shifting the Matrix from Legal Passivity to a New Domestic Legal Order: Towards the Justiciability of Economic, Social and Cultural Rights in Cameroon" (2017) 25:2 *African Journal of International and Comparative Law* 176.

<sup>150</sup> Takele Soboka Bulto, "The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights" (2010) 29:2 *University of Tasmania Law Review* 143.

The second pillar in achieving justiciability of socioeconomic rights is the setting (or forum): this refers to the judicial body that is mandated to hear and review violations of the rights that are protected. Through justiciability, domestic courts would be accorded the opportunity to interpret what are ESCR. This means that courts would be the forum where the substantive content, nature and limits of ESCR should be determined. The judiciary should step in as an independent arbiter that gives effect to these laws on ESCR. In so doing, the judiciary develops a normative framework, interprets, in the light of international law, the nature of ESCR as well as their limitations and the nature of the state's obligations according to domestic legislation. Finally, the domestic judiciary also determines what remedies are suitable, effective and applicable with regard to violations that have occurred.

According to Agbor, judicial interpretation of ESCR will also ideally enable a culture of accountability. This means that individuals would know that, like civil and political rights, ESCR, when violated, can be subjected to judicial scrutiny, and when found in violation, an applicable remedy will be imposed. Any legal system that recognises ESCR must have in place justiciable mechanisms with a protective mandate: the power to enforce the law by assessing and adjudicating on claims of violations.<sup>151</sup>

In this fashion, Frans Viljoen has observed pertaining the link between justiciability and accountability that: “[u]sed effectively, justiciable socio-economic rights may go as far as to expose the distortion in a state's financial (budgetary) priorities. Its application may be most incisive where a state does not allocate its available resources to realise socio-economic rights.”<sup>152</sup> Martin Scheinin has added: “Through justiciability, the state becomes subject to the disclosure of its policies, priorities,

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<sup>151</sup> Avitus Agbor, *supra* note 149, at 196.

<sup>152</sup> Frans Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2007) at 570.

decisions and budgetary and other resource allocations to an impartial and independent judiciary for scrutiny.”<sup>153</sup> And most decisively Margit Tveinen has concluded that: “Undoubtedly, with an impartial and independent judiciary, justiciability of ESCR becomes an effective tool in ensuring and achieving state transparency and accountability.”<sup>154</sup>

The third and last pillar in achieving justiciability of socioeconomic rights is the consequence: this refers, when finding that a violation has taken place, to the remedies available to such victims. Such remedies may include reparations, guarantees of non-repetition or a request to the state to take steps, over time, towards realising the rights.<sup>155</sup> But in addition to its protective mandate, the consequence of justiciability regarding the judiciary also includes a promotional role: by interpreting publicly the nature and content of ESCR and situating them within a normative framework of universality, interdependence, indivisibility and interrelatedness, an awareness of ESCR will be promoted. Justiciability thus becomes a *conditio sine qua non* for the enforcement of ESCR at the domestic level.

According to Agbor (and the scholars promoting the three hypotheses scrutinized in this dissertation):

“Through justiciability, enforcement and implementation will increase. As courts are able to interpret and publish their judgments on ESCR, this means that complaints of violations will be taken to the courts. The mere fact that complaints can be taken to the courts will mean that the government will be committed to ensuring that more effective measures are put in place towards the recognition and respect of ESCR”<sup>156</sup>.

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<sup>153</sup> Martin Scheinin, “Economic, Social and Cultural Rights”, in Asbjorn Eide, Catarina Krause, and Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (Kluwer Law International, 2001) at 17.

<sup>154</sup> Margit Tveiten, “Justiciability of Socio-Economic Rights: Reflections on Norwegian and South African Debate and Experience” in Wenche Barth Eide and Uwe Kracht (eds.), *Food and Human Rights in Development-Volume I: Legal and Institutional Dimensions and Selected Topics* (Cambridge: Intersentia, 2005) at 164.

<sup>155</sup> *Ibid.* at 196.

<sup>156</sup> Avitus Agbor, *supra* note 149, at 194.

However, Agbor also admits that for such effect to occur it is required “an independent, competent and impartial judiciary, a culture of the rule of law where everyone is equal to the law and accountability trumps impunity, and a culture of political responsibility.”<sup>157</sup>

In sum, the reasoning behind justiciability of ESCR as a tool for courts to enable social transformation considers that:

“in addition to achieving more transparency and accountability from the state on how it defines policies and priorities in the utilisation of its resources, justiciability of economic and social rights could become an effective weapon in reclaiming social and economic justice and equality for people who are marginalised or secluded from infrastructural development and service delivery as well as those who are impoverished. Through justiciability, these people will be able to speak out, state their grievances, detail the nature of their challenges and articulate their opposition to the systemic seclusions to which they have been subjected.”<sup>158</sup>

The previous reasoning will be further scrutinized in the next sections by laying out other arguments for the justiciability of social rights, contrasting them with arguments against the justiciability of social rights, and trying to advance a synthesis and conclusion for both.

## **4.2 Arguments for the justiciability of social rights**

Along the lines of “three pillars of justiciability” advanced by Agbor, a number of scholars (including those aforecited at the beginning of this dissertation and whose hypotheses will be evaluated), argue that claiming a right via the courts is as effective, if not more so, as non-judicial alternatives. In order to fully comprehend their logic,

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<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

in this section, three main arguments for the justiciability of social rights will be analyzed.

#### **4.2.1 Justiciability is unaffected by political interests**

Social policy generated by the political process may, and usually does, affect the individual's rights. Therefore, in order to protect individual rights from potential violations arising from such processes an independent power is needed. Among the three branches of power, the judiciary is usually thought to be the best candidate to guarantee such protection because of its independence.<sup>159</sup>

The reasoning for the judiciary's alleged position to make judgments independently of political considerations resides in the fact that it is not a popularly elected organ. According to Ronald Dworkin, "legislators are subject to pressures that judges are not, and this must count as a reason for supposing that ... judges are more likely to reach sound conclusions about rights".<sup>160</sup> As such, the judiciary is less susceptible to the pressures of a majority of voters when reaching decisions and rendering judgments, and due to this is more likely to protect individual rights despite the will of the majority.<sup>161</sup>

Michael Walzer points out that the judicial enforcement of social rights radically reduces the reach of "democratic" decision making.<sup>162</sup> But due to their distributive nature, social rights must precisely be left out of the scope of political deliberation in

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<sup>159</sup> It is important to note that this traditional division of tasks between the political branches and the judiciary is not a necessary feature of a democratic system, but rather a matter of institutional design. As it happens, most western democracies have developed into a constitutional model where courts are entrusted with the protection of rights. See Wojciech Sadursky, "Judicial Review and the Protection of Constitutional Rights" (2002) 22:2 *Oxford Journal of Legal Studies* 275.

<sup>160</sup> Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press 1985) at 70.

<sup>161</sup> Kim Lane Scheppele, "A Realpolitik Defense of Social Rights" (2004) 82:7 *University of Texas Law Review* 51.

<sup>162</sup> Michael Walzer, "Philosophy and Democracy" (1981) 9:3 *Political Theory* 391, at 391-392.



order to avoid some outcomes that might be morally unacceptable.<sup>163</sup> So, once health, education, food, etc. are recognized as protected rights, political decisions regarding those issues (including resource issues) will be necessarily limited.<sup>164</sup>

Thus, if the state has a duty to promote and protect social rights, then the judiciary has the power to act whenever that duty is disrespected. In Dworkin's terms, such is a matter of principle, despite the issues regarding resources, taxation and the will of the majority that may be involved.<sup>165</sup> To put it in simpler words, courts can protect social rights even against the will of the majorities, since their role is determined by a criterion of justice instead of one of democracy.

#### **4.2.2 Justiciability favors democracy**

Notwithstanding the last argument, courts do not necessarily have to work against democracy. Based heavily on John Rawls' theory of justice as fairness,<sup>166</sup> some authors consider that effective protection of social rights is actually necessary to have a substantive democracy, and thus fairer conditions for political participation. The reasoning of this argument is that an informed participation in a democracy requires achieving the "social minimum" guaranteed by social rights. In this fashion, there can only be equal participation if all citizens have at least an equal minimum level of livelihood<sup>167, 168</sup>

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<sup>163</sup> This argument is similar to that described regarding constitutionalization in Chapter 3.3.3.

<sup>164</sup> Octavio Motta Ferraz, *An Insurance Model for the Justiciability of Social and Economic Rights* (London: PhD dissertation, University College London, 2006) at 91.

<sup>165</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 297.

<sup>166</sup> John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001).

<sup>167</sup> *Ibid.* at 95-96.

<sup>168</sup> As stated in Chapter 2, the OHCHR follows a similar discursive line by arguing that "the enjoyment of all human rights is interlinked...it is often harder for individuals who cannot read and write to find work, to take part in political activity or to exercise their freedom of expression. Similarly, famines are less likely to occur where individuals can exercise political rights, such as the right to vote. United Nations Human Rights Office of the High Commissioner: Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?, available at:

<http://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx>.

Constitutionalized social rights could also strengthen the legitimacy of a democratic state for other two reasons:

a) Legal changes are not only implemented by the legislative branch. “The courts may play a positive role in providing a forum where the disadvantaged and the marginalized in representative politics can have their voices heard, thereby fostering democratic participation.”<sup>169</sup> In this manner, judicial resolutions may generate legal changes for people who are not adequately considered by designated representatives.

b) As seen in the argument of weak substantive rights, not all judicial resolutions regarding social rights require the intervention of the legislative branch. “Judicial enforcement of social rights has the potential for promoting democratic deliberation without displacing the decision-making function of the political branches of the government.”<sup>170</sup> Thus, in the case of weak substantive rights, the separation of powers principle can be maintained and participation on legal changes can be achieved without legislative reforms.

### **4.2.3 Justiciability reduces inequality**

In the debate about the desirability of judicial review, it is sometimes said that courts are better at moral reasoning than legislatures, and that this is one of the reasons they should be entrusted with final authority over certain essential moral issues pertaining both individual and minority rights.<sup>171</sup> According to this reasoning, Dworkin

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<sup>169</sup> Scott Sheeran & Sir Nigel Rodley (eds.), *Routledge Handbook of International Human Rights Law* (London: Routledge Publishing, 2013) at 552.

<sup>170</sup> Siri Gloppen, “Dialogic Justice in the Enforcement of Social Rights” in Siri Gloppen & Alicia Ely Yamin, *Litigating Health Rights* (Cambridge: Harvard University Press, 2011) at 238.

<sup>171</sup> See Jeremy Waldron, “The Core of the Case against Judicial Review” (2006) 115 *Yale Law Journal* 1346.

has argued that courts “insure that the most fundamental issues of political morality will be finally set out and debated as issues of principle and not political power alone.”<sup>172</sup>

As has been previously discussed, Siri Gloppen goes one step beyond and argues that courts may enable social transformation, particularly in developing and poor countries. Gloppen argues that courts have a privileged position to provide a “transformative performance” since they analyze and decide in a case to case basis, and as such, are more connected to the particular circumstances and problems of the population when compared to the other branches of power. As can be seen, **this argument is in line with the third hypothesis that states that when both the constitutionalization and the justiciability suppositions are met, a general improvement in welfare will ensue.**

## **4.3 Arguments against the justiciability of social rights**

Contrasting with the majority of scholars who favor making social rights justiciable, there is another group who argues the contrary. In this section, their arguments against social rights’ justiciability will be analyzed.

### **4.3.1 Justiciability is not based on an independent power**

A reason against social rights justiciability is that it presupposes the independence of the judiciary. Although there is not a unanimous definition of judicial independence, it is believed that at its minimum it must be considered as “freedom from absolute control by other government institutions...{and} some degree of freedom from

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<sup>172</sup> Ronald Dworkin, *supra* note 165, at 70.

control by litigants and public opinion... requiring judges' ability to render decisions in cases without fear of retribution."<sup>173</sup> 174

Steven Voigt identified that in some countries the government may intentionally avoid confrontations with the judiciary since maintaining a façade of independence might be beneficial for their interests. According to Voigt, an independent judiciary increases the credibility of a government since "judicial independence is correlated with economic growth".<sup>175</sup>

On a similar token, Georg Vanberg argues that "establishing and maintaining judicial independence requires that political actors with the ability to attack or undermine judicial autonomy do not find it in their interest to do so."<sup>176</sup> The question then becomes; why could it be in the political actors' interests to respect judicial independence? The answers are manifold: to gain credibility, to have a mediator among other power holders, to have an institutional power confirm their property rights, to deviate attention from informal enforcement of power, etc.

The aforementioned phenomena are most acute in populist regimes that intend to use "independent" judiciaries to enhance legitimacy and ensure bureaucrats' compliance. Nonetheless, the use of unofficial punishments for judges that step too

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<sup>173</sup> Frank B. Cross, "Judicial Independence" and Georg Vanberg, "Establishing and Maintaining Judicial Independence" both in Gregory A. Caldeira, Daniel Kelemen & Keith E. Whittington, *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008).

<sup>174</sup> Moreover, other line of inquiry posed by the critical legal realists argues that the members of the judiciary have biases and pressures that usually affect their neutrality. See Duncan Kennedy "Strategizing Strategic Behavior in Legal Interpretation" (1996) 4 *Utah Law Review* 785; Duncan Kennedy, *A critique of Adjudication* (Cambridge: Harvard University Press, 1997); and Duncan Kennedy, "The critique of rights in critical legal studies" in Wendy Brown & Janet Halle, *Left legalism/Left Critique* (North Carolina: Duke University Press, 2002) at 178-227. See also Roberto Mangabeira Unger "The Critical Legal Studies Movement" (1983) 93 *Harvard Law Review* 561.

<sup>175</sup> Steven Voigt Feld, "Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators" (2003) 19 *European Journal of Political Economy* 497, at 516.

<sup>176</sup> Georg Vanberg, *supra* note 173, at 116.

far from the *status quo* is also used in democratic countries. Among the disciplinary and restraining measures that can be used against the judiciary, it is possible to find:

Political tinkering with judicial appointment and tenure procedures to ensure the appointment of compliant judges and/or to block the appointment of undesirable judges; court-packing attempts by those who hold political power; disciplinary sanctions against 'overly independent' judges; impeachment or removal of objectionable or over-active judges; or the introduction of serious jurisdictional restrictions that limit the boundaries and powers of judicial review.<sup>177</sup>

As will be subsequently detailed, both in Japan and Mexico those measures have sometimes been used against overactive judges. Its effects do not only apply to the targeted judge or justice but also function as a warning towards other members of the judiciary to refrain from activism. Frequently within civil law countries, this has created a tendency of conservative, ineffective or passive courts.

All the foregoing considerations are exacerbated when dealing with social rights. As will be explained, in Japan and Mexico, courts are aware of the probability for a recognized right to actually be respected by the corresponding agencies even before they decide about the substantive claim itself. Since neither country stipulates a long tenure, this awareness includes a cost/benefit analysis over the effect of each judgment for the judges and justices' careers. In some countries, including both herein compared, judges are also aware that their decisions may be ignored in many cases. This seems particularly likely when they rule against other branches of power. If that is the case, the judge may simply decide to refrain from judgment.<sup>178</sup>

#### **4.3.2 Justiciability is affected by the courts' inadequacies**

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<sup>177</sup> Evan Rosevear & Ran Hirschl, *supra* note 1, at 223.

<sup>178</sup> James Melton, *Do Constitutional Rights Matter?* (Working Paper for the University College London, 2004) at 9-11.

The courts may have three main types of inadequacies which affect their performance and, in turn, the justiciability of social rights. The first type of inadequacy refers to the lack of sufficient information to render a judgment (*indeterminacy*). The second type of inadequacy refers to a lack of democratic support (*illegitimacy*). The third type of inadequacy refers to a lack of technical competence (*incapacity*). Although such inadequacies may be applicable to all rights, they are specifically problematic regarding social rights as will be now explained.

Regarding the first type of inadequacy (*indeterminacy*), since social rights tend to be vaguely phrased and ambiguously provided in international and domestic law, they imply that a court must judge according to such indeterminate law. Because social rights are indeterminate, they might arguably be fulfilled in innumerable ways including interpretations that restrict, instead of extend, social rights.

Regarding the second type of inadequacy (*illegitimacy*), it is important to remember that in democratic countries it is the prerogative of the majority, represented in the legislative branch, to decide upon the national assets and expenses<sup>179</sup>. Therefore, by adjudicating and compensating public resources, the judiciary would be violating both the separation of powers and the representative principles<sup>180</sup> because “[a] court is not the place where it is possible to engage in [the necessary] sort of negotiation and compromise.”<sup>181</sup>

Regarding the third type of inadequacy (*incapacity*), the courts have the following technical and practical limitations:

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<sup>179</sup> See Martha Jackman, “The Protection of Welfare Rights Under the Charter” (1988) 70 *Ottawa Law Review* 315.

<sup>180</sup> Eyal Kimel, *Of Social and Economic Rights and Neo-Liberal Constitution* (LLM Thesis, University of Toronto, 2003).

<sup>181</sup> Quoted in Deval Desai, ““Courting” Legitimacy: Democratic Agency and The Justiciability of Economic and Social Rights” (2009) 4:1 *Annual, Interdisciplinary Journal of Human Rights Law* 25.

First, courts lack the fact-finding powers required to allocate resources. A judge can neither know the minimum levels of compliance, the state organs involved, or the practices of implementation, nor interview all the affected parties.<sup>182</sup>

Secondly, “the constitutional review of individual constitutional social rights is impossible, as it leads judges to assess governmental social policies on the basis of individual cases that are not necessarily connected to one another.”<sup>183</sup> This is known as the problem of polycentricity.<sup>184</sup>

Thirdly and finally, even supposing the courts decide to establish or revise a welfare program, how can they guarantee its implementation and monitor its efficiency? Would they have to integrate a bipartisan commission with members of the judiciary and the executive branches? Would they mandate periodic reports of progress? Or would they just consider the mandated organ or branch will act in good faith?

#### **4.3.3 Justiciability of social rights is trivialized**

In Connor Gearty’s chapter of the book “Debating Social Rights”, he takes a position against the justiciability of social rights. Gearty outlines three key propositions for his approach to social rights. Although 1) He recognizes that social rights are important and that such rights deserve to be respected, protected and promoted; 2) He states that the value of social rights lies mainly in the political arena and not in the courts’ jurisdiction and; 3) Due to the foregoing, he posits that putting too much importance

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<sup>182</sup> Lawrence G. Sager, *Justice in Plain Clothes: A Theory of American Constitutional Practice* (New Haven: Yale University, 2004) at 86-89; Rodolfo Figueroa, “Justiciabilidad de los Derechos Económicos, Sociales y Culturales: Discusión Teórica”, (2009) 1:1 *Revista Chilena de Derecho* 587; and Cecile Fabre, *supra* note 5, at 156.

<sup>183</sup> Cecile Fabre, *supra* note 5, at 109.

<sup>184</sup> Peter Cane, *An Introduction to Administrative Law* (Oxford: Oxford University Press, 1996) quoted in *Pushpanathan v. Canada*. (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982.

in the legal process is the 'least effective way' of securing social rights and, on the contrary, presents the risk of trivializing them<sup>185</sup>.

In this train of thought, Gearty praises the role of judges as “secondary actors who hold the state to account for failing to give effect to that which it has already committed itself to a specific, targeted legislation or policy”.<sup>186</sup> He also lauds the constitutional inclusion of non-justiciable social rights, citing the example of the explicitly non-enforceable directive principles under the Irish and Indian constitutions. However, **he strongly advises against the deceitful combination of including social rights in the constitution in order to make them justiciable.**

Gearty argues that “when there is a fixation on justiciability as the benchmark for social rights, its plaintiffs lose valuable and limited resources that could be used in another, more effective method”.<sup>187</sup> This is what Gearty calls the “lure of the legal” and can be (and has been), used by many governments to distract the attention of the unprivileged citizens as well as social rights activists. Therefore, it is not only that constitutionalized social rights may be trivial, “however active and intrusive their judicial overseers might choose to be”,<sup>188</sup> but rather that such strategy may alienate the plaintiffs from their main goals by fixating them on making such rights justiciable.

*Having provided working concepts for justiciability and judicial enforcement in Chapter 1, this chapter deepened the discussion regarding justiciability as a tool for realizing ESCR and producing social transformation. After referring to Avitus Argbor's “three pillar theory for making ESCR justiciable” two types of arguments were outlined: arguments for and against the justiciability of social rights. Arguments for justiciability include justiciability being unaffected by political interests, favoring of*

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<sup>185</sup> Connor Gearty, “Against Judicial Enforcement” in Connor Gaerty & Virginia Manouvalou, *Debating Social Rights* (Oxford: Hart Publishing, 2010) at 1.

<sup>186</sup> *Ibid.* at 55.

<sup>187</sup> *Ibid.* at 33-34.

<sup>188</sup> *Ibid.* at 82.



*democracy and reducing inequality. Arguments against justiciability include the claim that justiciability is not based in an independent power, the way in which judges and justices' inadequacies, including indeterminacy, illegitimacy, and incapacity, affect justiciability in practice, and the trivialization of social rights. In the analyses of Japan and Mexico covered in Parts II and III the aforementioned arguments will be revisited in their specific domestic contexts.*

# Chapter 5 The right to social security

*After having analyzed the topic of social rights in general, this chapter will delve into one of its species: the right to social security (RSS), aiming to provide insight regarding the history and evolution of such right. The chapter will analyze the RSS as defined by international law, and the different paradigms and programs that have lead to the current standard of social protection floors. Among other problems, the RSS lacks a shared definition, standards, minimums and domestic obligations at the international level. This dissertation argues that such problem has facilitated, in turn, the contravention of the RSS in domestic jurisdictions, which will be specifically analyzed in Parts II and III of this dissertation.*

## 5.1 The right to social security in international law

The lack of a common definition is probably the most important problem for the RSS in the international arena. Notwithstanding that a commonly cited textbook from the ILO refers to social security as:

“... [t]he protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children.”<sup>189</sup>

There is no unanimous or legally binding definition of the RSS. In fact, the RSS remains as one of the most flexible and heterogeneous concepts, both in international and domestic law. And regarding justiciability, having a flexible

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<sup>189</sup> ILO, *Introduction to Social Security* (ILO, 3rd edition 1984) at 2-3.

definition of the RSS means “it is far from clear what could be the precise obligations of states who ratify the international instruments concerning this right, and/or who incorporate this right in their national constitution”.<sup>190</sup>

As a right, social security was first developed in international law and was then adopted in the domestic legislation of some countries. In this section, a recapitulation of such development, from the middle ages to the most recent recommendation from the ILO, will be made. The reason for such historical recount is to highlight the consistent lack of a precise definition and protection of the RSS.

### **5.1.1 Before social security was a right**

Social security has a strong historical affinity with Christianity, and particularly the Catholic Church.<sup>191</sup> The Sacred Scriptures considered poverty sacred and thus advocated charity for the poor and healthcare for the sick.<sup>192</sup> However, with the advent of Protestantism in the XVIth Century, poverty lost its sacramental value,<sup>193</sup> and charity competed with beneficence. Charity implied that every man had the duty to help a fellow in need, thus transferring poor relief as a duty of the Church to society at large.<sup>194</sup>

A second moment came in the XVIIIth Century with the French Enlightenment, when a minimum of welfare for the masses began to be seen as a responsibility for the state. In 1748 Montesquieu commented that: “the State owes every citizen certain

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<sup>190</sup> Johan Put, “Social Security Rights” in Jef Van Langendonck (ed.), *The Right to Social Security* (Oxford: Intersentia Antwerp-Oxford, 2007) at 187.

<sup>191</sup> See Michell Mollat, *The Poor in the Middle Ages: An Essay in Social History* (New Haven: Yale University Press, 1986) at 20-25.

<sup>192</sup> *Ibid.* at 50-53.

<sup>193</sup> According to this point of view, beneficence reflects a secularization of assistance to the poor. See Francois Ewald, *History of the Welfare State* (Paris: Grasset, 1986) at 44.

<sup>194</sup> *Ibid.* at 45-46.

subsistence, proper nourishment, convenient clothing, and a kind of life not incompatible with health".<sup>195</sup> And in 1755 his fellow philosopher Jean-Jacques Rousseau added that: "the security of individuals is so intimately connected with the public confederation that, apart from the regard that must be paid to human weakness, that convention would in point of right be dissolved, if in the State a single citizen who might have been relieved were allowed to perish..."<sup>196</sup>

These two *Encyclopédistes* also helped to create the labor-dependent model of social security. Regarding this subject, in *De l'esprit des lois* Montesquieu postulates that: "A man is not poor because he has nothing, but because he does not work. The man who without any degree of wealth has an employment is as much at his ease as he who without labor has an income of a hundred crowns a year."<sup>197</sup> Rousseau also proposes work as the primary means of ensuring equality and cautions that: "Man in society is bound to work; rich or poor, weak or strong, every idler is a thief."<sup>198</sup>

The labor-subordinated welfare would come full force immediately after the French Revolution. On one hand, in 1793 the Declaration of the Rights of Man and Citizen recognized that: "Public relief is a sacred debt. Society owes maintenance to unfortunate citizens, either procuring work for them or in providing the means of existence for those who are unable to labor."<sup>199</sup> On the other hand, with the secularization of the state every individual became responsible for itself.

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<sup>195</sup> Montesquieu, *Del espíritu de las leyes* (Mexico City: Editorial Porrúa, 2007) at Libro XXIII, Capítulo XXIX (Asilos y Hospitales) at 350-351.

<sup>196</sup> Jean Jacques Rousseau, *A Discourse On Political Economy*, Public Domain, 1755, available at: <http://www.constitution.org/jjr/polecon.htm>.

<sup>197</sup> Montesquieu, *supra* note 195.

<sup>198</sup> Jean Jacques Rousseau, *Emile, or Education*, Translator: Barbara Foxley. 1762, available at: <http://oll.libertyfund.org/titles/rousseau-emile-or-education>.

<sup>199</sup> Article 21, Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793) reprinted in *Liberty, Equality, Fraternity: Exploring the French Revolution* (New York: American Social History Productions, 2001), available at: <http://www.columbia.edu/~iw6/docs/dec1793.html>.

As was detailed in the chapter related to the welfare state, the *laissez passer*<sup>200</sup> approach would be influential all over Europe until the second half of the XIXth Century, when governments had to deal with pauperism and work-related accidents due to the over-accelerated industrialization.<sup>201</sup> The rising pressure of the socialists and worker movements led Chancellor Otto von Bismarck to design and establish a social insurance system.<sup>202</sup> Although originally confined to industrial workers, this system was gradually extended to other professions but did not cover unemployed people by any means.<sup>203</sup>

The German example began to be emulated by other western countries, including England with its National Insurance Act (1911), France with its Social Insurance Act (1930), and the USA with its Social Security Act (1935).<sup>204</sup> Finally, after WWII and under the recommendations of the *Beveridge Report*, Great Britain set in motion a vast system that unified previous programs and laws into a single insurance scheme. The “Beveridge” insurance scheme was so successful that it became the model endorsed by the UN.<sup>205</sup>

### 5.1.2 The ILO and the UDHR

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<sup>200</sup> The concept was popularized by Adam Smith in his book “The Theory of Moral Sentiments”. Adam Smith, *The Theory of Moral Sentiments* (New York: Gutenberg Publishers, 2011).

<sup>201</sup> Fabien Bottini, “The Roots of the French Welfare State” (2013) 20:2 *Jurisprudence*, Mykolo Romerio University 643.

<sup>202</sup> The reference to Bismarck Laws can be found in Chapter 2.

<sup>203</sup> Ignacio Carrillo Prieto, *Derecho de la Seguridad Social* (Mexico City: Universidad Nacional Autónoma de México, 1981) at 32.

<sup>204</sup> José Antonio Herce & Juan Fernando Jimeno, *La reforma de las pensiones en el contexto internacional* (Mexico City: Editorial UNAM, 2006) at 164.

<sup>205</sup> Fernando Solís & Alejandro Villagómez (comps.), *La seguridad social en México* (Mexico City: Editorial UNAM, 2011) at 156; and Martin Lengwiler, “Cultural, Meanings of Social Security in Postwar Europe”, (2015) 39:1 *Social Science History* 85.

Along with the Declaration of Philadelphia on May 10<sup>th</sup>, 1944,<sup>206</sup> the ILO emitted the first international instrument on Social Security: the Income Security Recommendation (R067).<sup>207</sup> In it, income security schemes are suggested to relieve want, prevent destitution and restore income which is lost due to inability to work, or death of a breadwinner. The R067 also established a division between social insurance (which covered workers and self-employed contributors), and social assistance (which covered children, old people, widows and those permanently unable to work).<sup>208</sup>

In 1948 the UDHR would establish social security as a human right. In this regard, two articles from the UDHR must be analyzed in parallel; whereas Article 22 acknowledges that:

***“Everyone, as a member of society, has the right to social security*** and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”<sup>209</sup>

Article 25 states that:

***“(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control...”***<sup>210</sup>

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<sup>206</sup> “III. The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve:... (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care” (ILO, Declaration of Philadelphia, 1944).

<sup>207</sup> ILO, Income Security Recommendation (R067) 1944, at 1 to 4.

<sup>208</sup> *Ibid.*

<sup>209</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 22, available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>210</sup> *Ibid.* Article 25.

The reading of these two articles in parallel seems confusing. The first sentence of Article 22 announces the right to social security, but the content of such right does not appear until Article 25. As Johannes Morsink points out: "The anomaly is that the phrase "social security" and the standard list are split, for the adjective "social" was left out of Article 25. The split text was caused by a clerical mistake, which went unnoticed for a while and caused a great deal of trouble when discovered."<sup>211</sup>

The aforementioned "clerical mistake" influenced how the RSS would thereafter be discussed, defined and enforced. While Article 22 contains a right of a broad and vaguely humanitarian kind, Article 25 contains a more technical and standard legal definition but with the adjective "social" suppressed. Having two possible meanings, each country could choose the interpretation most favorable to their interests.

Additionally, similar to what happened with social rights, there was a strong disagreement between the communist and capitalist standpoints on welfare financing.<sup>212</sup> Such disagreement led to a minimalist interpretation of the benefits listed in Article 25. In order to deny a right to an insurance scheme administered or even financed by the state, "the consensus about the list was that the items on it were part of the cluster right to (social) security, but that the means of implementing that right should be left to the discretion of each state."<sup>213</sup>

The UDHR thus settled the role of the state as that of enabler instead of guarantor; its duty could be fulfilled by merely promoting and supervising the RSS instead of

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<sup>211</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 2000) at 200.

<sup>212</sup> One notable comment that summarizes the opposition towards social rights comes from Maurice Cranston when he states "what the modern communists have done is to appropriate the word "rights" for the principles that they believe in". Maurice Cranston, *Human Rights To-day* (London: Ampersand, 1962) at 38-39.

<sup>213</sup> "In this way the drafters refused to link their declaration to any specific manner of organizing a national economy. As they had done in the case of property rights, they wanted to allow for the options of mixed economies and social security packages". Johannes Morsink, *supra* note 211, at 210.

providing it directly.<sup>214</sup> Moreover, the benefits of such right appear reserved for laboring citizens and their dependents (*in the event of unemployment*), thus establishing a paradigm that privileges male, formally employed citizens over any other demographic group. **In many nations, including both herein analyzed, this enabled the male *breadwinner model* and the *labor dependency paradigm*.**<sup>215</sup>

### 5.1.3 Minimum standards of social security and the ambiguity of ICESCR's article 9

Commonly known as “minimum standards for social security”, ILO’s Convention of 1952 (C102) became the first international instrument to establish the nine branches to be covered by social security: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivors benefit.<sup>216</sup> These benefits were granted mainly due to a partial or complete lack of employment, and varied with each state in terms of the population covered, as well as the scope and level of benefits provided.<sup>217</sup>

Even though C102 remains the flagship convention on social security, it didn’t recognize it as a right *per se* (as the UDHR did), nor distinguished between social insurance and social assistance. More significantly, once again employees and bureaucrats were privileged over the rest of the population. Therefore, and even

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<sup>214</sup> Katharine Young, *supra* note 6, at 93.

<sup>215</sup> “One of the negative effects of merging the right to medical care into the article on social security is that (strictly speaking) a person’s rights to food, clothing, housing, medical care, and social services are now all made dependent on his or her being a member of a household or a family with a breadwinner, who was either employed or, as the article says, unemployed “for reasons beyond his control.” This merger in effect killed the independent existence of the right to health care and the other rights (to food, clothing, and housing) that are means to help one get and maintain good health... In its desire for brevity, the Third Session merged these rights into the rights workers have to social security for themselves and for their families. Johannes Morsink, *supra* note 211, at 198-199.

<sup>216</sup> ILO, C102, 1952. Parts II to X.

<sup>217</sup> Emmanuel Reynaud, “The Right to Social Security – Current Challenges in International Perspective” in Eibe Riedel, *Social Security as a Human Right, Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Berlin: Springer Publishing, 2007) at 1.



though C102 does not mandate a specific way for financing the social security scheme<sup>218</sup>, the characteristics of social insurance with its male<sup>219</sup> breadwinner model<sup>220</sup> persisted.

By 1966, the ambiguity in the legal phrasing of the RSS would become worse with the ICESCR<sup>221</sup> since its Article 9 only acknowledges that: “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”<sup>222</sup> Being the shortest article in the covenant, and formulated in a very general and abstract manner, the specific content and the limits of the right are not clear. Eibe Riedel explains that this occurred because “the drafters clearly were of the opinion that article 9 would have to be seen in conjunction with Articles 22 and 25 of the UDHR and in particular the ILO Convention No. 102.”<sup>223</sup> Moreover, other social security provisions can be found in the same covenant’s Article 10 that indicates:

“The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family...
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth.

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<sup>218</sup> “Article 71. The cost of the benefits provided in compliance with this Convention and the cost of the administration of such benefits shall be borne collectively by way of insurance contributions or taxation or both...” ILO, C102, 1952.

<sup>219</sup> The Convention only establishes the terms of: a wife “as a woman who is maintained by her husband” (Article 1(c)); a widow “as a woman who was maintained by her husband at the time of his death”. (Article 1(d)); and a child “as a child under school-leaving age or under 15 years of age, as may be prescribed” (Article 1(e)) ILO, C102, 1952.

<sup>220</sup> The term “breadwinner” appears explicitly in this Convention 30 times. In many cases it is used to describe the necessity of granting some type of benefits for the widow and children upon his death (Articles 32, 33, 36, 37, 60); in others, to define him as a “skilled manual male employee” or an “economically active male persons” (Articles 65 and 66).

<sup>221</sup> This Covenant came into force the 3rd of January, 1976.

<sup>222</sup> Article 9 of the International covenant on Economic, Social and Cultural Rights consulted at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>223</sup> Eibe Riedel, “The Human Right to Social Security: Some Challenges” in *Social Security as a Human Right, Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Berlin: Springer Publishing, 2007) at 21.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.”<sup>224</sup>

As well as Article 11 that mentions:

“1. The States Parties to the present Covenant **recognize the right of everyone to an adequate standard of living for himself and his family**, including adequate food, clothing and housing, and to the continuous improvement of living conditions. **The States Parties will take appropriate steps to ensure the realization of this right**, recognizing to this effect the essential importance of international co-operation based on free consent.”<sup>225</sup>

As can be seen, there is an interweaving between Articles 9, 10 and 11 of the ICESCR, analogous to that of Articles 22 and 25 of the UDHR. While Article 9 seems to refer particularly to social insurance, Articles 10 and 11 have a broader scope and seem to point towards tax-financed social assistance. Thus, Jennifer Tooze<sup>226</sup> has identified two different approaches to such dilemma: 1) The “division approach”, which analyzes Article 9 and Articles 10 and 11 separately, and 2) The “integration approach” which considers Articles 9, 10 and 11 as part of one same continuum.

Having two possible approaches, as usual, each state chose the one that best suited their needs. In practice, most states first covered public employees and then gradually began covering private employees. Rural, informal sector workers, unmarried women, people with disabilities, and non-residents were not covered under the foregoing schemes.

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<sup>224</sup> Article 10 of the International covenant on Economic, Social and Cultural Rights, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>225</sup> *Ibid.* Article 11.

<sup>226</sup> Jennifer Tooze, “The Rights to Social Security and Social Assistance: Towards an Analytical Framework” in Mashood Baderin & Robert McCorquodale, *Economic, Social, and Cultural Rights in Action* (Oxford: Oxford Scholarship Online, 2009) at 331-361.

Furthermore, according to Francois Merrien, since the 1980s public assistance was diminished worldwide under the pretense that: “economic growth would eventually produce **trickle-down improvements** in the population’s standard of living as they gradually entered the modern sector.”<sup>227</sup> Needless to say, the 1990s economic crises in Mexico and Japan<sup>228</sup> proved that such pretense was wrong. As a countering measure, in the late 1990s, short-term safety net programs<sup>229</sup> were developed domestically and endorsed by the World Bank and the International Monetary Fund.<sup>230</sup> Nonetheless, such programs eventually received strong international criticism for being “politically expedient, socially stigmatizing, fiscally unaffordable and creating dependency on handouts.”<sup>231</sup>

In the 2000s, social assistance was gaining importance over social security in the international debate. The ILO began a campaign towards extending a basic RSS in developing countries.<sup>232</sup> In this regard, the conditional cash transfer programs (CCT) of Mexico were presented to defend the feasibility of their claim.<sup>233</sup> The agenda of “social security for all” continued to be pushed by the UN in November of 2007 when the United Nations Committee on Economic and Social Rights (CESCR) adopted General Comment No. 19 (GC19).

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<sup>227</sup> François-Xavier Merrien, “Social Protection as Development Policy: A New International Agenda for Action” (2013) 4:2 *The Graduate Institute Geneva* 89.

<sup>228</sup> The Mexican economic crisis took place in 1994 and the Asian economic crisis in 1997.

<sup>229</sup> Safety net programs are based on monetary transfers or the provision of food supplies usually combined with recovery programs (such as public works programs) to avoid the “trap of dependency”. See Umberto Gentilini, “Mainstreaming Safety Nets in the Social Protection Policy Agenda: A New Vision or the Same Old Perspective?” (2007) 2:2 *Journal of Agricultural and Development Economics* 133, available at: [ftp://ftp.fao.org/docrep/fao/008/af137e/af137e00.pdf](http://ftp.fao.org/docrep/fao/008/af137e/af137e00.pdf).

<sup>230</sup> See Peter Townsend, “From Universalism to Safety Nets: The Rise and Fall of Keynesian Influence on Social Development” in Thandika Mkandawire, (ed.), *Social Policy in a Development Context* (Palgrave online, 2004) at 37-62.

<sup>231</sup> Stephen Devereux, J. Allister McGregor & Rachel Sabates-Wheeler, “Social Protection for Social Justice” (2011) 42:6 *IDS Bulletin, Special Issue: Social Protection for Social Justice* 1.

<sup>232</sup> The aforementioned was known as the “Global Campaign on Social Security and Coverage for All” and its slogan was that “a basic set of social security benefits is affordable even for developing countries”.

<sup>233</sup> The cases used to prove this claim were the Cash Conditioned Transfer schemes of Latin America such as the Mexican Oportunidades Program. See “Can Low Income Countries Afford Basic Social Security?” *Social Security Policy Briefing*, Paper 3 (ILO, 2008), available at: <https://www.ilo.org/gimi/gess/ShowRessource.action?ressource.ressourceId=595>.

### 5.1.4 General comment no. 19 (GC19)

The GC19 provides the most complete international interpretation of the RSS to this day.<sup>234</sup> To begin with, GC19 establishes a clear basis of the RSS on ICESCR's Article 9, putting an end to the debate between the division and integration approaches. GC19 also defines the RSS: 1) Practical delimitation<sup>235</sup>; 2) Elements<sup>236</sup>; 3) Non-Discriminatory application<sup>237</sup>; 4) Obligations from the States; 5) Coverage by

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<sup>234</sup> For the authoritative nature of "Comments and Recommendations" see Nisuke Ando, "General Comments/Recommendations" in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford Public International Law), available at: <http://opil.ouplaw.com/>.

<sup>235</sup> "2. The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents General Comment 19 The right to social security (art. 9). UN Committee on Economic, Social and Cultural Rights (CESCR) adopted on the 23<sup>rd</sup> of November 2007. E/C.12/GC/19 {hereafter GC19}.

<sup>236</sup> **"Availability.** States must ensure that a social security system, however composed, is available to provide benefits to address relevant impacts on livelihood. Such system must be administered by the State, and should be sustainable to provide continuity over generations.

**Social risks and contingencies.** States' social security systems should provide for the coverage of the following nine principal branches: health care; sickness; old age; unemployment; employment injury; family and child support; maternity; disability; and survivors and orphans.

**Adequacy.** Benefits provided under a social security arrangement must be adequate in both amount and duration to ensure that recipients may realize their rights to family protection and assistance, an adequate standard of living, and adequate access to health care. To facilitate this, States should regularly monitor the criteria used to determine adequacy. When a person makes contributions to a social security scheme that provides benefits to cover lack of income, there should be a reasonable relationship between earnings, paid contributions, and the amount of relevant benefit.

**Accessibility.** Access to social security involves five key elements: coverage, eligibility, affordability, participation and information, and physical access. Everyone should be covered by the State's social security system, particularly the most disadvantaged and marginalized groups, without discrimination on any prohibited ground. Non-contributory schemes will be necessary to ensure universal coverage. Qualifying conditions must be reasonable, proportionate and transparent. Any termination, suspension or reduction of benefits should be prescribed by law, based on reasonable grounds, and subject to due process. Any contributions required under a social security scheme must be stated in advance, affordable for all, and should not compromise other human rights. Everyone must have access to information on social security entitlements, and be able to participate in available social security systems. States should make sure that everyone can physically access social security services to access benefits and information and make any required contributions, with particular attention given to persons with disabilities, migrants, and persons living in remote, disaster-prone, or conflict areas (GC19).

<sup>237</sup> Including 1. Equality 2. Gender Equality 3. Workers inadequately protected by social security (part-time, casual, self-employed and homeworkers) 4. Informal economy 5. Indigenous Peoples and Minority Groups 6. Non-nationals (including migrant workers, refugees, asylum-seekers and stateless persons) and 7. Internally displaced persons and internal migrants (GC19).

the State in both public and private schemes<sup>238</sup>; 6) Violations<sup>239</sup> and; 7) Monitoring, Indicators and Benchmarks.<sup>240</sup>

GC19 also provides a concrete, clear and practical guide of the minimum duties that must be covered by each state in order to comply with Article 9. Such duties are known as “Core Obligations”, and include: a) ensuring access to a social security scheme that will enable all individuals and families to have essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education, or in its defect a core group of social risks and contingencies; b) ensuring this access on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups; c) respecting existing social security schemes and protecting them from unreasonable interference; d) monitoring the extent of the realization of the RSS and; e) using all resources that are at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations.<sup>241</sup>

Additionally, GC19 clarifies that the practical implementation of the RSS requires each state to take whatever steps necessary to ensure that everyone enjoys such right as soon as possible. These measures include creating laws, strategies, policies and programs, or adapting the existing ones to ensure that they are compatible with

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<sup>238</sup> “46. Where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, **States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security.** To prevent such abuses an effective regulatory system must be established which includes framework legislation, independent monitoring, genuine public participation and imposition of penalties for non-compliance” (GC19).

<sup>239</sup> “62. To demonstrate compliance with their general and specific obligations, States parties must show that they have taken the necessary steps towards the realization of the right to social security within their maximum available resources, and have guaranteed that the right is enjoyed without discrimination and equally by men and women. Under international law, a failure to act in good faith to take such steps amounts to a violation of the Covenant.” (GC19).

<sup>240</sup> “74. States parties are obliged to monitor effectively the realization of the right to social security and should establish the necessary mechanisms or institutions for such a purpose. In monitoring progress towards the realization of the right to social security, States parties should identify the factors and difficulties affecting implementation of their obligations.” (GC19).

<sup>241</sup> GC19 (Article 59).

obligations arising from Article 9.<sup>242</sup> Very importantly, GC19 calls for a national social security system that is sustainable, inclusive, non-discriminatory, constantly monitored, and which includes targets or goals.<sup>243</sup> Such system must be based on the principles of accountability and transparency which are state obligations and remain so even should its implementation be delegated to regional or local authorities.<sup>244</sup>

Finally, and very relevantly for this dissertation, GC19 provides remedies and accountability for any person or groups who have experienced violations against their RSS. These remedies may be either judicial or of another kind, both at national and international levels, and should entitle to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. Also, legal standing is given to national ombudspersons, human rights commissions, and NHRI. In this regard, **GC19 suggests incorporating the ICESR to domestic law in order to enhance the scope and effectiveness of remedial measures, thus enabling courts to adjudicate the RSS by direct reference to the covenant.**<sup>245</sup>

But along with all these advantages, GC19 has a significant problem within its legal nature.<sup>246</sup> General Comments are only “non-binding norms that interpret and add detail to the rights and obligations contained in the respective human rights treaties.”<sup>247</sup> Therefore, “while States will give them careful consideration, they may not give effect to them as a matter of course”<sup>248</sup>.

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<sup>242</sup> GC19 (Article 75).

<sup>243</sup> GC19 (Article 68).

<sup>244</sup> GC19 (Article 73).

<sup>245</sup> International Law Association: Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (London: ILA, 2004) para 18.

<sup>246</sup> See MoJ/EAP UNCRPD Project Research Note: The Legal Status of General Comments, May, 2014 1.

<sup>247</sup> Helen Keller & Leena Grover, “General Comments of the Human Rights Committee and their Legitimacy” in Helen Keller & Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012) at 129.

<sup>248</sup> International Law Association, *Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (London: ILA, 2004) note 55, para 16.

### 5.1.5 Social protection floors

The broad, developmental and rights-based approach from the turn of the millennium suffered a setback with the world economic crisis of 2008-2009. In this regard, during their 100<sup>th</sup> Labor Conference, the ILO recognized that the canonical C102 had failed to attain a defined minimum benefits package with universal coverage.<sup>249</sup> Thus, a new mechanism for “horizontal coverage extension” was elaborated and came to be known as the Social Protection Floors (SPF).

In 2011 the ILO acknowledged that “there [was] a need for a Recommendation complementing the existing standards that would provide flexible but meaningful guidance to Member States in building SPF within comprehensive social security systems tailored to national circumstances and levels of development.”<sup>250</sup> To this effect, in June of 2012 the ILO emitted its Social Protection Floors Recommendation (R202) “to establish or maintain SPF as fundamental elements of national social security systems, and to extend them to ensure higher levels of social security for as many people as possible.”<sup>251</sup>

Along with the Recommendation, a formal concept of SPF was denoted as “**nationally defined** sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion.”<sup>252</sup> R202 requires that such guarantees ensure access to all in need at a minimum, “to

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<sup>249</sup> ILC.100/M.VI Report of the International Labour Conference, *Social security for social justice and a fair globalization*. Recurrent discussion on social protection (social security) under the ILO Declaration on Social Justice for a Fair Globalization, Sixth item on the agenda. 100th Session, (Geneva, June 2011) at 147.

<sup>250</sup> ILC. 2011a. “Conclusions concerning the recurrent discussion on social protection (social security)”, in ILC, Resolutions adopted by the International Labour Conference at its 100th Session.

<sup>251</sup> Social Protection Floors Recommendation, (Geneva ILO, 2012) Paragraph 1. (Hereafter SPFR).

<sup>252</sup> SPFR Paragraph 2, (**emphasis added**).

essential health care, basic income security and to goods and services, defined as necessary at the national level.”<sup>253</sup>

R202 also mandates that their beneficiaries must be children (regardless of their residency status), as well as older persons, and persons unable to earn sufficient income (residents of the State Party).<sup>254</sup> In addition, R202 establishes that SPF must be established by a national law that specifies the range, qualifying conditions, and levels of the benefits, and provides free access to impartial, transparent, effective, simple, rapid and accessible complaint and appeal procedures.<sup>255</sup> Finally, in Paragraphs 8-12, R202 provides a series of policy suggestions for implementing the SPF but leave them open for each state to choose.<sup>256</sup>

Thus, R202 leaves the contents, limits and reclamation mechanisms of the SPF to each state party. For practical terms, this means that the RSS is subject to the economic and political ideologies of the government in turn. Therefore, R202 presents a vision of social security which in practice is: 1) prone to manipulation by political agents; 2) separated from the rights-based perspective and; 3) unclear in its hierarchy among the previous instruments that rule the RSS.

Regarding this last point, R202 has a similar problem to GC19. Whereas ratified ILO conventions have the same binding effect as treaties and can be invoked in most national courts<sup>257</sup>, the ILO recommendations do not have binding force, and only intend to provide guidance for law and policymaking.<sup>258</sup> Thus, **having an open ended, multi-referential and nonbinding international guide provides little or no help for making the RSS justiciable.**

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<sup>253</sup> SPFR. Paragraph 4, and 5.

<sup>254</sup> SPFR Paragraph 5 and 6.

<sup>255</sup> SPFR Paragraphs 7-11.

<sup>256</sup> SPFR Paragraph 8 (d).

<sup>257</sup> See Virginia A. Leary & Daniel Harry Warner (eds.), *Social Issues, Globalisation and International Institution: Labour Rights and the EU, ILO, OECD and WTO* (Amsterdam: Nijhoff Leiden, 2006) at 77-95.

<sup>258</sup> Heiko Sauer, “International Labour Organization (ILO)” in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford International Public Law, 2014) at paragraph 15.



Worse yet, SPF are less robust and well-grounded than the standards set by ILO C102 and GC19. Nonetheless, according to Virginia Leary, the reason for advancing an international agenda to adopt the SPF is that “social security systems, once the focus of neo-classical political criticism for decades, are now recognized as important social and economic stabilizers.”<sup>259</sup>

## **5.2 Contemporary distinction between social security, social assistance and social insurance**

As has been explained, for the ILO, social security, social assistance and social insurance have become synonyms since the R202 of 2012. The practical distinction henceforth has become whether programmes are contributory (social insurance) or non-contributory (universal or categorical social benefits in cash and in kind and means-tested social assistance). But even though ILO is the most important international organization to establish standards on social security, definitions vary widely in other organizations and across countries.

The OECD for example, acknowledges that there are overlaps and interrelationships between the terms social benefits<sup>260</sup>, social assistance, social security and social insurance. Nevertheless, this organization also recognizes that such terms are not necessarily self-explanatory and are not always used consistently, especially when comparisons are made between countries with different institutional structures. Taking these problems into consideration, the OECD proposed in 2013 a theoretical framework for standardizing the types of schemes providing social benefits dividing

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<sup>259</sup> Michael Cichon, Christina Behrendt & Veronika Wodsa, *The UN Social Protection Floor Initiative: Moving forward with the Extension of Social Security* (ILO, IPG 2 /2011) at 4.

<sup>260</sup> Social benefits are the payments made to households as part of social assistance, social security and other social insurance, or social transfers in kind. The payments are made when certain events occur, or certain conditions exist, that may adversely affect the welfare of the households concerned either by imposing additional demands on their resources or reducing their incomes. Social benefits may be provided in cash or in kind. OECD, *Framework for Statistics on the Distribution of Household Income, Consumption and Wealth* (Paris: OECD, 2013) at 225.

them into: a) social assistance schemes, and b) social insurance schemes (further divided into: b1) social security schemes, and b2) employment-related social insurance).

- a) **Social assistance schemes** comprise social benefits provided in cash either for the population at large, or segments of the population, funded by general government and without direct contributions to the scheme by, or on behalf of, potential beneficiaries. Benefits may be universally available, such as a pension paid to all the population over a certain age or to all people with a specific disability, such as blindness. More commonly, beneficiaries usually have to meet other conditions. In particular, benefits are often “means-tested”, i.e. available **only to people with income and assets below specified thresholds, and it is likely to require additional conditions relevant to particular benefits.** For example, **unemployed people may be eligible for unemployment benefits only if they can show that they are actively seeking employment.**<sup>261</sup>
- b) **Social insurance schemes** comprise social benefits provided to participants in insurance schemes that meet at least one of the following conditions:
- i. Participation in the scheme is obligatory either by law or under the terms and conditions of employment of an employee, or group of employees.
  - ii. The scheme is a collective one operated for the benefit of a designated group of workers, whether employed or non-employed, participation being restricted to members of that group.
  - iii. An employer makes a contribution (actual or imputed) to the scheme on behalf of an employee, whether or not the employee also makes a contribution.<sup>262</sup>

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<sup>261</sup> *Ibid.* at 226.

<sup>262</sup> *Ibid.*

b1) **Social security schemes** are social insurance schemes operated by general government. They may be operated on behalf of the whole population or on behalf of specific segments of the population. Employers may provide social contributions to social security schemes, but the full responsibility for paying benefits lies with general government.

b2) **Employment-related social insurance** is any type of social insurance other than social security and is always tied to employment. Schemes set up by governments to provide pensions or other social benefits to their own employees, including defence personnel, are normally employment-related social insurance, and are not regarded as social security.<sup>263</sup>

Notwithstanding the previous distinctions, it is important to remember that all international legislation and recommendations pertaining the implementation of the RSS delegate such endeavor to each State party. Therefore, in this dissertation, the RSS will be understood as comprising both **the sub-categories of social assistance and social insurance** since, as will be explained in the subsequent chapters, they **are confused in both of the countries herein examined**. Moreover, it will be argued that **such confusion is intentional in both countries, and serves the purpose of establishing a discretionary, limited, and employment-conditioned interpretation of the RSS by the courts at the domestic level, while maintaining an appearance of compliance and progressiveness at the international level**.

*This chapter provided several of the existing definitions for the RSS. Due to such plethora of definitions, it was demonstrated that there exists a lack of consensus, which in turn makes the constitutionalization of such right very difficult. The chapter also advanced that since the international documents related to the RSS delegate the standards for compliance to each member state, the indeterminacy of the RSS*

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<sup>263</sup> *Ibid.* at 227.

*is sometimes intentionally used by some countries to render such right as unenforceable. Such claims will be specifically proven in Parts II and III of this dissertation.*

## **Chapter 6 Japan as a welfare state**

*To understand social rights, and the RSS in Japan, it is important to first explain the development of Japanese welfare before and after WWII. Along with the historic overview of the Japanese case, the elements required for such evolution will be examined. As it will be later explained, there exist specific elements which distinguish the case of Japan from the definition of welfare state established in Chapter 2.1. This chapter will be especially dedicated to the analysis of such elements.*

### **6.1 History of Japanese welfare before the 1980s**

Like most countries, social security in Japan began as charity. However, whereas religious organizations used to help the needy regardless of their condition, the Japanese government has historically provided welfare relief only to those without a family. This particularity would determine the beneficiaries and the design of the welfare apparatus of Japan.

#### **6.1.1 From Meiji to the defeat in war (1868-1944)**

Since the Meiji Era in the late XIXth Century, the Japanese state had a subsidiary role in providing protection for the needy. Even the first Japanese poor law, the Relief Order of 1874,<sup>264</sup> provided only a minimum amount of benefits for people without a

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<sup>264</sup> Poor Relief Order (1874), No. 162, Introduction. See Ministry of Health and Welfare Fifty-Year Historical editorial Board (ed.), *Fifty-Year History of Ministry of Health and Welfare* (Tokyo: Chuo-hoki-shuppan, 1988) at 241.

family. Moreover, in the case that the Meiji government could identify a family member healthy enough to work, welfare would be automatically denied to or withdrawn from the recipient. The reason adduced for this was that “any other way of proceeding would enable the few “lazy people” to abuse the work of the many.”<sup>265</sup>

To a certain extent, this paradigm was modified by Japan’s militarism which began with the first Sino-Japanese War. According to Sheldon Garon, “in 1932 came a tenfold increase in assistance recipients and an eightfold increase in private welfare organizations; all within just two years”.<sup>266</sup> The reason for such welfare increase was both to control the internal uprising of socialist movements, and to mobilize and enhance the human resources of the nation.<sup>267</sup>

In the first sense, the discourse of social welfare was a powerful tool to portray a government that was not only thinking about the conquering of distant lands but also about the problems in their own land. In the second sense, the promulgation of the National Health Insurance Act (1938), and the establishment of the Employee Pension System (1941) served respectively to conscript the newly affiliated workers and farmers, and to use their contributions to finance the wars.<sup>268</sup>

But welfare expenditure ceased with the attack on Pearl Harbor. When Japan joined WWII, all her resources were reallocated to military expenses. Not only was the welfare budget for civilians reduced, but the health benefits of the wounded soldiers were also maintained to a minimum.

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<sup>265</sup> Stephen J. Anderson, *Welfare Policy and Politics in Japan: Beyond the Developmental State* (New York: Paragon House, 1993) at 41-42.

<sup>266</sup> Sheldon Garon, *Molding Japanese Minds: The State in Everyday Life* (Princeton: Princeton University, 1997) at 43.

<sup>267</sup> *Ibid.* at 58.

<sup>268</sup> Stephen J. Anderson, *supra* note 265, at 52-53.

### 6.1.2 From the occupation to the social welfare services act (1945-1951)

With the defeat and surrender of Japan, the Potsdam Declaration of July 26, 1945, was imposed. The Declaration ordered 1) the removal of permanent authority and influence of those who deceived the Japanese people and led them to attempt world conquest, 2) the occupation of the country until a new peaceful, safe and just order was established and the destruction of military power was confirmed, 3) the complete disarmament of the army, 4) the punishment of war criminals and **removal of obstacles that prevented the democratization of the country**, and 5) **the reconstruction of the economy and industry**.<sup>269</sup>

To supervise the completion of such objectives and lead the Occupation Army, General Douglas MacArthur was named *Supreme Commander of the Allied Powers* (SCAP). MacArthur was aware of the importance that welfare had for Japanese military mobilization and decided to use it to provide relief for a devastated nation, and legitimacy for the Occupation Army. Thus, the SCAP model of welfare provided one crucial difference when compared to the previous one, it stated that “the Japanese government should be primarily responsible for welfare provision to support people’s basic standard of living, and the benefits should be provided to all citizens without discrimination.”<sup>270</sup>

SCAPS’ model concurred with the aforementioned Potsdam objectives 4) and 5). In MacArthur’s plan, promoting welfare enabled social equality and economic development. Thus, the controversial concept of 生活保護 {*seikatsu hogo*} (translated as life, livelihood, or minimum standards of living, depending on the

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<sup>269</sup> Potsdam Declaration, Proclamation Defining Terms for Japanese Surrender, (Issued at Potsdam, July 26, 1945), available at: <http://www.ndl.go.jp/constitution/e/etc/c06.html>.

<sup>270</sup> Masayuki Fujimura, “Comparing Japanese and Korean welfare regimes” quoted by Sunil Kim, *Reforming Pension with Pensioners: Social Dialogue and the Politics of Developmental Welfarism in Japan and Korea* (Berkeley: PhD Dissertation, 2011) at 19.

author) would be included in Article 25 of the new Constitution of Japan, promulgated on November 3<sup>rd</sup>, 1946 and into force in May 3<sup>rd</sup>, 1947.

SCAP's reforms continued with more specific measures for the recovery of the war bereaved. The Child Welfare Act (1947),<sup>271</sup> the Persons with Disabilities Act (1949),<sup>272</sup> and the Public Assistance Act (1950),<sup>273</sup> were enacted and became known as the "three laws of welfare" advanced by the SCAP.<sup>274</sup> These laws were influenced by the New Deal ideology of the Occupation Army.

Nonetheless, by 1949 a local economic crisis and the rise of the communist threat from China led the SCAP to change its priorities in what is commonly known as the "reverse course".<sup>275</sup> For welfare, the reverse course meant new budget cuts and the return of the Japanese pre-war bureaucrats. Accordingly with these changes, the Social Welfare Act (1951)<sup>276</sup> reverted welfare as a non-justiciable right; the Civil Code was reformed to restate the "family responsibility" for the unhealthy, and the welfare agencies began to place the onus of not having a healthy family member as a reason for dismissal.<sup>277</sup>

### **6.1.3 The LDP and welfare expansion (1951-1979)**

The San Francisco Treaty of 1951 marked the formal end of the Occupation, and by 1952 Japan had regained its independence.<sup>278</sup> A new political, economic and social

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<sup>271</sup> 児童福祉法(Jidō fukushi-hō) Child Welfare Act, Act No. 164 of 1947.

<sup>272</sup> 障害者基本法 (Shōgaishakihonhō) Basic Act for Persons with Disabilities, Act No. 84 of 1949.

<sup>273</sup> 生活保護法(Seikatsuhogohō) Public Assistance Act, Act No. 144 of 1950.

<sup>274</sup> Konosuke Odaka, *The Evolution of Social Policy in Japan* (Washington: World Bank Institute, 2002) at 1.

<sup>275</sup> Peter Duus (ed.), *The Cambridge History of Japan, Volume 6: The Twentieth Century* (Cambridge: Cambridge University Press, 1988) at 43.

<sup>276</sup> 社会福祉法 (Shakai fukushi-hō) Social Welfare Act, Act No. 45 of 1951.

<sup>277</sup> Sunil Kim, *supra* note 270, at 7-9.

<sup>278</sup> No. 1832. Treaty of Peace with Japan. Signed at San Francisco, on 8 September 1951, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20136/volume-136-I-1832-English.pdf>.



system began to take shape from the amalgamation of the Prewar and SCAP paradigms. In such sense, although by 1949 the SCAP had reversed its progressivism and disfavored socialist ideas, it was the triumph of the Liberal Democratic Party (LDP) which determined a complete return of welfare conservatism in Japan.

The LDP has ruled from its foundation in 1955 to this day (with a brief interruption from 2009-2012)<sup>279</sup> maintaining a majority in the Diet from 1955 to 1993 and from 2016 to this day. Similar to the case of Mexico, the LDP has won by targeting specific groups of voters such as farmers and small business owners offering them welfare protection. Thus, welfare (or its promise), has been systematically used by the LDP for votes, legitimacy and maintaining political power.<sup>280</sup>

Since its origins, the LDP developed welfare programs including universal pension and health insurance schemes (promised in campaign in 1958, and enacted as the National Pension Insurance in 1961), welfare service for the elderly (1963), and welfare for mothers and widows (1964).<sup>281</sup> The welfare approach was also evident in expenditure, and during the governance of Sato Eisaku (1964-1972), national pension benefits were doubled, free medical care for the elderly was introduced and pensions were indexed to the rate of inflation.<sup>282</sup>

Nevertheless, welfare expansion ended with the Oil Crisis of 1973. There was a small but noticeable retrenchment in social expenditure and state provided services<sup>283</sup>. Moreover, after the Second Oil Crisis of 1979, the government

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<sup>279</sup> Mexico's PRI has similarly ruled from 1929 and until this day (minus 12 years from 2000 to 2012).

<sup>280</sup> Margarita Estévez-Abe, *Welfare and Capitalism in Postwar Japan: Party, Bureaucracy, and Business* (Cambridge: Cambridge Studies in Comparative Politics, 2008).

<sup>281</sup> Sunil Kim, *supra* note 270, at 20.

<sup>282</sup> James I. Matrayat, *Japan's Emergence as a Global Power* (Westport: Greenwood Press, 2001) at 38.

<sup>283</sup> Gregory Kasza, *One World of Welfare: Japan in Comparative Perspective* (Ithaca: Cornell University Press, 2006) at 67.

proclaimed a New Economic and Social Seven Year Plan to create a “proper system of public welfare built on the **basis of self-help efforts of individuals and cooperation within families and communities.**”<sup>284</sup>

## 6.2 Japanese-style welfare society (1980-1990)

As T. J. Pempel and Toshimitsu Shinkawa indicate, the paradigm of “company based welfare”, in which a large part of social welfare responsibilities was transferred to private companies, existed in Japan since before WWII.<sup>285</sup>

Company based welfare was beneficial in Japan both for the companies and for the government. On one hand, the companies provided a system of work protections including lifetime employment, company insurance schemes, health services, pension plans, productivity and loyalty bonuses, etc. On the other hand, the government offered the companies tax deduction for their welfare expenditure, the possibility to invest employee pension contributions, and a paternalist economy that restricted competition with foreign markets.<sup>286</sup>

However, company based welfare had one important weakness; it was only useful for employees in a constantly growing economy. In this sense, social rights were work-derived or, more precisely, *company-derived*.<sup>287</sup> Furthermore, “the benefits that a worker received could greatly differ across companies, industries, jobs and

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<sup>284</sup> Arthur Gould, *Capitalist Welfare Systems: A Comparison of Japan, Britain and Sweden* (New York: Longman Publishing, 1993) at 37(**emphasis added**).

<sup>285</sup> Toshimitsu Shinkawa and T. J. Pempel, *Occupational Welfare and the Welfare State in America, Scandinavia, and Japan* (London: Macmillan, 1996) at 299.

<sup>286</sup> Margarita Estévez-Abe, *supra* note 280, at 30-40.

<sup>287</sup> Company-derived welfare is very similar to the paradigm of labor-dependant welfare explained in Chapter 5.

other variables.”<sup>288</sup> These circumstances began to generate inequality in the self-defined “Japanese middle-class society.”<sup>289</sup>

In such regard, since the 1980s, priorities completely departed from welfare, and shifted towards economic growth. The neo-liberal pretense of the “trickle-down effect”<sup>290</sup> was used by the LDP leaders “as the most crucial remedy for the social disease.”<sup>291</sup> Furthermore, in a speech to the Diet, Masayoshi Ohira indicated that “welfare facilities and services should be carried out by the local community and private organizations.”<sup>292</sup> Thus, the rhetoric of “Japanese-style Welfare Society”<sup>293</sup> understood as “the minimum security by the government plus the spirit of self-help”<sup>294</sup>, began to be commonly used by the government to imply a sum of company based welfare plus self-reliance.

Since company based welfare was an important element for “Japanese-style Welfare Society”, a series of policies to subsidize employment even in non-competitive industries were enabled by the Japanese government. One such policy, which was also endorsed by the Supreme Court of Japan (SCJ) was known as the principle of “abusive dismissal”<sup>295</sup> and was used to delay or impede firing workers. Employment protection was intended to maintain the public perception of the

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<sup>288</sup> Stephen J. Anderson, *supra* note 265, at 28.

<sup>289</sup> See Ezra F. Vogel, *Japan's New Middle Class: The Salary Man and His Family in a Tokyo Suburb of California* (Los Angeles: University of California Press, 1971) and then contrast with Jeff Kingston, *Contemporary Japan: History, Politics and Social Change since the 1980s* (London: Wiley-Blackwell, 2010).

<sup>290</sup> The “trickle down effect” was discussed in Chapter 3.

<sup>291</sup> Toshiaki Tachibanaki, “Japan was not a Welfare State, but...” in Richard T. Griffiths and Toshiaki Tachibanaki, (eds.), *From Austerity to Affluence: The Transformation of the SocioEconomic Structure of Western Europe* (New York: St. Martins Press, 2000) at 201.

<sup>292</sup> Sunil Kim, *supra* note 270, at 25 (**emphasis added**).

<sup>293</sup> The term “Welfare State” is avoided as such in the next couple of decades. “Society” as a term was preferred in order to avoid an immediate responsibility by the Japanese Government.

<sup>294</sup> Miki Takeo quoted in Christian Aspalter, *Social Works in East Asia* (New York: Routledge, 2016) at 22.

<sup>295</sup> This criterion was first established in the case of *Nihon Salt Manufacturing Case*, (Supreme Court, 2nd petty bench, 25 April 1975, 29 Minshu p 456 and reiterated in *Kochi Broadcasting Co.* (Supreme Court, 2nd petty bench, 31 January, 1977, Rodo-Hanrei p 268).

“Japanese middle-class society” and at the same time transfer the employee’s welfare to the private companies.

But in contrast to employment protection, social assistance was seriously undermined in the 1980s. Among other consequences, healthcare ceased to be free, public assistance budget was reduced, the retirement age for pension was announced to be raised to 65 years, and the required contribution years to qualify for full pension benefits was lengthened to 40 instead of 32.<sup>296</sup> More importantly, the term 国民負担 {*kokumin futan*} (translated as “public burden rate” or “people’s burden rate”), began to be commonly used by the LDP administrations.

The *people’s burden rate* is the proportion of total tax revenue (combining tax and social security contributions) to national income. According to Mari Miura,<sup>297</sup> more important than its technical definition, such term makes it seem like the people 国民 {*kokumin*}, bear the tax burden 負担 {*futan*}, without receiving any benefit in return. In this way, this term began to be used to gain the favor of the public opinion regarding welfare retrenchment.

Along with *people’s burden rate* came a media campaign that exalted the stable employment rates, and the support that the government gave to workers. More importantly, the campaign reinforced the notion that the government’s role was always subsidiary to that of the family and the private company. Such subsidiarity generated the next welfare crisis, one whose aftershock continues to this day.<sup>298</sup>

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<sup>296</sup> Gregory Kasza, “The Rise (and fall?) of Social Equality: The Evolution of Japan’s Welfare State” in Alisa Gaunder (ed.), *Routledge Handbook of Japanese Politics* (New York: Routledge, 2011) at 196.

<sup>297</sup> Mari Miura, *Welfare through Work: Conservative Ideas, Partisan Dynamics, and Social Protection in Japan* (New York: Cornell University Press, 2012) at 60-61.

<sup>298</sup> The concept of subsidiarity in Japan is particularly developed in Gøsta Esping-Andersen, “Hybrid or Unique? The Japanese Welfare State between Europe and America” (1997) 7:3 *Journal of European Social Policy* 179.

### 6.2.1 The full-time housewife

Since the Public Assistance Act, the Japanese state had relied on the family as the basis for welfare, a characteristic of the residual model of welfare. Richard Titmuss defines the residual model of welfare “as that in which social services form a safety-net under the economic system, and only when the “natural” channels of welfare -the private market and the family- break down “should social welfare come into play, and then only temporarily”.<sup>299</sup> In this fashion, social policies and employment practices were allegedly enforced to maintain the “traditional family”, but in practice reinforced women’s economic dependence on men and discouraged divorce.

Notwithstanding the foregoing, in 1981 Japan signed the International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).<sup>300</sup> With this international basis, women groups began to mobilize and protest against the discriminatory practices on employment and welfare.<sup>301</sup> More alarmingly for the *status quo*, some women under the age of forty began “focusing on fulfilling their personal and career aspirations and refusing to subscribe to the traditional fertility patterns.”<sup>302</sup> The results of such changes would be reflected in 1989’s total fertility rate (TFR) which hit a record-low of 1.57 children per woman, well below the replacement rate of 2.08 children per woman.

For the Japanese state, the previous developments were critical for two reasons. The first reason has to do with the dependency rate (DR), which measures the relationship between the economically active (in this case thought to be male

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<sup>299</sup> Richard Titmuss, “Social Policy” in Stephan Leibfried & Steffen Mau (eds.), *Welfare States: Construction, Deconstruction, Reconstruction* (Cheltenham: Edward Elgar Pub., 2008) Volume I, at 30-31.

<sup>300</sup> Japan did not ratify the CEDAW until 1985.

<sup>301</sup> See Yumiko Ehara, “Japanese Feminist Social Theory” in Anthony Elliott, Masataka Katagiri & Atsushi Sawai, *The Routledge Companion to Contemporary Japanese Social Theory: From individualization to globalization in Japan today* (New York: Routledge, 2013) at 163.

<sup>302</sup> Ito Peng, “Social Care in Crisis: Gender, Demography, and Welfare State Restructuring in Japan Social Politics” (2012) 9:3 *Social Politics* 411.

company workers), and the economically inactive (in this case thought to be infants, elders and, depending on the government's interests, women). In order for the *Japanese-type Welfare Society* to work properly, a DR with more economically active persons is required to maintain the welfare of those inactive. As can be expected, this could not be achieved with such a low TFR.

The second reason lies in the instrumentality of women for the residual model of welfare. Women's cooperation as "full-time housewives" (a romanticized role of the female caregiver of both children and the elderly), was necessary to avoid or at least reduce costs to the government. Both policy and media campaigns encouraged the conservative ideal of the woman's dual role as wife and mother.<sup>303</sup> Indeed, the "male breadwinner model" desperately depended in the "full-time housewife" not only for the viability of the family, but also for that of the welfare system at large.

The Ministry of Health and Welfare (MHW) became aware of the foregoing and began taking emergency measures. First, it targeted husbands without a full-time job by promoting a reform that allowed non-employed citizens to contribute and receive an old-age pension, and modicum healthcare.<sup>304</sup> Second, it reluctantly enacted the Equal Employment Opportunity Law (EEOL)<sup>305</sup> intending to comply with the CEDAW in order for its ratification and international approval.

The reforms respectively supported the male breadwinner model, punished women who not complied with the dual role of mother and wife, and saved face in the

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<sup>303</sup> See Tomiko Yoda, "The Rise and Fall of Maternal Society: Gender, Labor and Capital in Contemporary Japan" in *Japan after Japan: Social and Cultural Life from the Recessionary 1990s to the Present* (Durham: Duke University Press, 2006) at 239-274; and Chizuko Ueno, *The Modern Family in Japan: Its Rise and Fall*, (Melbourne: Melbourne Trans Pacific Press, 2008).

<sup>304</sup> Christian Aspalter, *supra* note 294, at 22.

<sup>305</sup> 男女の均等な機会及び待遇の確保等女子労働者の福祉の増進に関する法律 (Danjo no kintōna kikai oyobi taigū no kakuho-tō joshi rōdō-sha no fukushi no zōshin ni kansuru hōritsu) Act on Equal Opportunity between Men and Women in Employment, Act No. 113 of 1972 (a.k.a. Equal Employment Opportunity Law).

international community. When the reforms were put to practice, the subsidies for unemployed husbands maintained them in lower paying part-time jobs and, even though the EEOL “prohibited discrimination against women in terms of training, fringe benefits, mandatory retirement, and dismissal”, it did not do so “in recruitment, hiring, assignment and promotion”<sup>306</sup> rendering it useless in the long term.

Additionally, “traditional women” (*i.e.* housewives) were encouraged to fill their role with welfare incentives and tax deductions. The statutory share in the inheritance of a spouse, for example, was increased from one-third to one-half, so by the end of the decade “the treatment of spouses reached a point that can only be described as excessively favorable to male breadwinners.”<sup>307</sup> Because of it, “since the 1990s Japan’s livelihood security system has been even more rigidly locked into the male breadwinner model than that of any other country.”<sup>308</sup>

## 6.2.2 The graying society

The other problem of the *Japanese Style Welfare Society* has to do with its aging population. Since 1949 life expectancy at birth in Japan has consistently increased surpassing all other industrialized countries since 1970 at 72 years.<sup>309</sup> By 1980 the Japanese population aged over 65 years comprised more than 10% of its total.<sup>310</sup>

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<sup>306</sup> In practice, the EEOL was just a smokescreen for the big companies that complied with the gender quota hiring one or two women for middle managerial positions without promotion and the rest of them as indefinite part-timers with limited salary and benefits. See Mari Miura, *supra* note 297, at 78.

<sup>307</sup> Mari Osawa, “Twelve Million Full-time Housewives: The Gender Consequences of Japan’s Post-War Social Contract” in Oliver Zunz, Leonard Schoppa & Nobuhiro Hiwatari (eds.), *Social Contracts under Stress: The Middle Classes of America, Europe and Japan at the Turn of the Century* (New York: Russell Sage Foundation, 2009) at 265.

<sup>308</sup> Mari Osawa, *Social Security in Contemporary Japan: A Comparative Analysis* (New York: Routledge, 2011) at 53.

<sup>309</sup> As of 2012 Japan has a record average of 83 years. Table I-45 consulted in the Ministry of Health, Labor and Welfare, available at: <http://www.mhlw.go.jp/english/database/db-hh/1-2.html>.

<sup>310</sup> The World Bank, *Population ages 65 and above (% of total)*, available at: <http://data.worldbank.org/indicator/SP.POP.65UP.TO.ZS?page=4>.

The problem is not only the age increase and its respective costs, but also the specific generation which is achieving such life expectancy; the Baby Boomers. Having been born in the years 1947-1949, this cohort was disconnected with most of the experiences of war and deprivation from their parents and grew mainly in times of economic prosperity. The Baby Boomers were also raised under new standards and policies that favored the nuclear family and disapproved of the three-generation household (a model prevalent until WWII in which grandparents helped to care for children in exchange of reciprocity in their final years).

The Baby Boomers are notoriously active as a political pressure group with the highest levels of participation in elections and referenda.<sup>311</sup> Hence, for the LDP this has been a generation that has always received special considerations in order to gain their favor. By such logic, for example, the Act of Health and Medical Services for the Aged was enacted in 1982 to “make up for the limitations of the public expenditure system of medical bills for the elderly.”<sup>312</sup>

In 1989, after various social cuts and the introduction of the consumption tax, an even bigger deferral was made favoring the Baby Boomers with the Ten-Year Strategy to Promote Health Care and Welfare for the Aged (*a.k.a* Gold Plan). Unlike other social policies, the Gold Plan “was given three times as much budget as had been given for the past 10 years, and various efforts were made to realize it by setting target figures for concrete deadlines and performance.”<sup>313</sup> Yet, even the Gold Plan along with most of the late 1980s new welfare programs could not be realized due to an unexpected economic crisis.

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<sup>311</sup> In fact, since 1990 the turnout of voters in their 60s has generally been the highest for lower house elections, and the case of voters in their 70s has been the second highest since the 2005 election. Yasuo Takao, “Aging and Political Participation in Japan: The Dankai Generation in a Political Swing” (2009) 49:5 *Asian Survey* 852.

<sup>312</sup> Masayuki Fujimura, “Social Change and Social Policy in Japan” (2009) 18 *International Journal of Japanese Sociology* 4, at 7-10.

<sup>313</sup> *Ibid.*



## 6.3 The lost twenty years

By August of 1990 the Nikkei Stock Index fell by at least a half, and by 1992 asset prices had unmistakably collapsed; this was called the “bubble burst” of the Japanese economy. For macroeconomics, such burst meant chronic deflation, low growth, declining gross output per capita and labor efficiency. For workers, it meant unemployment, and more part-timers earning less than minimum salaries. All these changes generated what has been called the “Lost Twenty Years” (失われた 20 年, *Ushinawareta Nijūnen*).

### 6.3.1 Structural reforms in welfare (1990-2000)

By the beginning of the 1990s, the Japanese government had three urgent matters to solve: low fertility, an aging population, and labor disparity. The MHW thus enacted structural reforms to a) develop childcare services and financial support to increase birthrates; b) implement health and pension reforms for the elderly and; c) design new employment policies to establish common standards.<sup>314</sup> The previous objectives were developed along these lines:

a) The Childcare Leave Law (1991)<sup>315</sup> allowed for up to one year leave (without pay)<sup>316</sup> for working women who had to take care of children.<sup>317</sup> Nonetheless, since the EEOL did not consider illegal the requisite imposed by employers to be relocated

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<sup>314</sup> National Institute of Population and Social Security Research, Social Security in Japan 2014 at 6, available at: <http://www.ipss.go.jp/>.

<sup>315</sup> 育児休業、介護休業等育児又は家族介護を行う労働者の福祉に関する法律 (kuji kyūgyō, kaigo kyūgyō-tō ikuji matawa kazoku kaigo o okonau rōdō-sha no fukushi ni kansuru hōritsu) Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members, Act No. 76 of 1991.

<sup>316</sup> This disposition was reformed in 2000 to include a 25% income replacement.

<sup>317</sup> See translation and analysis in Carl Haub, *Japan's Demographic Future* (New York: Population Reference Bureau, 2010), available at: <http://www.prb.org/Publications/Articles/2010/japandemography.aspx>.

at any given time, such form of indirect discrimination was used as a deterrent against women who intended to work, but at the same time were expected to remain as family caregivers.

b) The Long-Term Care Insurance Act (1997)<sup>318</sup> was enacted to financially separate the costly elderly care from medical systems by charging for the latter on a private contract basis. Furthermore, after three years of parliamentary negotiations, the Long-Term Care Insurance System (LTCIS)<sup>319</sup> came into operation in 2000 and delegated elderly welfare to private providers. According to the MHW the system was designed to “shift the burden of elderly care imposed mainly on women, to the state.”<sup>320</sup> However, some authors<sup>321</sup> consider that the real objective of the system was to enhance private competition (by allowing free choice of providers), and to give more autonomy (and responsibility) to municipalities in welfare provision. What is certain is that by the end of the decade, none of these objectives were met.

c) After the collapse of the economy, it became clear that the seniority-based and lifetime employment system was untenable. The MHW had to revise labor and welfare legislation to downsize “public employment services, training schemes, and employment services {that} created huge government costs.”<sup>322</sup> For example, the revised Worker Dispatchment Law (as of 1999)<sup>323</sup> opened a door for subcontracting employees and reduce previously agreed welfare contributions via outsourcing. By

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<sup>318</sup> 介護保険法(Kaigo hoken-hō) Long-Term Care Insurance Act, Act No. 123 of 1997.

<sup>319</sup> The LTCIS covers care services for people over the age of sixty-five who are deemed to require care and those between the ages of forty and sixty-four who need care as a result of disabilities resulting from aging. Insurance contributions are compulsory for people over the age of forty. Ito Peng, *supra* note 302, at 430.

<sup>320</sup> Ministry of Health, Labour and Welfare, *Long-term care insurance in Japan* (General affairs division health and welfare bureau for the Elderly), available at: [http:// www.mhlw.go.jp/english/topics/elderly/care/index.html](http://www.mhlw.go.jp/english/topics/elderly/care/index.html).

<sup>321</sup> See for example Jeffrey C. Campbell & Naoki Ikegami, “Long-term Care Insurance Comes to Japan” (2000) 19:3 *Health Affairs* 26.

<sup>322</sup> Masayuki Fujimura, *supra* note 312, at 9-10.

<sup>323</sup> 労働者派遣事業の適正な運営の確保及び派遣労働者の就業条件の整備等に関する法律(Rōdōshahakenjigyō no tekiseina un'ei no kakuho oyobi haken rōdō-sha no shūgyō jōken no seibi-tō ni kansuru hōritsu) Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Act No. 88 of 1985.

1999 "atypical workers" amounted to 27.5% of the employed workforce in Japan,<sup>324</sup> with huge differences in wages and welfare benefits when contrasted with full-time workers.<sup>325</sup> With the steady increase of part-time jobs and decrease of full-time jobs, the result was more underemployment and the rise of the "working poor".<sup>326</sup>

### 6.3.2 Participatory welfare society (2000-2010)

Neoliberal policies gained momentum in 2000 when the MHW enacted important pension reforms. First, retirement ages were set to increase from 60 to 65 years, and contribution rates from 17.35% to 26.7% in 2025. Secondly, the overall lifetime pension benefit was set to be reduced by 20% over 20 years. Third, a new earnings test was introduced for those aged between 65 and 69 years.<sup>327</sup>

Regarding the topic of healthcare, the government increased patients' co-payments to 30% in 2001 and introduced a separate contributory insurance scheme for the elderly in 2005.<sup>328</sup> Childcare was privatized resulting in only middle-high class families being able to afford it.<sup>329</sup> Long-term care insurance benefits were also reduced, a 10% co-payment was introduced, and the eligibility criterion was limited to older people living alone and with a severe disability.<sup>330</sup>

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<sup>324</sup> This term refers to part-time workers, dispatched workers, and workers who conclude fixed-term employment contracts.

<sup>325</sup> Ministry of Labor, *White Paper on Labor 2000* (Tokyo: Ministry of Labor, 2000) at 169.

<sup>326</sup> Also known as "Precariat", the term refers to the workers who earn wages inferior to the living standard referred by Article 25 of the Japanese Constitution, and which have become more prevalent each year.

<sup>327</sup> Hwang Gyu-Jin, "Explaining Welfare State Adaptation in East Asia: The Cases of Japan, Korea and Taiwan" (2012) 40:2 *Asian Journal of Social Science* 174.

<sup>328</sup> Margarita Estévez-Abe, *supra* note 280.

<sup>329</sup> See Naoko Soma & Junko Yamashita, "Child Care and Elderly Care Regimes in Japan" (2011) 27:2 *Journal of Comparative Social Welfare* 133, at 142.

<sup>330</sup> Mayumi Hayashi, "The Care of Older People in Japan: Myths and Realities of Family Care" (2011) *History and Policy*, available at: <http://www.historyandpolicy.org/papers/policy-paper-121.html>.

Along with the aforementioned reforms, the link between labor and welfare became even more evident in 2001 with the merger between the Ministry of Health and Welfare, and the Ministry of Labor to form the Ministry of Health, Labor, and Welfare (MHLW). According to Fujimura, this was “a movement responsive to the changes of the times”,<sup>331</sup> and reflected the prolonged economic recession. Furthermore, since companies were no longer a sustainable “partner” in the *Japanese-style Welfare Society*, the recently formed MHLW advanced its agenda to create a 参加型福祉社会 {*sankagata fukushi shakai*} (*participatory welfare society*).

The plan started in the late 90s with national campaigns to encourage the participation of citizen volunteers and Non-Profit Organizations (NPOs) in welfare services. The slogan under those campaigns was that “today’s volunteers would be tomorrow beneficiaries”,<sup>332</sup> and its success could be seen in the 190,000 voluntary welfare commissioners that contrasted with the mere 15,000 public welfare officials. In 1998 such numbers implied a 12.5 to 1 ratio and huge savings for the government of Japan.<sup>333</sup>

The next step of the plan was institutionalization, which was achieved with the “Law to Promote Specified Non-profit Activities” of 1998,<sup>334</sup> and the amendment of the Social Welfare Act in 2000.<sup>335</sup> Both laws rule citizen’s voluntary participation in

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<sup>331</sup> Masayuki Fujimura, *supra* note 312, at 7-10.

<sup>332</sup> Masayuki Fujimura, “The Welfare State, the Middle Class, and the Welfare Society” (2000) 9 *Review of Population and Social Policy* 5, at 7.

<sup>333</sup> Roger Goodman, “The ‘Japanese-style Welfare State’ and the Delivery of Personal Social Services” in Roger Goodman, Gordon White & Huck-ju Kwon, (eds.), *The East Asian Welfare Model: Welfare Orientalism and the State* (New York: Routledge-Goodman, 1998) at 144.

<sup>334</sup> 特定非営利活動促進法 (Tokutei hieirikatsudōsokushinhō) Act on Promotion of Specified Non-profit Activities, Act No. 7 of 1998.

<sup>335</sup> The Social Welfare Act has been in force for almost 50 years.

welfare<sup>336</sup> and listed the “partners” that could provide welfare services.<sup>337</sup> After this legislation was enacted, NPOs dedicated exclusively to welfare services increased from 22.7% (in 1985) to 57.8% (in 2011).<sup>338</sup>

It is important to denote that, even though its relevance in humanitarian help is undeniable,<sup>339</sup> NPOs in Japan became seriously compromised in their autonomy and decision-making after their institutionalization.<sup>340</sup> Margarita Estévez-Abe<sup>341</sup> has denounced the interventionism that the central government exercises by limiting the media discourses, excluding specific groups and benefitting some NPOs at the expense of others. Because of this, Robert Pekkanen also considers that: “State influence in Japan has consciously molded civil society to produce a plethora of small, local groups and a dearth of large, professionalized, independent organizations.”<sup>342</sup>

In this regard, Akihiro Ogawa’s ethnographic work provides a realistic analysis of Japanese NPOs in the early 2000s. In his fieldwork, he discovered that a “coercive, self-disciplined subjectivity {was} intentionally produced and reproduced under the

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<sup>336</sup> There were many variables contributing to the introduction of the NPO law. This includes the fact that there was an urgent need for the implementation of LTCL, enacted in 1997 and implemented in 2000, and limited local and community infrastructure to deal with the universal long-term care services. One solution was to activate local government, and communities and NPOs through political and legislative decentralization and deregulation of the NPOs through the NPO law. It is also important to remember that many civil society groups also pushed for NPO laws, as prior to this laws all the social welfare body and service institutions was under the administrative guidance from the central government through local governments.

<sup>337</sup> The term “Partner” included “individual citizens, participatory civic groups, professional nonprofit organizations, for profit enterprises, and quasi-governmental organizations that are created by the state outside its formal structure”. Margarita Estévez-Abe, “State-Society Partnerships in the Japanese Welfare State” in Frank J. Schwartz & Susan J. Pharr (eds.), *The State of Civil Society in Japan* (Cambridge: Cambridge University Press, 2003) at 240-241.

<sup>338</sup> Junko Yamashita, “Citizen Participation or Low-Cost Care Providers? Welfare Non-profit Organisations in Japan” (2013) 10:4 *Social Science Japan Journal* 45, at 52.

<sup>339</sup> The great support of Japanese NPOs could be seen in the Great Hanshin-Awaji Earthquake of 1995, and the Fukushima Crisis of 2011.

<sup>340</sup> Sheldon Garon, *Molding Japanese Minds: The State in Everyday Life* (Princeton: Princeton University, 1997) at 43.

<sup>341</sup> Margarita Estévez-Abe, *supra* note 337, at 240-241.

<sup>342</sup> Robert Pekkanen, “Japan’s New Politics: The Case of the NPO Law” (2000) 26:1 *Journal of Japanese Studies* 111.

name of volunteerism in contemporary Japanese society.”<sup>343</sup> Ogawa also found that “the volunteer activities organized under NPOs actually replace the government’s provision of these services...cutting costs in public administration”.<sup>344</sup>

Indeed, Estévez-Abe’s research also demonstrates that, after the institutionalization process, NPOs end looking a lot like governmental agencies. She identified that the direct cause of de-personalization can be found in the bureaucratic discretion to grant legal status.<sup>345</sup> In this manner, the criteria to determine if a NPO is “of public interest” has served as a door which opens for organizations which can implement and legitimate policy, gather information, and control interest groups, and which closes for organizations with dissidents, opponents, and non-aligned interests.<sup>346</sup>

Junko Yamashita also argues that participation and representation in these organizations become unequal after institutionalization. Her study demonstrated that “participation by individuals in the development of community welfare policies is quite limited”.<sup>347</sup> Therefore, she questions “how NPOs can legitimately claim to represent local citizens if they do not encourage member involvement in organizational management and decision-making.”<sup>348</sup>

In sum, by the end of the first decade, the MHLW implementation of the *participatory welfare society* achieved exactly what they intended; “welfare expansion without budget expansion.”<sup>349</sup> Not only are the Japanese people relying once again on community and self-help rather than the state, in many cases, they are doing so believing it is their privilege. Similar to the case of the “full-time housewives”, the

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<sup>343</sup> Akihiro Ogawa, *The Failure of Civil Society? The Third Sector and the State in Contemporary Japan* (New York: Suny Press, 2009) at 4.

<sup>344</sup> *Ibid.* at 93-94.

<sup>345</sup> Legal status allows essential activities for NPOs such as renting or buying real estate, contracting and tax deducting.

<sup>346</sup> Margarita Estévez-Abe, *supra* note 337, at 157.

<sup>347</sup> Junko Yamashita, *supra* note 338, at 16.

<sup>348</sup> *Ibid.*

<sup>349</sup> Sunil Kim, *supra* note 270, at 39.

NPOs are presented as symbols of the new democratic culture enabled by the Japanese government; in truth, however, they are necessary elements to maintain low costs in a troubled welfare state.

## **6.4 This decade so far**

In 2009, for the first time in Japanese history, the LDP lost its power to a coalition led mainly by the centrist-oriented Democratic Party of Japan (DPJ). Among the causes for their defeat was the scandal regarding the loss of more than 50 million public pension records by Japan's Social Insurance Agency in 2007, and the falsification of income and premiums calculations by various LDP politicians in 2008. Moreover, the trust of the elderly electorate was seriously undermined with the privatization of the postal service and the welfare retrenchments previously mentioned.

The defeat of the LDP was the first real transfer of power after almost 60 years of uninterrupted rule. In the eyes of many Japanese, there was hope that having a new ruling party would mean better working and living conditions. The DPJ garnered such public perception by denouncing neo-liberalism and advocating social protection and equal work to enable their landslide victory.

To finance their social welfare project, a controversial increment in the consumption tax would be introduced after much negotiation with the LDP and the *New Komeito Party*. The hike from 5% to 8% to be applied by April 2014, and up to 10% for October 2015, was an emergency response to the unpayable costs of social security expenditures, particularly those deriving from the elderly. Along with the new

consumption tax, a series of pension reforms were enacted with the goal of overhauling the most costly welfare system in Japan.<sup>350</sup>

Nonetheless, most of the reforms had important exemptions that preserved the *status quo*. This contrasted with the bold campaign promises of change made by the DPJ and became an important cause of disenchantment for the public opinion.<sup>351</sup> Such disenchantment grew even more with the inadequate handling of the earthquake, tsunami and nuclear reactor crises of March, 2011. After being disillusioned with three DPJ prime ministers, the electorate turned back to the LDP. In the elections of December 2012, Shinzo Abe became once again prime minister, which implied a return to neo-liberal policies rebranded now as *Abenomics*.

Abe's first personalized policies or "arrows" within *Abenomics* included monetary easing by the Bank of Japan, and fiscal expansion by applying the first tax consumption increment. By 2014 Abe continued his programs and announced plans for economic growth and structural reforms. The ambitious reforms would include corporate governance, market, work and health liberalizations, and the expansion of childcare to increase women in the workforce. However, most of these reforms were undermined by the new recession that overcame Japan in 2014, and that has delayed the second consumption tax hike until 2019.<sup>352</sup>

Regarding social security, since 2013 Abe summoned a "National Committee on Social Security Systems Reform" (NCSSR) which has studied the unavoidable

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<sup>350</sup> See Noriyuki Takayama, *Japan's 2012 Social Security Pension Reform*, Discussion Paper for the Center for Intergenerational Studies, Institute of Economic Research, (Tokyo: Hitotsubashi University, October 2012), available online at: [http://takayama-online.net/pie/stage3/English/d\\_p/dp2012/dp574/text.pdf](http://takayama-online.net/pie/stage3/English/d_p/dp2012/dp574/text.pdf).

<sup>351</sup> See Noriyuki Takayama, "Pension Coverage in Japan" in Robert Holzmann, David Robalino & Noriyuki Takayama (eds.), *Closing the Coverage Gap: The Role of Social Pensions and Other Retirement Income Transfers* (Washington: World Bank, 2009) at 111-118.

<sup>352</sup> Isabel Revnolds, *Abe Postpones Japan's Sales-Tax Hike Until Late in 2019* (Bloomberg, June 31, 2016), available at: <http://www.bloomberg.com/news/articles/2016-06-01/abe-postpones-japan-s-sales-tax-hike-until-late-in-2019>.



problems posed by the low fertility and aging of society. One of the proposals considered was to shift from a seniority-based model, to a capacity based model, regarding contributions and beneficiaries of social welfare.<sup>353</sup> However, without the resources coming from the tax hike originally expected for 2014, such proposal would require increasing the pensionable age and adjusting benefits and contributions for high-income beneficiaries; both politically unattractive measures which canceled the whole proposal.

During the current administration other less substantial approaches have been implemented such as: a) the introduction of “My Number”, a unique 12-digit individual number that intends to put together fiscal and social security information to reduce tax evasion, increase tax revenue and fine-target the beneficiaries of social security benefits;<sup>354</sup> b) the marketing/development of “Womenomics”<sup>355</sup> a policy to endorse higher female labor participation by promoting better childcare and employment opportunities and; c) a comprehensive reform for National Health Insurance sustainability by including more community care services, strengthening preventive measures, and adopting common policies for cost efficiency for public and private health providers.<sup>356</sup>

Since these policies have been recently introduced (2015-2016), it is difficult to measure its practical impact. However, a preliminary impression can be found in the

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<sup>353</sup> Yashiro Naohiro, “Clock Running Down on Social Security Reform” in *Nippon.com* [2014.05.20], available at <http://www.nippon.com/en/in-depth/a03003?pnum=1>.

<sup>354</sup> The Japanese government estimates that My Number could boost annual tax revenues by as much as 240 billion yen (US\$2 billion). International Update, February, 2016, U.S. Social Security Administration, available at [https://www.ssa.gov/policy/docs/progdesc/intl\\_update/2016-02/2016-02.pdf](https://www.ssa.gov/policy/docs/progdesc/intl_update/2016-02/2016-02.pdf).

<sup>355</sup> See the discussion on Womenomics including Mizuno Tetsu, *Abenomics is Womenomics* (Discuss Japan, Japanese Foreign Policy Forum, No. 31), available at: <http://www.japanpolicyforum.jp/archives/economy/pt20160605163823.html>.

<sup>356</sup> Akira Morita, *The Economic and Social Impacts of Depopulation in Japan and its consequences to Global Economy*, presentation for the INTERNATIONAL SOCIAL SECURITY CONFERENCE of May 19, 2015, Kuala Lumpur, available at: [http://www.kwsp.gov.my/portal/documents/10180/5509594/1.\\_Prof\\_Akira\\_Morita\\_-\\_The\\_Economic\\_and\\_Social\\_Impacts\\_of\\_Depopulation\\_in\\_Japan\\_and\\_Its\\_Consequences\\_to\\_Global\\_Economy\\_.pdf](http://www.kwsp.gov.my/portal/documents/10180/5509594/1._Prof_Akira_Morita_-_The_Economic_and_Social_Impacts_of_Depopulation_in_Japan_and_Its_Consequences_to_Global_Economy_.pdf).

remarks of the Japanese Federation of Bar Associations (JFBA). In August of 2015, the JFBA made a public denouncement of the “industrialization of public-related services,” including social security services such as medical care, nursing care, and child-rearing.<sup>357</sup> These criticisms coincide with the ones advanced since 2013 by the NCSSR and yet, not much progress has been achieved during the parliamentary discussions. Thus, while the official discourse celebrates the achievements of *Abenomics*, the truth is that as of 2017 the old paradigm of the *Japanese-Style welfare society*, a euphemism for self-reliance, family residualism and NPOs substituting public responsibilities, is more alive than ever before.

*This chapter presented a panoramic view of the development of the welfare state within the Japanese context. Since the XIXth century, but more clearly after WWII, the Japanese welfare state is characterized by residualism, which has relied on its own citizens under specific considerations, such as the full-time housewife, and the male breadwinner. Nonetheless, the current economic and demographic conditions have rendered such model inviable. Therefore, this chapter will be of the utmost importance as background for the argument that the constitutionalization of the RSS has not necessarily improved the welfare of that state’s citizens.*

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<sup>357</sup> *Ibid.*

# Chapter 7 Social rights in Japan

*This chapter will examine the protection of social rights in Japan, by first explaining the history of the fundamental human rights. After such explanation, the reasons for the particular type of protection that social rights in Japan receive, along with the lack of practical incorporation of international law to domestic legal standards will be explained. The foregoing will be done with the intention of clarifying how social rights are perceived in Japan.*

## 7.1 History of the concept of human rights in Japan

In 1868 the Meiji Restoration implied a return of power to the Emperor after more than two centuries of Tokugawa military rule and with it, many scholars believe that the Japanese modernity began. Yet, unlike its western counterparts, Japan never had a proper political theory as understood in the European sense: "Having taken China's Confucianism as a State doctrine, the Japanese never...questioned in depth the different structural conformation between State and society."<sup>358</sup> Therefore, Meiji Restoration was not preceded by political debates regarding the status of a determined political order. Indeed, there were peasant and courtesan revolts, but they attained practical matters rather than ideological foundations.<sup>359</sup>

A lack of such tradition also meant that the notion of rights (emanating from the claims of the people against the abuses of authority), was also rare. In fact, some traditional legal historians consider that a proper concept of rights did not exist before the Meiji Era. Carmine Blacker, for example, writes: "At the beginning of the Meiji

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<sup>358</sup> William G. Beasley, *The Meiji Restoration* (Stanford: Stanford University Press, 1972) at 54.

<sup>359</sup> *Ibid.* at 55.

period the enormous majority of Japanese were entirely ignorant of its rights for the reason that there had been no idea even remotely equivalent to it in the old Confucian philosophy...Having no idea of rights, the Japanese naturally had no word to express the idea.”<sup>360</sup>

Some other more critical and contemporary scholars have ascertained that, even though a precise equivalent didn't exist, various antecedents similar to the concept of rights can indeed be found. John Haley explains that in the Kamakura period (1185-1333), the concept of *shiki* was understood and used for entitlements to income.<sup>361</sup> Kenzo Takayanagi acknowledges that several centuries later, Tokugawa civil justice protected certain types of interests and provided remedies as a matter of grace, but *de facto* many Japanese considered these interests as rights.<sup>362</sup> Moreover, in the same time period, Roger Bowen identifies a series of rights of subsistence (food, protection and non-excessive taxes), that were guaranteed by the government in order to maintain its legitimacy.<sup>363</sup>

Yet, most accounts about the origin of “rights” in Japan begin with the translation of western legal texts by the linguist Rinsho Mitsukuri. The word, 権利 {*kenri*}, first appeared in William Martin's Chinese translation of *Weaton's Elements of International Law*, published in Beijing in 1864 and introduced in Japan by Mitsukuri in 1865.<sup>364</sup> The word *kenri* is divided in 権 {*ken*} that came to mean authority, power, dignity and prestige, and two different characters were proposed for *ri*. One character

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<sup>360</sup> Carmine Blacker, *The Japanese Enlightenment: A Study of the Writings of Fukuzawa Yukichi* (Cambridge: Cambridge University Press, 1964) at 104-105.

<sup>361</sup> John O. Haley, *Authority without Power: Law and the Japanese Paradox* (New York: Oxford University Press, 1991) at 42.

<sup>362</sup> Kenzo Takayanagi, “A Century of Innovation: The Development of Japanese Law, 1868-1961” in Arthur Taylor Von Mehren, (ed.), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963) at 24.

<sup>363</sup> Roger Bowen, *Rebellion and Democracy in Meiji Japan: A Study of Commoners in the Popular Rights Movement* (Berkeley: University of California Press, 1980) at 117-119.

<sup>364</sup> See Douglas Howland, *Translating the West: Language and Political Reason in Nineteenth-Century Japan* (Honolulu: University of Hawaii Press, 2002).

for 利 {ri} means profit, gain, benefit, and advantage. The other character for *ri*, 理 means reason, justice, truth, and principle.

From the late 1860s, and continuing for several decades, two different translations of rights, 權利 and 權理, both pronounced *kenri*, were being used in Japan. Eventually, 權利 *kenri* came to be used not only in official government and legal documents, but also in the writings of intellectuals, journalists, and others for discussing rights in Japanese.<sup>365</sup> Among them, a group of former samurai that had studied Western philosophy formed the Movement for Freedom and Popular Rights (Movement).

The founders of the Movement were the first in Japan to make political use of the newly created language of rights<sup>366</sup>. Embedded in the very name of the Movement 自由民権運動 {*Jiyu Minken Undo*}, was the contentious character for rights, the 權 {*ken*} of 權利 {*kenri*}. Such character arrived via the Ministry of Justice (MOJ), run by Eto Shimpei who recruited Mitsukuri Rinsho to translate European legal codes. “In the process of doing so, Mitsukuri encountered the term “*droit civil*”. He translated it as じんみんけんり {*jimin kenri*}, soon shortened to 人権 {*jinken*} (human rights) or 民権 *minken* (civil rights).”<sup>367</sup>

The Movement demanded a popular assembly and a constitution. By 1880 its members began distributing their own constitutional projects in local magazines and newspapers. With such pressure in mind, “the Meiji Imperial government decided,

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<sup>365</sup> It is not clear why 權利 prevailed over 權理, but many consider it unfortunate. Had 權理 become the common usage, the Japanese word for “right” would have combined power or authority, with reason or principle. Instead, it combines power or authority with profit or interest. Eric Feldman, *The Ritual of Rights in Japan: Law, Society, and Health Policy* (Cambridge: Cambridge University Press, 2000) at 18-19.

<sup>366</sup> Roger Bowen, *supra* note 363, at 107.

<sup>367</sup> Donald Calman, *The Nature and Origins of Japanese Imperialism: A Re-interpretation of the 1873 Crisis* (New York: Routledge Press, 2013) at 98.

confidentially, to create their own version of a constitution favorable to their interests.”<sup>368</sup> Thus, in March of 1882 Minister Ito Hirobumi parted to Europe with a group of political and legal scholars with the mission to find a model of a constitution compatible with the Japanese imperial system (*tenno sei*). Prussia would be considered the best candidate since “local politics were very similar to the Japanese of those times.”<sup>369</sup> Indeed, there were many factors in common between the two countries: “the unification of Germany happened much later than the other European powers; the German Empire was formed in 1871, the same year that the Meiji government could finally unite Japan by abolishing the daimyo with prefectures.”<sup>370</sup>

The constitution was quickly drafted and promulgated without any participation of a popular assembly on February 11, 1889. The Imperial Constitution of Japan (commonly known as the Meiji Constitution) accomplished two important goals: it gave legitimacy to Japan in the international arena and mitigated the popular unrest lead by the Movement.

Regarding the first goal, the Meiji Constitution had not only lifted Japan to the status of “civilized nation”, but along with praise from legal scholars such as James Bryce, Rudolf von Ihering, and Oliver Wendell Holmes, allowed the renegotiation of the unequal treaties imposed since Townsend Harris.<sup>371</sup>

Yet, regarding the second goal, the constitution established that the sovereignty resided on the Emperor, and the few rights enumerated were given as gifts from the Emperor and as such could be claimed back; therefore, the original goals of the Movement were not satisfied.<sup>372</sup> Indeed, unlike the rights in western constitutions

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<sup>368</sup> Kichisaburo Nakamura, *The Formation of Modern Japan as Viewed from Legal History* (Tokyo: The Centre for East Asian Cultural Studies, 1962) at 59.

<sup>369</sup> *Ibid.* at 60.

<sup>370</sup> Margaret Mehl, *History and the Nation in Nineteenth-century Japan and Germany* (London: Palgrave-Macmillan, 1998) at 29.

<sup>371</sup> Edwin O. Reischauer, *The Japanese* (Cambridge: The Belknap Press, 1977) at 89.

<sup>372</sup> Kenzo Takayanagi, *supra* note 362, at 7.

that were based on popular sovereignty, in Meiji Japan individual rights were secondary. In this sense, Herman Roessler, one of the foreign consultants for elaborating the Meiji Constitution, affirmed that individual rights “in the Japanese Imperial Constitution remained as matters of national positive law...” and that the Constitution “...prudently abstained of an absolute recognition of individual or natural rights which have altered the solid relationship that existed between the government and the governed, creating social disharmony and revolutionary movements.”<sup>373</sup>

Even in its phrasing, the Meiji Constitution referred to the Japanese people as “subjects” instead of “citizens”. The constitution also limitedly granted the rights to vote and to be elected,<sup>374</sup> residency,<sup>375</sup> religion,<sup>376</sup> expression,<sup>377</sup> and petition<sup>378</sup>, with the caveat (frequently invoked) of “not being contrary to peace and public order”. Limitations on the authority only included abstention from arbitrary detention,<sup>379</sup> and a vaguely formulated guarantee of due process.<sup>380</sup>

Therefore, besides the aforementioned historical notions (and a short but important development and advocacy of political rights by socialist groups in the 1920s and 1930s), the classical account of human rights in Japan tends to begin with the Allied Occupation.<sup>381</sup> In this regard, by October of 1945 General MacArthur notified the

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<sup>373</sup> Johannes Siemes, *Herman Roessler and the Making of the Meiji State* (Tokyo: Sophia University in cooperation with Charles E. Tuttle Company, 1968) at 115-116.

<sup>374</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 29.

<sup>375</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 21.

<sup>376</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 28.

<sup>377</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 29.

<sup>378</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 30.

<sup>379</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 33.

<sup>380</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 34.

<sup>381</sup> “It would be incorrect, however, to accept uncritically the notion that within Japanese society the principle of fundamental human rights had its origins in the military Occupation of the United States. This assertion perpetuates the Eurocentric assumption that human rights constitute a fundamentally Western concept that must be imposed on non-Western societies for them to take root beyond Europe and North America. Even recent studies that seek to complicate the notion of universal human rights advocacy as cultural imperialism often still attribute the growth of human rights discourses in postwar Japan to the influence of forces beyond Japanese society. Yet as Ian Neary has rightly noted in describing the progressive ideals imbued in the 1946 constitution, “None of the concepts of the Constitution were unknown in Japan and many of the rights listed in the Constitution

then prime minister, Kijuro Sidehara, that in conformity with the Potsdam Declaration, it was imperative to make an integral revision of the Meiji Constitution due to its undemocratic and militaristic intentions.<sup>382</sup> “Since then and until February of 1946 the Japanese Government developed various constitutional projects to comply with SCAP’s orders. Nonetheless, General MacArthur and his advisors considered that the projects remained too similar to the old constitution.”<sup>383</sup>

On February 13, 1946, a special Japanese Commission was summoned “in order to discuss the enactment of a new constitution”. The Japanese believed that the meeting was intended for discussing the last project they have submitted (commonly known as the Matsumoto draft). However, “they were unpleasantly surprised by receiving a totally new and different project written entirely by the Allies.”<sup>384</sup>

After many failed attempts of renegotiation, the Allied project, known popularly as the *MacArthur Constitution*, was passed and proclaimed by the Diet to maintain the fiction that it was written by and for the Japanese. The Emperor complied with the façade of legitimacy and promulgated the Constitution on November 3<sup>rd</sup>, 1946 to come into force on May 3<sup>rd</sup>, 1947. His speech for the occasion makes evident the imposition of foreign values and the politics behind the process of drafting the constitution:

“This constitution represents a complete revision of the Imperial constitution. It seeks the basis of national reconstruction in the universal principle of mankind. It has been decided upon by the freely expressed will of the people. It explicitly stipulates that the people of Japan renounce war of their own accord, and that they desire to see the realization of a permanent peace founded on justice and

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had been the targets of popular struggles in the pre-war period.” Erik Esselstrom, “The Life and Memory of Hasegawa Teru: Contextualizing Human Rights, Trans/Nationalism, and the Antiwar Movement in Modern Japan” (2008) 101 *Radical History Review* 145.

<sup>382</sup> John H. Maki, “Japanese Constitutional Style” in Dan Fenno Henderson, *The Constitution of Japan: Its First Twenty Years, 1946*, 67 (Seattle: University of Washington Press, 1968) at 9.

<sup>383</sup> *Ibid.*

<sup>384</sup> Hideo Tanaka, *The Japanese Legal System* (Tokyo: University of Tokyo Press, 1976) at 120.



order throughout the world, and that having constant regard to the fundamental human rights, they will conduct the national affairs on the fixed line of democracy.”<sup>385</sup>

## 7.2 Fundamental human and social rights

The new constitution, known hereafter as the Constitution of 1947, is divided into 11 Chapters and 103 articles that politically place Japan as a unitary,<sup>386</sup> democratic state.<sup>387</sup> From the interpretation of its articles, it can also be classified as a republic with parliamentary government<sup>388</sup> containing three branches of power.<sup>389</sup> More importantly, along with the transformation of the Emperor as a mere symbol of the State<sup>390</sup> and the renunciation of war,<sup>391</sup> the Constitution of Japan now established since its Preamble that *the sovereignty resided in the people*.

Chapter III titled “Rights and Duties of the People”<sup>392</sup> also has a completely renovated perspective towards fundamental rights, including their inviolability,<sup>393</sup> use according to public welfare,<sup>394</sup> and respect for the individual wellbeing.<sup>395</sup> In the words of Takayanagi “this Chapter includes all the elements included in a classic Bill of Rights and also grants the status of fundamental rights to social and economic

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<sup>385</sup> Tadao Yainahara, “Religion and Democracy in Modern Japan” in Harold Scott Quigley & John E. Turner, *The New Japan: Government and Politics* (Minneapolis: University of Minnesota Press, 1997) at 164.

<sup>386</sup> As opposed to a Federation, Japan contains forty-seven administrative divisions, with the Emperor as its head of State.

<sup>387</sup> Japan can be considered a democratic State based in their parliamentary government and the right to choose their public officials and to dismiss them according with the guaranteed universal adult suffrage. Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 15.

<sup>388</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 1 Article 41. “The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State”. (Const. of Japan).

<sup>389</sup> Chapter IV the Diet, Chapter V the Cabinet, and Chapter VI the Legislature.

<sup>390</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 1.

<sup>391</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 9.

<sup>392</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 10-40.

<sup>393</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 11.

<sup>394</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 12.

<sup>395</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 14.

rights”.<sup>396</sup> Furthermore, Chapter X titled “Supreme Law” establishes in its Article 97 that: “The fundamental human rights by this Constitution guaranteed to the people of Japan... are conferred upon this and future generations in trust, to be held for all time inviolate.”<sup>397</sup>

All these provisions represent a stark contrast with the Meiji Constitution. According to the principle of popular sovereignty, fundamental human rights override any other instances (including the prime minister and the Diet along with their executive orders and laws). The principle of constitutional supremacy means, in this context, that the Japanese constitution “shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.”<sup>398</sup> Following the same logic, since the constitution establishes the fundamental human rights as inviolable, no law, ordinance or act of government should be contrary to them.

In this sense, Shigenori Matsui highlights the character of individual rights protected as “fundamental human rights” in the Japanese constitution. The subtle difference lies in that these types of rights are considered to be inherent to all human beings because of their human dignity, and as such are not conferred by the Japanese constitution but only recognized by it.<sup>399</sup> Yet, although human dignity is traditionally considered the founding value of human rights, it was also a foreign concept for the Japanese and, as such, is missing in the constitutional text.<sup>400</sup> In any case, the pragmatic solution of the Japanese legal theory has been to consider human rights as fundamental because of their constitutional status.

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<sup>396</sup> Kenzo Takayanagi, *supra* note 362, at 178.

<sup>397</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 97.

<sup>398</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 98.

<sup>399</sup> Shigenori Matsui, “The protection of “Fundamental Human Rights” in Japan” in Randall Peerenboom, Carole J. Petersen & Albert H.Y. Chen (eds.), *Human Rights in Asia: A Comparative Legal Study of Twelve Asian jurisdictions* (London: Routledge, 2006) at 125.

<sup>400</sup> The philosophical basis of Article 25 will be discussed in Chapter 8.

Regarding the typology of fundamental human rights, as many modern constitutions, the Japanese one includes equality rights, negative freedoms, positive freedoms, procedural protections, and socioeconomic rights. Also, as many modern constitutions, the most developed rights are freedoms from governmental interference (*a.k.a.* classic or first generation rights). However, fundamental human rights are not necessarily limited to those specifically listed in the constitution. “There are various unenumerated fundamental human rights derived from the protection of life, liberty, and the pursuit of happiness for example that have been recognized explicitly by the courts.”<sup>401</sup>

The constitution also recognizes as fundamental the right to life,<sup>402</sup> the right to education,<sup>403</sup> the right to work,<sup>404</sup> and the basic labor rights.<sup>405</sup> These social rights have gained certain opposition by some scholars who consider they are not proper natural rights since they do not predate the state and as such are not inherent to mankind.<sup>406</sup> But natural rights theory is not necessarily the basis for social rights in Japan since other approaches to justify them existed even before the Constitution of 1947.<sup>407</sup>

Indeed, Tatsuo Morito, a member of the socialist party and of the Committee to revise the Meiji Constitution, defended the need for social rights based on the inequalities that develop with capitalism. Various Japanese law professors<sup>408</sup> actually consider that Morito was responsible for introducing the phrases “the right and duty to work”

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<sup>401</sup> Shigenori Matsui, *supra* note 399, at 126.

<sup>402</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 25.

<sup>403</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 26.

<sup>404</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 27.

<sup>405</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 28.

<sup>406</sup> Shigenori Matsui, *supra* note 399, at 125.

<sup>407</sup> The current dominant theory is that social rights are also natural rights because they are inherent to all human beings. Natural rights are not classical natural rights. They are contemporary ones. Shigenori Matsui, *supra* note 399.

<sup>408</sup> Among these law professors are Nobuyoshi Ashibe, Sakae Wagatsuma and Toshiyoshi Miyazawa.

of Article 27, and “the right to maintain a minimum standard of living” of Article 25.<sup>409</sup> 50 years after its promulgation, the Research Commission for the Constitution still recognizes social rights and commented that “it was monumental that the Constitution adopted the provisions about the social rights when it was established. Stipulating the social rights is one thing that makes the current Constitution special.”<sup>410</sup>

From the theoretical perspective, there would appear to be a clear recognition of social rights as fundamental human rights. Yet, after the leftist movements were once again suppressed in the “reverse course”,<sup>411</sup> very few claims of social rights were substantiated. Even though during the 1960s civil rights movements, “reivindicated the right to social security, the right to public assistance based on income and to a well-remunerated job”,<sup>412</sup> it was only after the signing of the ICCPR and ICESCR that Japan began a formal jurisprudence of social rights.

### 7.3 Incorporation of international treaties

As was explained in Chapter 2, it is important to distinguish between the international treaties signed by the member state, from their actual incorporation in domestic law, and from its implementation by the three branches of power and (if applicable) the NHRI. In this section, it will become apparent that there is a substantive gap between theory and practice of international human rights law in Japan. This gap has generated an appearance of international compliance which

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<sup>409</sup> Hiroshi Sasanuma, *Un aperçu de la protection des droits sociaux au Japon*, Université de Shizuoka Traduction: Isabelle GIRAUDOU Institut français de recherche à l'étranger, MFJ, CNRS-MAEE et David-Antoine MALINAS Université du Tōhoku. Ebisu (Printemps/Ete 2010) at 58.

<sup>410</sup> Research Commission on the Constitution, *Handbook on the Research Report on the Constitution of Japan* (Tokyo: House of Councillors, 2005) at 20.

<sup>411</sup> This phenomenon was explained in Chapter 5.

<sup>412</sup> Hiroshi Sasanuma, *supra* note 409, at 201-224.

contrasts with the lack of real measures to promote, protect, and enforce social rights. In this section, the reasons for such discrepancy will also be explained.

To begin with, it is important to remember that by the time the UN was created, Japan was still an “enemy power” and thus didn’t participate in the drafting of the UDHR, the ICCPR or the ICESCR. Neither was Japan one of the 35 states that ratified the ICCPR and ICESCR when they came into force.<sup>413</sup> Although some social rights had been recognized by the Japanese constitution, the ICESCR had developed a more advanced and useful theory for them. However, it would take several years for such theory to even be considered by judges, representatives, and policymakers due to the late ratification of the covenant.

Furthermore, Japan placed several reservations for the ICESCR<sup>414</sup> which implied that international social rights were not as welcomed in Japan as they were in other countries. The strength of the rights recognized in the covenant was further affected by the Japanese theory of incorporation of international treaties into domestic law.<sup>415</sup> Matsui comments that “in Japan, it is generally believed that an international treaty can be directly applied by the domestic courts **only when it is self-executing**. As a result, some of the rights protected by these covenants and conventions are directly applicable but others are not.”<sup>416</sup>

Moreover, the Japanese constitution states that “treaties concluded by Japan and established laws of nations shall be faithfully observed.”<sup>417</sup> Therefore, in theory, so long as Japan ratifies and duly publishes the corresponding treaty, international law

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<sup>413</sup> Japan ratified such treaties until 1978.

<sup>414</sup> Japan placed a special reservation in Article 8, which meant that workers in the public sector would continue to be denied of the right to organize and strike and Article 7, disputing a right to remuneration on public holidays. Hiroshi Sasanuma, *supra* note 409, at 88.

<sup>415</sup> See the discussion of incorporation theories in Chapter 2.

<sup>416</sup> Shigenori Matsui, *supra* note 399, at 128 (**emphasis added**).

<sup>417</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 98.

has complete legal force in Japan. However, in practice, such legal force varies considerably. Regarding the ICESCR there are three main reasons for this:

First, the bureaucracy, the Diet, and the courts have very different opinions regarding the validity of social rights. For the executive branch, most governmental agencies circumscribe their acts to domestic statutory regulation. For the legislative branch, international law is usually seen as a model that may serve as inspiration, but such model cannot be directly applied since it still “lacks the particularities of the Japanese context which only the representative lawmakers possess”.<sup>418</sup> Finally, for the judicial branch, even though an extensive discussion will be presented in the next chapter, suffice it for now to say that seldom do they apply international treaties, and when they do “courts harmonize the treaty’s language with domestic law, either by conflating the two, or by interpreting the treaty so as to avoid direct conflict with existing law.”<sup>419</sup>

Secondly, regarding rights established in the ICESCR, they are very unlikely to overturn domestic law. According to Timothy Webster, the consensus among both judges and legislators is that ICESCR language is “too vague” and therefore, “since the early 1980s, courts have uniformly maintained that the ICESCR does not have a direct effect in Japan.”<sup>420</sup> Some Japanese courts have argued that since the covenant indicates that its rights “are to be realized progressively and to the maximum of each country’s available resources” they are not self-executing and cannot be applied directly.<sup>421</sup> Thus, the programmatic language of the ICESCR has routinely been used as an excuse to deny the enforcement of its rights and duties.<sup>422</sup>

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<sup>418</sup> See Timothy Webster, “International Human Rights Law in Japan: The View at Thirty” (2010)23:2 *Columbia Journal of Asian Law* 241.

<sup>419</sup> *Ibid.* at 245.

<sup>420</sup> *Ibid.* at 251.

<sup>421</sup> In 1989, the Supreme Court of Japan denied the direct applicability of the CESC in the Shiomi Case (Supreme Court, 1st petty bench, 2 March 1989, 1308 Hanreijihou p 68).

<sup>422</sup> Timothy Webster, *supra* note 418, at 251.

Thirdly, “strategically speaking, plaintiffs rarely rely on international law to the exclusion of domestic law”.<sup>423</sup> The few litigants which have begun to invoke international covenants tend to be rejected due to the zealous protection of the constitution which courts consider “contains a more specific and comprehensive regulation than international law”. In this way, “the courts have been reluctant to rely on these covenants and conventions to invalidate governmental conduct.”<sup>424</sup> Instead, as will be further explained, it is more common to find cases where the plaintiffs have invoked international standards of equality, due process or fair minimums, to broaden the criteria of judges and policymakers.<sup>425</sup>

*This chapter argued that the idea that rights were an act of grace rather than an obligation of the state, affected the development of a human rights theory in Japan. The disregard towards international treaties containing social rights was analyzed in such light. This acquires importance since the Japanese are seldom able to enforce social rights generated from an international covenant, as the rights contained therein must be incorporated and adapted to domestic law. In sum, international law provides little comfort for the Japanese who want to have social rights (including the RSS) enforced.*

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<sup>423</sup> *Ibid.* at 246.

<sup>424</sup> Shigenori Matsui, *supra* note 399, at 128.

<sup>425</sup> The “equality litigation strategy” will be analyzed in Chapter 9.

# Chapter 8 The judiciary, judicial review and litigation in Japan

*In this chapter, a review of the structure and status of the judiciary, and of the practice of judicial review in Japan will be made. Such review will enable an explanation of how a zealous protection of the status quo by the Japanese courts has generated a limited enforcement of social rights. Moreover, relevant legal cases will be analyzed to demonstrate a pattern of judicial conservatism and passivity. This chapter closes with a description of the causes for judicial apathy, as well as the social attitudes towards law and litigation that affect the embodiment of social rights, and the lack of welfare betterment through the courts.*

## 8.1 The Japanese judiciary

The Judiciary was greatly benefited by the Japanese Constitution of 1947. Even though during Meiji times and the early Taisho era the courts had been active, it was in the Constitution of 1947, with its Chapter VI, that their functions and independent status became official. According to Article 76:

“The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.  
No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.  
All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.”

The Japanese Judiciary has three main levels of hierarchy: Supreme Court of Japan (SCJ), high courts, and district courts. The SCJ has the highest hierarchy; it can deliberate in 1 Grand Bench and 3 Petty Benches, and its judges are designated by the Cabinet with its Chief Judge appointed by the Emperor. Below them are high courts that admit appeals, and then district courts whose judges are also appointed



by the Cabinet from a list of persons nominated by the SCJ but that don't require an Imperial appointment.<sup>426</sup>

There are 8 high courts in Japan that take appeal cases from decisions of the 50 district courts, allowing for up to two appeals and completing in this manner the three-tiered vertical court structure. Finally, there are also 438 summary courts that handle small claims civil cases (disputes not in excess of ¥1,400,000), as well as minor criminal offenses, and also family courts tied to each district court that deals with cases of juvenile delinquency cases, divorce, and other forms of domestic disputes.<sup>427</sup>

Regarding tenure, judges cannot be removed except by public impeachment, a process in which they are judicially declared mentally or physically incompetent to perform official duties, and no disciplinary action against them may be administered by any executive organ or agency.<sup>428</sup> Judges of the inferior courts may hold their term up to 10 years with the option of indefinite reappointments until their mandatory retirement.<sup>429</sup> Justices of the SCJ however, "shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of 10 years, and in the same manner thereafter until the age of mandatory retirement."<sup>430</sup>

With reference to their internal organization, the SCJ is also responsible for determining the rules of procedure and practice for attorneys and public procurators,

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<sup>426</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 80.

<sup>427</sup> Supreme Court of Japan, Court System of Japan. 3. Courts other than the Supreme Court (Lower Courts). Retrieved on July 5, 2016: [http://www.courts.go.jp/english/judicial\\_sys/Court\\_System\\_of\\_Japan/index.html#04](http://www.courts.go.jp/english/judicial_sys/Court_System_of_Japan/index.html#04).

<sup>428</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 78.

<sup>429</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 80.

<sup>430</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 79.

as well as the internal discipline of the courts.<sup>431</sup> Japanese jurisdiction is peculiar since, unlike western courts, it doesn't provide specialization regarding the subject matter (family, property, crime, etc.) until very recently and in very few cases. This lack of specialization also allows for a "system of courts and procurators centralization that enables the Constitution, statutes and administrative norms to have uniformity in their interpretation."<sup>432</sup>

## 8.2 Judicial review in Japan

The Meiji Constitution did not provide for judicial review, so acts and laws of the executive and legislative were under the supervision and control of the Emperor himself. This would change with the inclusion of judicial review in the Constitution of 1947. In this Section, the foundations, methods, and doctrines, as well as the actual practice of Japanese judicial review will be scrutinized.

### 8.2.1 The foundations of judicial review

Even though activists of the *Kenpo Kondankai* (Constitutional Discussion Group) proposed a draft of the new constitution that included a strictly statutory judicial review,<sup>433</sup> the formal origin of this institution must be traced to the SCAP's drafts. In one of such drafts the SCJ was established as the court of last resort with the power to review the constitutionality of any law, order, ordinance, or other governmental actions, but without definitive decisions regarding the interpretation of the constitution.<sup>434</sup> This limitation intended to prevent an overpowered SCJ.

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<sup>431</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 77.

<sup>432</sup> Yoshiyuki Noda, *Introduction to Japanese Law* (Tokyo: University of Tokyo Press, 1976) at 125.

<sup>433</sup> See Tatsuo Sato, *Nihonkoku Kenpo Seiritsushi*, [A History Of the Establishment of the Constitution] (Tokyo: Yuhikaku, 1994) at 853-860.

<sup>434</sup> Ray A. Moore, & Donald L. Robinson (eds.), *The Constitution of Japan: a Documentary History of its Framing and Adoption, 1945 – 1947* (Princeton: Princeton University Press, 1998) at 224.

However, in the following months, such limitation began fading since more pressing matters were at stake during the discussions of the Japanese constitutional commission. In the draft of March 5, 1946, Article 77 stated that “The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”<sup>435</sup> This would later become the verbatim content of Article 81 of the Japanese constitution, and the current foundation for judicial review.

From this draft also came important comments that would determine the practice of judicial review in Japan. “Kanamori Tokujiro, minister of state without portfolio, who oversaw problems of constitutional revision, explained that the Supreme Court would use the power of judicial review only in concrete cases”.<sup>436</sup> Moreover, he opined that when a court would find a statute unconstitutional, “the court would merely refuse to apply the statute in that case since in his understanding this refusal was completely different from the nullification of a law”.<sup>437</sup> Although non-official, both of these interpretations have remained influential within the judiciary to this day, and determine the requirement of a claim to decide and the particularistic nature of judges and justices decisions.

When the Constitution of 1947 was finally proclaimed, Article 81 introduced the system of judicial review. According to Article 81, the Japanese Constitution is the supreme law of the nation, and the SCJ has the power to determine its final interpretation. Furthermore, the courts have jurisdiction and can strike down government acts that they deem unconstitutional.<sup>438</sup>

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<sup>435</sup> *Ibid.* at 225.

<sup>436</sup> Tatsuo Sato, *supra* note 433, at 643.

<sup>437</sup> Norikazu Kawagishi, “The Birth of Judicial Review in Japan” (2007) 5:2 *International Journal of Constitutional Law* 308, at 320.

<sup>438</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 81 and Supreme Court of Japan, grand bench, 8 July, 1948, 2 Keishu, p 801.

Regarding legislation, “the courts can...determine the constitutionality of any law.”<sup>439</sup> Moreover, due to a judicial opinion of the early 1950’s, constitutional control is not only reserved to the SCJ but it “also includes its control by lower judges since they owe the same loyalty to the Constitution.”<sup>440</sup>

But notwithstanding the foregoing, in 1952’s case of the Police Reserve Force such strong stance was reversed. In such landmark case it was established that:

*“Our Supreme Court isn't provided with authority of abstract judgment that even if a regal action has not been taken, we can draw a conclusion on a controversy existing beyond the interpretation of the [C]onstitution or other legislation. Indeed, the Supreme Court has the authority to review the constitutionality of law, but this authority is exercised within the limits of judicial power.”*<sup>441</sup>

From this case onwards, the tendency of the SCJ to play a low profile, and defer controversial decisions to the executive and legislative, has become common practice. As a general rule, abstract norm control, acts of government or autonomous societies that may be considered of political nature, and disputes among private entities tend to be considered beyond constitutional review. Although similarly limited within a specific set of cases as the U.S. Supreme Court, some authors consider that these reservations, along with other elements that will be furtherly examined, have gained the SCJ a reputation as “the most conservative court in the world.”<sup>442</sup>

### **8.2.2 Methods and doctrines of judicial review**

There is an identifiable pattern of judicial review that coincides with many of the methods and doctrines which have developed since the aforementioned case of

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<sup>439</sup> Junichi Satoh, “Judicial Review in Japan: An Overview of the Case Law and An Examination of Trends in the Japanese Supreme Court’s Constitutional Oversight” (2008) 41:2 *Loyola of Los Angeles Law Review* 603, at 606.

<sup>440</sup> Guillermo F. Margadant, *El Derecho Japonés Actual* (Mexico City: Fondo de Cultura Económica, 1993) at 41.

<sup>441</sup> Supreme Court of Japan, grand bench, 8 October, 1952, 6 Minshu, p 783 (National Police Reserve Case).

<sup>442</sup> David M. Beatty, *Constitutional Law in Theory And Practice* (Toronto: University of Toronto Press, 1995) at 121.

1952. In such matters, Itsuo Sonobe identifies the following recurring methods and doctrines when the Japanese courts have exercised judicial review:

**a) Balancing method and the principle of minimum necessity**

As most of the courts in the rest of the world, the Japanese judiciary has oftentimes to decide between two competing interests and values. The particularity with the Japanese balancing method is that since 1966 its courts have maintained a “principle of minimum necessity” according to which “certain minimum limits can and often must be imposed on constitutional rights so long as they are necessary and reasonable.”<sup>443</sup>

This is a very controversial criterion since it has been used to curtail the rights of assembly, freedom of press and occupation (among others), under the pretense of maintaining order and public welfare. In fact, the court has oftentimes “interpreted the Constitution to accord more closely with traditional values by means of the “public welfare” doctrine.”<sup>444</sup> As will be subsequently explained, this has been one of the reasons for a passive judiciary which tends to restrict social rights.

**b) Conforming interpretation method and the Brandeis formula in Japan**

The conforming interpretation method also dates from the 1960s, and refers to the interpretation of a given statute. Basically, the method establishes that if more than one interpretation of a provision can exist (one broad that may conflict with the

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<sup>443</sup> Supreme Court, grand bench, 26 October, 1966, 20 Minshu p 901 (All Postal Workers, Tokyo Grand Central Post Office Case).

<sup>444</sup> Herbert F. Bolz, “Judicial Review in Japan: The Strategy of Restraint” (1980) 4:1 *Hastings International and Comparative Law Review* 87.

constitution, and other narrow that does not clash with the constitution), the narrow one should be adopted.

This method is usually applied in “instances where it is clear that had the approach not been taken, a court would have had to hold the provision unconstitutional.”<sup>445</sup> Thus, it is often criticized for selectively deciding the breadth of a provision depending on the subjective interests at hand.

An example can be found in the case of All Agricultural and Forest Workers, Police Office Act Opposition Case.<sup>446</sup> In this case, the Grand Bench held the constitutionality of prohibiting strikes under the National Employees Law since “an ambiguously narrowed interpretation would be of disservice to the rationale of the law.”<sup>447</sup> This decision was held in order to avoid a strike, and maintain a public service uninterrupted.

The Japanese courts have also been influenced in their approach to judicial review by the “Brandeis formula” as coined in the opinion of U.S. Justice Brandeis in the *Ashwander v. Tennessee Valley Authority* case<sup>448</sup>. According to Brandeis’ criterion: “The courts will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”<sup>449</sup> This criterion has been frequently used by Japanese courts to dismiss extensive interpretations of human rights in general, and social rights in particular.

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<sup>445</sup> Itsuo Sonobe, “Human Rights and Constitutional Review in Japan” in David M. Beatty, *Human Rights and Judicial Review: A Comparative Perspective* (London: Martinus Nijhoff Publishers, 1994) at 150.

<sup>446</sup> Supreme Court, grand bench, 25 April, 1973, 27 Keishu, p 547 (All Agricultural and Forest Workers, Police Office Act Opposition Case).

<sup>447</sup> *Ibid.*

<sup>448</sup> *Ashwander v. Tennessee Valley Authority* 297 U.S. 288 (1936) p 348.

<sup>449</sup> *Ibid.*

### **c) Method of analyzing adequate means to ends in statutes**

Since the Police Reserve Force case of 1952<sup>450</sup> the courts have tended to routinely accept statutes proclaimed by the Diet as being constitutional. The methodology that determines the constitutionality of the means being employed in a statute has helped such tendency. By applying the proportionality test (the least restrictive means of regulation), the courts can ascertain that the measures chosen by a given statute are considered suitable to promote their ends.

Two relevant cases explicitly refer to the analysis of adequate means to ends. In the Parricide Case of 1973<sup>451</sup>, Chiyo Aizawa was raped by her own father when she was only fourteen, and forced to keep a spousal relationship with him for fifteen years. When she eventually came to have a boyfriend and her father opposed, she strangled her father in desperation in October, 1968. The court decided that although the goal of filial respect was commendable, including it in a criminal law was not an adequate mean, and thus struck down the parricide provision from the criminal code as unconstitutional.

In the Forest Act Case of 1987<sup>452</sup> two brothers each owned one-half of a forest and one of them, as co-owner was prevented from seeking the division. The court determined that although the goal of avoiding the partition of land into minuscule and unmanageable portions was important, denying any request by an owner to divide a registered forest unit whose ownership is held in common was considered to lack reasonableness as a mean. The court thus struck such requirement as unconstitutional.<sup>453</sup>

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<sup>450</sup> Police Reserve Force Case, *supra* note 441.

<sup>451</sup> Supreme Court, grand bench, 4 April 1973, 27 Keishu, p 265 (Parricide Case).

<sup>452</sup> Supreme Court, grand bench, 22 April, 1987, 41 Minshu, p 408 (Forest Act Case).

<sup>453</sup> Itsuo Sonobe, *supra* note 445, at 154.

#### **d) Doctrine of reasonable distinction/unreasonable discrimination**

In accordance with Article 14 and other equality articles of the Japanese constitution, the courts have acknowledged the discretionary power of the legislature in determining whether certain differentiating treatment is reasonable. In its test of reasonable distinction/unreasonable discrimination, the court has established that “only in cases where the legislative exercise of discretion fails grossly to be reasonable, exceeds its authority and is abused, does such discrimination become unconstitutional”<sup>454</sup>. The court has applied this doctrine to strike down article 200 of the Criminal Code in the aforementioned Parricide case, and to consider the House of Representatives composition illegal in 1976.<sup>455</sup>

#### **e) Doctrine of public welfare**

It is common to use “public welfare” as an argument to restrict human rights or statutory interpretation. Similar to the case that will be described in Mexico, public welfare is an equivocal term that can change with every different judicial interpretation. In Japan, for example, public welfare has been once defined as “the order to maintain the minimum moral standards” in order to justify the sales restriction of the novel “Lady Chatterley’s Lover”.<sup>456</sup> Public welfare was then considered to comprise “the public interest in peace and order” in the Sasebo Demonstration against USS Enterprise’s Call of Port case.<sup>457</sup> And to the point of ridicule, the SCJ has also used the concept of public welfare to include “the aesthetic view of the urban landscape” in the Osaka Municipal Ordinance Prohibiting Outdoor Advertisement case of 1968.<sup>458</sup>

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<sup>454</sup> *Ibid.* at 157.

<sup>455</sup> Supreme Court, grand bench, 14 April, 1976, 30 Minshu, p 223 (First Reapportionment Case).

<sup>456</sup> Supreme Court, grand bench, 13 March 1957, 11 Keishu, p 997 (“Lady Chatterley’s Lover” Case).

<sup>457</sup> Supreme Court, 3<sup>rd</sup> petty bench, 16 November, 1982, 11 Keishu p 908. (Tanaka case).

<sup>458</sup> Supreme Court, grand bench, 18 December, 1968, 22 Keishu, p 1549.



Although these methods and doctrines are not legally binding to any judge, the analysis of more than 60 years of jurisprudence seems to confirm their common use. As will be explained in the next sections, to a large extent they are essential elements that determine judicial passivity in Japan. Regarding such passivity, its analysis will begin by referring to the few cases where judicial review has been exercised.

### 8.2.3 Judicial review in practice

In plain numbers, since 1947 the SCJ has struck down only seven statutes under constitutional grounds. Moreover, these judicial resolutions have not been particularly relevant for the legal history of the country. The laws that have been struck down are: a) The aforementioned criminal law that established a greater punishment for parricides violating the principle of equality;<sup>459</sup> b) A law that violated the freedom of occupation for banning pharmacies operating in close proximity;<sup>460</sup> c) A law restricting the ability of co-owners of forest land to subdivide their property;<sup>461</sup> d) A rule limiting the liability of the postal service for the loss of registered mail;<sup>462</sup> e) The exclusion of overseas voters from participation in national elections under the Public Office Election Act;<sup>463</sup> f) A statutory provision that discriminated illegitimate children for citizenship eligibility,<sup>464</sup> and g) A statutory provision establishing a waiting term of 100 days for women to get married after the divorce<sup>465</sup>.

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<sup>459</sup> Parricide case, *supra* note 451.

<sup>460</sup> Supreme Court, grand bench, 30 April 1975, 29 Minshu, p. 572 (Pharmaceutical Act Case).

<sup>461</sup> See Forest Act Case, *supra* note 452.

<sup>462</sup> Supreme Court, grand bench, 11 September 2002, 56 Minshu, p. 1439.

<sup>463</sup> Supreme Court, grand bench, 14 September 2005, 59 Minshu, p. 2087.

<sup>464</sup> Supreme Court, grand bench, 4 June 2008, 62 Minshu, p. 1367.

<sup>465</sup> Supreme Court, grand bench, 16 December 2015, 69 Minshu 1079.

<sup>466</sup> In two malapportionment cases, the SCJ declared statutory provisions unconstitutional but it did not invalidate the election conducted under these unconstitutional provisions. Therefore, technically it has not struck down those statutes.

Regarding government acts, only in 2 cases have such acts been struck down on constitutional grounds by the SCJ:

a) In *Nakamura v. Japan*,<sup>467</sup> a third party was affected by a forfeiture action involving a ship used in smuggling operations. Since Japanese customs law allowed for the forfeiture of a third party's property even without her knowledge or possibility of participation in the main case, the SCJ determined that the constitutional rights to private property and due process of law were violated. Nonetheless, the SCJ did not pronounce regarding the unconstitutionality of the law and limited its judgment to the particular administrative act of forfeiture.

b) In the *Ehime Tamagushi case*,<sup>468</sup> the SCJ Grand Bench evaluated a taxpayer claim against government officials that spent public funds to contribute to the Yasukuni and Gokoku shrines, thus violating the principle of separation of church and state. The SCJ declared that: “[I]t is reasonable to assume that these offerings constitute prohibited religious activities under Article 20(3) of the Constitution, because the purpose of the offerings had religious significance and the effect of the offerings led to support or promotion of a specific religion, and the relationship between the local government and Yasukuni Shrine or other shrines caused by these offerings exceeded the reasonable limit under the social and cultural conditions of Japan.”<sup>469</sup> Thus, these disbursements were illegal because they were made to religious activities prohibited by the article.”<sup>470</sup>

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<sup>467</sup> Supreme Court, grand bench, 28 November, 1962, 16 Keishu, p 1593 (Confiscation of Property of Third Parties Case).

<sup>468</sup> Supreme Court, grand bench, 2 April 1997, 51 Minshu, p 1673 (Ehime Tamagushi Case).

<sup>469</sup> Supreme Court, grand bench, January 20, 2010, (Sorachibuto Shrine Case), available at [http://www.courts.go.jp/app/files/hanrei\\_jp/347/038347\\_hanrei.pdf](http://www.courts.go.jp/app/files/hanrei_jp/347/038347_hanrei.pdf).

<sup>470</sup> *Ibid.*

To sum the previous argumentation, the judiciary has been passive and seldom used its faculties of judicial review to struck down statutes or invalidate administrative acts. The SCJ is also extremely deferential to the other branches of power. Such deference is particularly acute with the Diet as “the highest organ of state power.”<sup>471</sup> In the next sections, an analysis of the structural and ideological reasons for this deferential attitude will be explained.

### 8.3 Weak courts

One possible explanation for the judicial passivity in Japan is not that they do not want to be more engaged, but rather that they don’t have the means to do so. Haley defends this argument in his book “Authority without Power”, and notes that courts in Japan have actually very few coercive powers to render their judgments effectively.<sup>472</sup> Because of this, when judges are aware that their decisions will be ignored, they avoid judicial activism. Even more, in the case of Japan since a judge’s performance is evaluated quantitatively more than qualitatively, judges prefer to ignore claims with too much complexity or political content in order to maintain high numbers of cases in their record.

There are also structural and procedural obstacles that have enabled weak courts in Japan. Some of these obstacles come from the regulation of the judiciary on the constitution and relevant statutes. However, most of them are actually based on rules or practice coming from the judiciary itself. Although by no means a definitive enumeration, the following are the most important hurdles for judicial activism:

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<sup>471</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov3, 1946, art. 41. See for example: 1) Hiroshi Itoh, *The Supreme Court and Benign Elite Democracy in Japan* (New York: Routledge, 2016); 2) Kaoru Inoue, *Kurutu Saibankan* {crazy judges} (Tokyo: Gentosha, 2007); 3) Sigal Ben-Rafael Galantia & Alon Levkowitzb, *Attitudes Towards Judicial Review in Japan and South Korea: Indications for the Existence of a Liberal-Democratic Civic Culture* (New York: Routledge, 2014); and 4) Junichi Satoh, *supra* note 439.

<sup>472</sup> John O. Haley, *supra* note 361.

### 8.3.1 Limited range of remedies

Article 77 of the constitution acknowledges that the judiciary has its own rule-making power. Nonetheless, regarding cases against the government and its bureaucracy, there is a series of special regulations in the Administrative Cases Litigation Act (ACLA), which allows for a very limited degree of relief against administrative actions.

Furthermore, regarding the revocation of an administrative action, “the suit must be filed attacking the administrative “disposition,” *i.e.*, the final order of the agency” <sup>473</sup>. This means that preparatory and intermediate actions before such order are not subject to revocation. Thus, for example, the temporary closing of an establishment for inspection, or the suspension of health care procurement during a social security investigation, may not be revoked by the courts.

### 8.3.2 The requirement of an actual case to decide and legal interest

Another important power that the Japanese judiciary lacks is that of declaration and advisement. “Actual and concrete disputes must exist before the courts can adjudicate”.<sup>474</sup> Therefore, the Japanese courts may not provide declaratory relief before application.

Additionally, legal standing is only granted to litigants that may demonstrate “legally protected interest” in disputes.<sup>475</sup> Therefore “unlike Americans who can go to the court only upon showing injury in fact, the Japanese plaintiff who wants to challenge

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<sup>473</sup> Shigenori Matsui, “A Comment upon the Role of the Judiciary in Japan” (1988) 35 *Osaka University Law Review* 17.

<sup>474</sup> Hiroshi Itoh, “Judicial Review and Judicial Activism in Japan” (1990) 53:1 *Law and Contemporary Problems* 169.

<sup>475</sup> ACLA Section 9.

a governmental action must show that his or her alleged interest is somehow protected by the specific statutes.”<sup>476</sup> This is a problem for accessing justice and deters many plaintiffs from challenging governmental actions.

### **8.3.3 Dual supremacy of court and diet**

The constitutional Article 41<sup>477</sup> puts a heavy stone on the Japanese judiciary. The elevated status of the Diet makes that, despite being the “court of last resort”,<sup>478</sup> the SCJ seldom questions the constitutionality of laws, statutes, and amendments, even though it has an explicit capacity to do so as established by Article 81 of the Japanese constitution.

In addition, there is a “glaring theoretical inconsistency between the concept of parliamentary supremacy based on popular sovereignty, and the concept of judicial supremacy via judicial review.”<sup>479</sup> This inconsistency creates what Dan Henderson aptly characterizes as the “dual supremacy” of Court and Diet.<sup>480</sup> Such “dual supremacy” implies that there can be no logical place for two supreme powers (the courts and the Diet), and usually, the courts are the ones surrendering.

### **8.3.4 The cabinet legislation bureau**

Another way in which the “separation of powers doctrine” seems to disfavor the Japanese judiciary has to do with the executive’s Cabinet Legislation Bureau (CLB). The CLB is comprised of senior government officials with expertise in specific legal

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<sup>476</sup> Shigenori Matsui, *supra* note 473.

<sup>477</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 41 “The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State”.

<sup>478</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 81.

<sup>479</sup> Herbert F. Bolz, *supra* note 444.

<sup>480</sup> Dan Fenno Henderson, *supra* note 382.

areas. Even though the constitution does not mention this organ,<sup>481</sup> the CLB regularly provides legal opinions and reviews drafts of bills, regulations, and ordinances to determine if they are consistent with the constitution and legal precedents.<sup>482</sup>

Thus, much of the work that would naturally fall within the SCJ attributions, is done by a specialized agency of the executive. Although the CLB was modeled after France's council of the state (*Conseil d'Etat*) as a legal advisor for the executive,<sup>483</sup> due to the significant influence of its opinions, “the Japanese Supreme Court has almost always upheld government acts.”<sup>484</sup> In other words, whenever a statute has been revised by the CLB, or a government act complies with its opinions, the SCJ has given it a tacit seal of approval undermining its own authority.

### 8.3.5 The *stare decisis* system

Among other things, the principle of binding precedent commonly known as *stare decisis* offers a certain amount of predictability in a judicial system. This principle is a cornerstone of common law systems, but is not as relevant in civil law systems (such as those of Japan and Mexico). Since Article 76 of the Japanese constitution has established that: “All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws”, having a binding precedent may be considered as a breach of judicial independence.

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<sup>481</sup> Junichi Satoh, *supra* note 439.

<sup>482</sup> Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau* (Japan Policy Research Inst., Working Paper No. 99, 2004), available at: <http://www.jpri.org/publications/workingpapers/wp99.html>.

<sup>483</sup> For a criticism of the interference of the CLB upon the SC see Eiji Sasada, *Who's Protecting the Constitution? — “Twilight” of the Cabinet Legislation Bureau* (The Japan News – Yomiuri Shimbun), available at: [http://www.yomiuri.co.jp/adv/wol/dy/opinion/gover-eco\\_150803.html](http://www.yomiuri.co.jp/adv/wol/dy/opinion/gover-eco_150803.html).

<sup>484</sup> *Ibid.*

Since the postwar era, however, *stare decisis* has become a working doctrine that most judges and courts put into practice. Every now and then, there are lower court judges who “reach decisions different from Supreme Court precedents and in the long run obligate the highest tribunal to change its precedents.”<sup>485</sup> However, the precedents established by the SCJ tend to bind decision-making of inferior courts in practice more for its hierarchical status than for its legal status.

In such fashion, the *stare decisis* system in Japan is more of a *de facto* system than a legal one. Japanese *stare decisis* constantly poses the following questions for the Japanese courts: Should a judge follow respected precedents to comply with the *status quo*? Or should she risk disregarding previous decisions at the possible cost of having her judgment overturn by the SCJ and, in the worst case, risk her career? The vast majority of conservative judgments seem to point towards the former.

## 8.4 Judicial restraint

Having referred to the structural and procedural obstacles of the Japanese judiciary, this dissertation will now analyze the ideological ones. These obstacles imply above all judicial restraint. It is important to remember that as a civil law tradition, the balance between statute and judgment in Japan is different than that of common law countries. Both in Japan and Mexico, judges tend to consider themselves as applicators of the law created by the legislators and the bureaucrats,<sup>486</sup> and as a result, “most judges are reluctant to assert power that cannot be found in statutes.”<sup>487</sup> *The first restraint thus has to do with the narrow confines of the written law and the fear of overstepping their boundaries.*

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<sup>485</sup> Hiroshi Itoh, *supra* note 474.

<sup>486</sup> This phenomenon was explained in Chapters 2 and 3.

<sup>487</sup> Shigenori Matsui, “Why is the Japanese Judiciary So Conservative?” (2011) 88 *Washington University Law Review* 1375 at 1413.

Nonetheless, there are cases “when the unconstitutionality of public policy becomes so obvious, or administrative discretion becomes so unreasonable and arbitrary, that the judiciary dares to declare the governmental actions null and void.”<sup>488</sup> In such cases, even if judges venture to declare a law or a government action as unconstitutional, they remain most reluctant to suggest policy guidelines or specific mandates for rectification. In this sense, they act as if the affected rights are weak substantive rights,<sup>489</sup> and *leave the forms of rectification for the legislators or bureaucrats to decide, implying a second restraint for declaring statutes or acts unconstitutional.*

In Japan, there are some lower courts with younger and less prejudiced judges that could form an active judiciary. Unfortunately, lower court judicial activism is reversed to judicial restraint when a court of appeals sustains the constitutionality of public policies and the *status quo*. The most acute case of hierarchical restraint comes from the SCJ which has reversed the judicial activism of lower courts in especially important cases. “In fact, except for the Aizawa parricide case, all of the activist decisions of lower courts, upon appeal, have been reversed by the Supreme Court.”<sup>490</sup> *A third restraint thus lies in the hierarchical deterrence of judicial activism by courts of appeal.*

#### **8.4.1 Reasons for judicial restraint**

Shigenori Matsui has written extensively about Japanese judicial restraint. One first reason he advances to explain such concept has to do with the selection of the Justices of the SCJ by the Cabinet. “Even though the candidates have to meet

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<sup>488</sup> Hiroshi Itoh, *supra* note 474.

<sup>489</sup> This matter was explained in Chapter 3.

<sup>490</sup> Hiroshi Itoh, *supra* note 474.



statutory qualifications, otherwise the appointment is wholly discretionary, subject only to dismissal by the public review, which has never been an effective control on the Cabinet's appointment power.”<sup>491</sup> If the fact that the LDP has been practically an uncontested party in such Cabinet is taken into consideration, it is easy to understand the selection of similarly minded judges. <sup>492</sup>

A second reason posited by Matsui is that the judges are very wary of their prestige and of the relatively short time that they have possessed the power of constitutional control.<sup>493</sup> This leads them to minutely choose which cases to take, and how to decide them. Courts also tend to confirm governmental actions except in the most grossly evident cases and, even then, “only when the invalidation does not cause significant political embarrassment to the Cabinet and the ruling party.”<sup>494</sup>

A third reason has to do with the difficulty of constitutional amendment in Japan. While a judgment invalidating a regular statute just means a regular process of amendment, as per Article 96 constitutional amendments require the consensus of two-thirds of all members of both houses of the Diet, and its approval by a majority of votes in a national referendum.<sup>495</sup> Thus, since 1947 and up to October, 2017 no constitutional amendment has been made. This is why a judicial interpretation of the constitution has so much political weight and could disrupt the balance of power; a risk too big to take in a parliamentary democracy.

#### **8.4.2 Conservatism by institutional design**

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<sup>491</sup> Shigenori Matsui, *supra* note 473, at 22.

<sup>492</sup> This matter was explained in Chapter 5.

<sup>493</sup> It is important to remember that Judicial Review did not exist before the 1947 Constitution. See also the arguments advanced in Chapter 4.3.1.

<sup>494</sup> Shigenori Matsui, *supra* note 473, at 23.

<sup>495</sup> Nihonkoku kenpo [Constitution of Japan] [Constitution] Nov 3, 1946, art. 96.

The institutional design of the judiciary also affects its activism (or lack thereof). In the case of Japan, the frequent change of Justices makes it difficult for a counterculture to rise among the judiciary. Although Article 78 restricts removal to public impeachment, the fact that the average age of appointment for SCJ Justices is 65 years, and that they have a mandatory retirement age of 70, allows very little time for anti-establishment judgments.

Moreover, since the installment of the first postwar SCJ, only 18 different Chief Justices have taken such position. Because the Chief Justice has the most influential position within the SCJ, its change every 3 years (on average) has significantly created “lack of consistency within the case law, limiting the development of clear precedents to guide the application of judicial review.”<sup>496</sup> In sum, rapid changes by mandatory retirement have meant the impossibility to establish ground-breaking criteria.

Nonetheless, according to David Law, “what these institutional structures have created is not a judiciary that is necessarily or inherently conservative in ideology or disposition, but rather one that is highly responsive to the sensibilities of its internal leadership and capable of adapting quickly to a change in said leadership.”<sup>497</sup> In such regard, the other justices and inferior judges are not conservative *per se*, but rather efficiently adapt to the criteria of the Chief Justice in turn. Therefore, it is not that the LDP or the bureaucracy have to exert control over the whole judiciary, but rather they need only to exert it with its leader.

According to Hiroshi Itoh, the aforementioned phenomenon enables a “Benign Elite Democracy” <sup>498</sup> within the SCJ. Such *Benign Elite Democracy* enables elite senior judges to use their rank for imbuing the rest of the judiciary with their ideological and

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<sup>496</sup> Junichi Satoh, *supra* note 439, at 603.

<sup>497</sup> David S. Law, “The Anatomy of a Conservative Court: Judicial Review in Japan” (2009) 87:7 *Texas Law Review* 1545.

<sup>498</sup> See Hiroshi Itoh, *supra* note 474.

political preferences. By promoting or demoting inferior judges, relocating them to different prefectures, and confirming or revoking their decisions, judiciary elite *de facto* control jurisprudence more effectively than *stare decisis* would.

Finally, the selection of judges and justices in itself favors certain groups and social classes. Most judges are graduates from either Tokyo or Kyoto Universities (conservative institutions themselves).<sup>499</sup> In addition, the 15 seats of the SCJ allocate its justices on informal quotas but with at least 6 of their members being career judges (a majority of similarly indoctrinated individuals).<sup>500</sup> Thus, although there have been various complaints from the JFBA, the official appointment and reappointment procedures for lower court judges remain opaque.

All the above considerations equate the judiciary more to a bureaucracy than an independent organ of adjudication. The resemblance is greater if it is considered that its whole organization comprises “approximately one thousand people working in the monumental four-building Supreme Court complex...These administrators, in turn, oversee the lives of another 3,200 judges dispersed across over 250 towns and cities throughout Japan.”<sup>501</sup> And also similarly to a bureaucracy, it is common that the judiciary superiors use manipulation and unrelenting supervision of their subordinates to maintain the conservative system in check.<sup>502</sup>

#### **8.4.3 A qualitative analysis of independence in the judiciary**

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<sup>499</sup> Although more recently Chuo and Waseda have placed numerous judges and even justices to the SCJ, the aforementioned universities remain the top. See Hakaru Abe, “Education of the Legal Profession in Japan” in Arthur Taylor von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press 1963) at 159.

<sup>500</sup> Herbert F. Bolz, *supra* note 444.

<sup>501</sup> David S. Law, *supra* note 497, at 13.

<sup>502</sup> See Frank K. Upham, “Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary” (2005) 30 *Law & Society Inquiry* 421, at 453.

Finally, if the structural, institutional and tactical methods of restraining the judiciary fail, the conservative powers can use forms of direct control. To understand such forms of control it is important to firstly distinguish the two meanings that the word “conservative” may have regarding the Japanese courts. Firstly, it may be used to characterize a court that is so passive and cautious that it tends not to challenge statutes or government acts (which was just discussed). Secondly, it may be used to characterize a court that sympathizes and enables the policy of the conservative party (in the case of Japan the LDP).<sup>503</sup>

In their landmark study, Ramseyer and Rasmusen analyzed how such two meanings defined the Japanese judiciary and its relationship with the political establishment. Taking data from 1947 to 1993, they determined that: a) a judge's political affiliation affects her career prospects;<sup>504</sup> b) the opinions and judgments she makes affect her career; c) how much is affected depends on the probable political weight of the contended issue and; d) opinions and judgments contrary to government positions imply a career hit.<sup>505</sup>

Moreover, they found that when a particularly sensitive issue may fall into a court's remit, Japanese politicians “use general rules of standing and jurisdiction to remove many such disputes from the courts”. {And if this fails} They then use politically biased career incentives to ensure that judges who handle the remaining cases dispose of them in the way {they} prefer.”<sup>506</sup>

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<sup>503</sup> David S. Law, *supra* note 497.

<sup>504</sup> The statement by Ramseyer and Rasmusen however must be contrasted with the fact that there is not a clear cut division of political affiliation. In the case of Japan, unlike the USA, it is very difficult to determine political affiliation of judges and justices.

<sup>505</sup> Mark J. Ramseyer & Eric B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (Chicago: Chicago Scholarship Online: March, 2013).

<sup>506</sup> *Ibid.*

Evidently, there are also many cases involving a government official that have low or no political implications. In those cases, the courts decide impartially with formulaic sentences. Because of their workload and quantitative efficiency evaluations, Japanese judges, for example, tend to convict only those defendants that are undoubtedly guilty and discard the dubious cases.<sup>507</sup> This pattern creates the appearance of independent courts, which has been particularly harnessed by the LDP to enhance its legitimacy.<sup>508</sup>

In sum, the only way in which the SCJ could be genuinely independent requires more permanent places for judges to ingrain their own ideology. Alternatively, if there were more rapid changes in the political establishment, and should the LDP loosen its grasp in the other branches of power, the SCJ would be allowed, and forced, to become more active. But as of today, “rapid changes in the SCJ membership and incremental policy changes in the government will continue to work against judicial activism.”<sup>509</sup>

Finally, since the LDP cabinet appoints judges and justices, the chances of choosing progressive candidates are very slim. The courts themselves have defended fundamental doctrines which protect bureaucratic objectives such as that of public welfare, abuse of a right, and public interests; it is, therefore, unlikely to choose jurists who stand against such doctrines. After all, judicial predictability is a valuable tool of political leverage that neither the LDP, nor the bureaucracy can afford to give away.

## 8.5 Social attitudes towards law and litigation

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<sup>507</sup> *Ibid.*

<sup>508</sup> The use of the courts for legitimacy was explained in Chapters 3 and 4.

<sup>509</sup> Hiroshi Itoh, *supra* note 474.

The Japanese government and politicians are not the only cause for judicial passivity, the social perception towards law also plays an important role. Much has been written about the “special” attitude of the average Japanese towards law. Many texts from the *Nihonjinron*<sup>510</sup> claim that “the Japanese don’t like contracts because their word is more valuable than any piece of paper”, or that “they avoid litigation because harmony is a greater virtue than justice”. Yet, the cause for the distancing between the general society and law and litigation has to do with more practical matters. Such matters will be detailed in the next subsections.

### 8.5.1 Non-litigiousness

Japan has low rates of litigation. According to Itoh, in 1990, 6 of every 1000 Japanese filed a civil case.<sup>511</sup> Such findings seem to support the view that Japan is not a litigious society. There are many and diverse theories that try to explain this phenomenon.

Takeyoshi Kawashima identified an orientation towards groups rather than individuals, a preference for consensus over conflict, and a propensity to feelings of shame when involved in legal disputes as cultural factors for non-litigiousness.<sup>512</sup> Although this cultural explanation has been the subject of criticisms from Haley,<sup>513</sup> and Ramseyer,<sup>514</sup> among others, it still hasn’t been completely overruled. In fact, Matsui comments that “in Japan, those people who dispute the decisions of the

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<sup>510</sup> *Nihonjinron* is a genre of texts that focus on issues of Japanese national and cultural identity. Such texts share a general assumption of the uniqueness of Japan, and the term *nihonjinron* can be employed to refer to this outlook. See Yoshio Sugimoto, “Making Sense of *Nihonjinron*” (1999) 57:2 *Thesis Eleven* 81.

<sup>511</sup> Hiroshi Itoh, *supra* note 474, at 25.

<sup>512</sup> See Takeyoshi Kawashima, *Nihonjin no Ho Ishiki, The Legal Consciousness of the Japanese* (Tokyo: Iwanami Shoten, 1967) and Takeyoshi Kawashima, “Dispute Resolution in Contemporary Japan” in Arthur Taylor von Mehren, (ed.), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963).

<sup>513</sup> John O. Haley, “The Myth of the Reluctant Litigant” (1978) 4:2 *Journal of Japanese Studies* 359, at 373.

<sup>514</sup> Mark Ramseyer, “Reluctant Litigant Revisited: Rationality and Disputes in Japan” (1988) 14:1 *Journal of Japanese Studies* 111.

majority are often seen as disrupters of the group harmony... As a result, many plaintiffs in constitutional litigation receive harassing letters and midnight calls, and sometimes threats to their lives.”<sup>515</sup>

Tatsuo Inoue considers that such “tyranny of the community”, has not only deterred litigiousness but has also fostered an alternative enforcement of rules.<sup>516</sup> In this same line of reasoning, Haley considers that the community assumes many tasks of law enforcement and rights assertion that in other countries correspond to specialized agencies.<sup>517</sup> The community can also make “individuals reluctant to assert {rights}, afraid of being perceived as troublemakers or whiners... and so they do not feel that they are in the right to argue that others respect their privacy or beliefs.”<sup>518</sup> Such phenomenon has also been consciously exploited, and frequently applied, by the judicial doctrines of public welfare and public interests.

Another explanation for court aversion can be found in Haley’s “Myth of the Reluctant Litigant”. Haley argues that lawsuits are scarce in Japan, not because of anything in the Japanese national character, but primarily because of institutional barriers to litigation. These barriers were enacted “as a conservative reaction [of the bureaucracy] to the rising tide of lawsuits in the 1920s and early 1930s and a concern on the part of the governing elite that litigation was destructive to a hierarchical social order based upon personal relationships.”<sup>519</sup> Although most of the judicial system was overhauled after 1947, some of the aforementioned barriers still keep many plaintiffs out of the courts.

One final obvious consideration that may help to understand Japanese non-litigiousness has to do with rational choice. In this regard, having conservative and

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<sup>515</sup> Shigenori Matsui, *supra* note 487.

<sup>516</sup> See Tatsuo Inoue, “The Poverty of Rights-Blind Commuality: Looking Through the Window of Japan” (1993) 1 *Brigham Young University Law Review* 517, at 518.

<sup>517</sup> See John O. Haley, *supra* note 361.

<sup>518</sup> Patricia Boling, “Private Interest and the Public Good in Japan” (1990) 3:2 *Pacific Review* 138, at 147.

<sup>519</sup> John O. Haley, *supra* note 361, at 373.

relatively predictable judges (at least in higher instances), means that the average Japanese can make a cost-benefit analysis to determine if it is worthwhile to litigate. Since the social cost is high, and the expected benefit tends to be low, it is rational to avoid courts when other alternatives are available. Moreover, with the limited remedies of the courts, even if a right was justiciable, its enforcement would be very difficult. In simple terms, litigation in Japan is usually not worth the risk.

### 8.5.2 Lack of lawyers

Another practical barrier for litigation has to do with the role of lawyers as advisors and enablers to justice. Currently, “legal education in Japan can be divided into three stages, which are common to all lawyers, whichever branch of the profession they eventually follow.”<sup>520</sup> First, there is the university degree,<sup>521</sup> followed by the National Law Examination (NLE) and finally, a period of apprenticeship at the Legal Training and Research Institute.<sup>522</sup>

As if the first filter (coming from the elite Japanese universities) was not enough, it is important to note that the bar exams in Japan yield the least number of successful candidates worldwide. Even after extensive reforms enacted in the 90s, in 2010 only 22-30% of applicants approved the NLE.<sup>523</sup> The previous measures are exerted by the MOJ to maintain the profession as controlled as possible.

Saying there are too few lawyers in Japan is one thing, but to put such scarcity in context, in 2014 there were only 35,031 attorneys, around 1 for 4300 people,

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<sup>520</sup> Hakaru Abe, “Education of the Legal Profession in Japan” in Arthur Taylor von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963).

<sup>521</sup> Recently, and after a reform to increase the number of lawyers, a Law School JD Degree has been established as a sufficient requisite to take the National Bar examination.

<sup>522</sup> See Dean Meryll, *The Japanese Legal System* (London: Cavendish Publishing, 2002) at Chapter 4.

<sup>523</sup> Mayumi Nakamura “Legal Reform, Law Firms, and Lawyer Stratification in Japan” (2014) 1 *Asian Journal of Law and Society* 99.



registered with bar associations in Japan.<sup>524</sup> In contrast, in this same year, there were 321,000 lawyers, around 1 for every 375 people, registered in Mexico.<sup>525</sup> The difference is at least one order of magnitude higher with about the same population.

Finally, being elite with little competition, the remuneration expected from lawyers further distances them from the layperson looking for legal services. Thus, there is *low demand* for lawyers since *they are few and expensive, and at the same time, they are few and expensive* because there is *low demand for lawyers*. All these characteristics reinforce the notion of Japan as an almost “lawyerless society”.

### 8.5.3 Lack of an independent NHRI

Finally, most of the countries of the OECD have an independent and economically autonomous organ for protecting human rights (*a.k.a* NHRI)<sup>526</sup> but Japan doesn't have one. In its stead, the Japanese executive, in a clear contradiction of the independence principle, undertakes the promotion and defense of human rights with its own Human Rights Bureau (HRB).

Following the non-litigation approach, some members of the HRB are appointed as conciliators under the “Human Rights Conciliator System”. Understandably, Japanese human rights organizations have criticized the government for defaulting in their duties and the HRB itself “has been criticized for having most of its personnel doing part-time work since they hold other positions at the same time”.<sup>527</sup> Even after receiving recommendations from various international human rights agencies, Abe's

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<sup>524</sup> “日弁連 – 弁護士実勢調査 (Translation: JFBA – Lawyer Survey)” (in Japanese) Japanese Federation of Bar Associations. Retrieved at: <http://www.nichibenren.or.jp/en/>.

<sup>525</sup> *Encuesta Nacional de Ocupación y Empleo (ENOE)*, primer trimestre de 2014 (Mexico City: INEGI, 2014).

<sup>526</sup> The definition of NHRI can be found in Chapter 2.

<sup>527</sup> Overview: Human Rights in Japan in the Asia-Pacific Human Rights Information Center, available at: <http://www.hurights.or.jp/english/hurights1/human-rights-in-japan.html>.

administration answered that instead of enabling NHRI, existing governmental agencies will continue to be used for human rights violation cases.<sup>528</sup>

*The chapter provided a brief analysis of the Japanese judiciary and its obstacles, constraints and passivity. The chapter evidenced the lack of an independent judiciary, along with a limited number of legal remedies. As previously mentioned for civil law countries, and shown again in the present chapter, the judiciary limits itself to that literally stated in the legal ordinances, therefore not playing a major role in the enforcement of social rights. In addition, the aversion towards litigation brings the enforcement of such rights to a stasis. It seems that structural, procedural, ideological, political, cultural and social conditions, all of them, correlate with the absence of judicial activism in Japan.*

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<sup>528</sup> Report to the Human Rights Committee on the Issue of National Human Rights Institutions. For its consideration and adoption of the List of Issues to Japan by the Committee Task Force at 111st session (Joint Movement for NHRI and OPs, June, 2013).

# Chapter 9 Article 25 of the Japanese Constitution

*This chapter focuses on Article 25 of the Japanese Constitution, which provides the RSS in Japan. The chapter will delve into the origin of Article 25, the different theories of its interpretation, and the principal cases of jurisprudence on such matter. Most importantly, this chapter will mention the obstacles for making the RSS justiciable in Japan, along with the proposal of diverse ways by which welfare claims may be realized alternatively to that of litigation.*

## 9.1 The origin of article 25

The benefits of the 1874 Relief Order were restricted to very few people and very little money. Similarly, the Meiji Constitution did not contain a constitutional provision for social security or a right to a decent life. As explained in the previous chapter, with the militarization of Japan and full participation in WWII, any possibility of recognizing adequate livelihood as a right disappeared.

During the draft of amendments to the 1947 Constitution, the Japanese commission introduced a phrase corresponding to the second paragraph of the current Article 25. The phrase stated that "in all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health."

What the conservative drafters did not expect was that during the discussions of the Constitutional Diet, the Socialist Party would add an amendment known as the "Minimum Standards Clause" which became the current first paragraph of Article 25: "[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living". Thus, the current Article 25 of the Japanese Constitution can be read as follows:

“第二十五条 Article 25.

1) すべて国民は、健康で文化的な最低限度の生活を営む権利を有する。  
All people shall have the right to maintain the minimum standards of wholesome and cultured living.

2) 国は、すべての生活部面について、社会福祉、社会保障及び公衆衛生の向上及び増進に努めなければならない。  
In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health”.

As a result of the separated drafting of paragraphs 1 and 2, in the thought of some scholars, there is one right with specific instructions for its realization, and in the thought of others, two different rights under one provision. The previous differences correspond to the unified and dualist doctrines studied in Chapter 2.

According to Momii Tsuneki, a defender of the unified doctrine, “the first paragraph is the “irreducible guarantee of an emergency right to subsistence,” while “the second paragraph points that the State must strive to maintain or improve conditions that ensure a better minimum protection.”<sup>529</sup> Thus, in his thought the “right to subsistence” is the master idea which paragraph 2 develops and makes operational.

On the other hand, an example of the dualist doctrine can be seen in the Horiki case.<sup>530</sup> In its judgment, the judge considered that paragraph 1 refers to *a right to life or livelihood* which aims to *help the poorest and most desperate*. He further considered that paragraph 2 refers to a *RSS* whose purpose is *to prevent poverty*.

To both doctrines, however, Article 25 is one of the provisions regulating social rights whose aim is “protecting weak people economically and socially, and implement effective equality.”<sup>531</sup> Although Article 25 is considered the foundation and

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<sup>529</sup> Momii Tsuneki, *Shakaihoshōhō {Social Security Law}*, (Tokyo: Sōgō rōdō kenkyūjo, 1972) at 87.

<sup>530</sup> Supreme Court, grand bench, 7 July 1982, 36 Minshu, p 1235 (Horiki Case).

<sup>531</sup> Nobuyoshi Ashibe, *Kenpō {Constitution}* (Tokyo: Iwanami shoten, 2007).

recognition of social security as a constitutional right, its interpretation by the Japanese judiciary has followed a very limited, oftentimes passive, and sometimes even restrictive pattern as will be revealed in the analysis of the judicial cases in the next section.

## 9.2 Principal cases of jurisprudence

Article 25 by itself doesn't encompass the complete extension of the right to minimum standards of living or social security. As in most countries, it is necessary to analyze the actual cases and the theories according to which it is implemented. In Japan, the lack of judicial activism has led to very few cases where the violation of Article 25 has been claimed. The following are such cases.

### 9.2.1 Food supply act case (1948)<sup>532</sup>

In 1947 the Japanese economy was shattered, resources were scarce and black markets rampant. Because market control was necessary to secure an official distribution system, the SCAP immediately enacted the Food Supply Act (FSA) to ensure an appropriate distribution of healthy nourishments. In the Food Supply Act case, the defendant violated the provisions of the FSA by purchasing and transporting a small amount of rice in the black market, instead of respecting the allotted limit. When the authorities arrested him and took him to court, he claimed that the FSA and its application violated his right to a "minimum standard of living" because "it is impossible to preserve life or maintain health on the current food rations."<sup>533</sup>

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<sup>532</sup> Supreme Court, grand bench, 18 May, 1948, 3 Keishu, p 839 (Staple Food Act Case).

<sup>533</sup> *Ibid.*

Just after the enactment of the Japanese Constitution, this was the first case where a defendant invoked Article 25. The case also referred (in passing) to Article 27, since the defendant claimed that the FSA, by limiting the markets, was also contrary to economic freedom. Nonetheless, this second claim was immediately dismissed by Judge Shigeru Kuriyama, who maintained the constitutionality of such restriction insofar as it allows securing an equitable existence for all citizens.<sup>534</sup>

Regarding the principal claim, Justice Saito Yasuke formulated a landmark opinion which interpreted Article 25 as a programmatic right. His opinion was as follows:

“Paragraph I of the same article {25} is a declaration of the responsibility of the nation ... to manage state affairs so that all of the people can maintain the minimum standards of wholesome and cultural living. That must, in the main, be carried out by the enactment and enforcement of social legislation, but the maintenance and elevation of such a standard of living must be regarded as a function of the state. That is to say, the nation must assume that responsibility broadly toward all the people ... But the state does not bear such an obligation concretely and materially toward the people as individuals.”<sup>535</sup>

In this judgment the right to a minimum standard of living is reserved as a goal or an objective for the state and therefore, it is not granted individually to the Japanese people. Itoh calls this approach the "Negative Programmatic Declaration Theory",<sup>536</sup> and adds that it has dominated the legal discourse since the 1960s. Such interpretation was necessary because after their defeat in WWII, the Japanese government wasn't strong enough to grant judicially enforceable welfare. It has also been argued that if this case allowed an exception for the FSA, many other claims would follow suit, thereby altering the economic reconstruction efforts. At any rate, the fact that the constitution was completely new to the Japanese, and the

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<sup>534</sup> Hiroshi Sasanuma, *supra* note 409, at 201-224.

<sup>535</sup> John H. Maki, *supra* note 382.

<sup>536</sup> Hiroshi Itoh & Lawrence Ward Beer, *The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-1970* (Seattle: University of Washington Press, 1978).

precariousness of the postwar years, would result in more than 20 years without other plaintiff invoking Article 25.

### **9.2.2 Asahi v. Japan (1967)** <sup>537</sup>

In the Asahi v. Japan case, Shigeru Asahi, a tuberculosis patient at the Okayama National Sanitarium, was receiving 600 yen, the highest monthly allowance set by the Minister of Welfare, in addition to free meals and medical treatment. However, when his brother began to send him 1,500 yen each month, the director of the Social Welfare Office not only blocked the payment of the 600 yen, but also ordered Asahi to pay 900 yen out from the amount he received from his brother to cover part of the medical expenses. Asahi invoked the violation of Article 25 by the Minister of Welfare and prevailed at the Tokyo district court on October 19, 1960.

The Tokyo district court held that the "livelihood standard" in which the Minister based his administrative order was unconstitutional<sup>538</sup>. Contrary to the "Negative Programmatic Declaration Theory", the court also held that the level of a "minimum standard of living" should not be affected by the conditions of the national budget at the time, but that on the contrary, the minimum standard should lead and determine the budget. Moreover, the court held that, in theory, the level of a minimum standard of living could be objectively determined for a specific nation at a specific time. With such concrete standard the court recognized the right to subsistence as a legally enforceable right.

Nonetheless, Asahi's claim was defeated on appeal by the High Court of Tokyo in November 4, 1963.<sup>539</sup> The high court adopted the theory of a relative standard for determining the minimum standard of living, and considered the analysis of the

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<sup>537</sup> Supreme Court, grand bench, May 24, 1967, 21 Minshu, p 1043 (Asahi case).

<sup>538</sup> Tokyo District Court, 19 October, 1960, 11 Gyoshu 2921.

<sup>539</sup> Tokyo High Court, 4 November, 1963, 14 Gyoshu 53.

nation's finances as one requirement for such standard. Such approach gave prevalence to the budget and the Diet, and denied the previous view according to which Article 25 contained a concrete judicially enforceable right. The High Court of Tokyo also defended the mandate from the Minister of Welfare since it was an “act of administrative discretion” and not arbitrariness, since he was a technical expert on the matter of “livelihood”.

In their interpretation, the High Court of Tokyo also divided paragraphs 1 and 2 of Article 25. Regarding paragraph 2, the court established a “standard of clear violation for judicial review” which meant that “only the grossly unreasonable laws can be challenged”. In contrast however, regarding paragraph 1 the court mandated a strict scrutiny of the laws that were related to a “minimum standard of living”. According to the previous division, the court of appeal actually analyzed “the minimum standard of living” established on paragraph 1 as a concrete referent, and considered that the amount paid to Asahi was sufficient.

The rationale for arguing such sufficiency was that “almost ten million people lived under the allowance he was receiving, and that it would be unfair to favor those receiving supplemental allowances and do nothing for those who worked and received less income.”<sup>540</sup> This was an opinion in line with the notion that providing a pension higher than actual wages “would impede the will to work and...alter the moral rule of self-sufficiency that, whatever poverty, it is necessary to ensure survival on its own strengths and work.”<sup>541</sup>

Finally, the SCJ closed the case since the plaintiff (Asahi) died. Nevertheless, on May 24, 1967, the SCJ stated (*obiter dictum*) the following:

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<sup>540</sup> Hiroshi Sasanuma, *supra* note 409, at 201-224.

<sup>541</sup> *Ibid.*



“The concept of minimum standards of wholesome and cultured living is rather abstract and relative, and as such does not provide a concrete right. Such standards will be improved as our culture and national economy develop. These standards can be determined only after taking into consideration all these and other variable elements. Therefore, the determination of what "minimum standards of wholesome and cultured living" actually means [under particular circumstances] is within the discretion of the minister of Health and Welfare. His decision does not produce an issue as to the legality of the standards, although such a decision may produce an issue as to the propriety of the standards which may be discussed in terms of the political responsibility of the government in power. Only in cases where such a decision is made in excess of or by abuse of the discretionary power conferred by the law, so as to neglect [totally] the policy and objectives of the Constitution and the Livelihood Protection Act by ignoring the actual conditions of life and establishing extremely low standards, would such a decision be subject to judicial review of its legality.”<sup>542</sup>

In other words, and according to the aforecited, the SCJ gave complete discretion to government officials. This of course is contrary to any form of constitutionalism that places the protection and wellbeing of the individual over the will of the authorities. Unlike the court of appeal, the SCJ did not divide Article 25 and indistinctly applied the "standard of clear violation for judicial review" to all laws covered by it. Once again, it would take almost 20 years for another relevant resolution to reconsider the contents of Article 25.

### **9.2.3 Horiki welfare support case (1982)**<sup>543</sup>

In the Horiki Welfare Support case, the plaintiff was a blind woman living on disability payments, who in 1970 sought further public assistance in the form of child support for raising her son. The plaintiff had taken care of her son since 1955 without the presence or support from her husband. The Government of Hyogo Prefecture rejected her request, noting that the Juvenile Allowance Law<sup>544</sup> forbade concurrent

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<sup>542</sup> Cited from Akira Osuka, "Welfare Rights, Law and Contemporary Problems" (1990) 53:2 *The Constitution of Japan: The Fifth Decade: [Part 2]* 13.

<sup>543</sup> Supreme Court, grand bench, July 7, 1982, 36 Minshu, p 1235 (Horiki case).

<sup>544</sup> Juvenile Allowance Law, Law No. 238, 1961, art. 3 and 4.

payment of child support to a disability pensioner. She filed her suit arguing the unconstitutionality of the ban on concurrent payments based on Article 14 (equality rights), and under her right to enjoy “minimum standards of wholesome and cultured living” based on Article 25. Although she won in the Kobe district court<sup>545</sup>, she lost in the appeal to the Osaka high court<sup>546</sup>, and in the final appeal to the SCJ.

In its decision, the SCJ firstly examined if the Child Support Law was adequately applied. The SCJ agreed it was, and followed Asahi’s *obiter dictum* by pointing that:

“When considering implementation, {the State} must not overlook the nation’s financial conditions, and must make policy judgments in light of a variety of complex and highly technical factors in various fields. Selection of specific concrete legislative measures that meet the intent of the provision of Article 25 of the Constitution is left to the legislature’s broad discretion and is not suitable for judicial review except in cases of gross unreasonableness and clear abuse of discretion.”<sup>547</sup>

The SCJ secondly examined the argument of discrimination for treating the plaintiffs’ status as a single mother and her handicapped condition as the same impediment. Based on Article 14, the SCJ considered that the provision prohibiting multiple payments was neither arbitrary nor irrational. The acceptance of a “broad legislative discretion” led to the generally perceived notion that “as a rule, Article 25 protects no judicially enforceable right”.<sup>548</sup>

#### **9.2.4 Asahikawa Health Insurance Case (2006)<sup>549</sup>**

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<sup>545</sup> Kobe District Court, 20 September, 1972, 23 Gyoshu, p 711.

<sup>546</sup> Osaka High Court, 10 November, 1975, 26 Gyoshu, p 1268.

<sup>547</sup> *Ibid.*

<sup>548</sup> Akira Osuka, *supra* note 542, at 13-28.

<sup>549</sup> Supreme Court, grand bench, March 1, 2006, 60 Minshu, p 587 (Asahikawa case).

The plaintiff on the Asahikawa Health Insurance case sued the City of Asahikawa because the mayor required full health insurance premiums irrespective of their affordability. The National Health Insurance Act (NHIA)<sup>550</sup> mandated universal coverage, but allowed some exceptions for people on dire circumstances. However, the NHIA also delegated detailed regulation to the local municipalities. In this case, the respective ordinance only allowed payment exemptions and reductions if lives “became excessively difficult due to unforeseen disasters or incomes fell significantly in that particular year”, a circumstance that in the interpretation of the Asahikawa authorities did not apply to the plaintiff since he was not in a temporal economic hurdle, but rather was in a state of “constant and permanent poverty”.

The SCJ confirmed such obtuse reasoning, and found that since the NHIA did not exempt the permanently impoverished, the ordinance's restriction for premium reductions was neither applicable nor discriminatory against the economically weak. The SCJ therefore held both the NHIA and the referral to the local government ordinance as valid.<sup>551</sup> The SCJ also agreed that the mayor complied with Article 25 despite the fact that he forced the appellant to pay insurance premiums he could not afford, and that it was within his discretion to enforce the ordinance. In such terms, the SCJ definitively dismissed all the claims from the plaintiff.

**As can be seen in the four previous cases, the inclusion of a constitutional provision for the RSS in the case of Japan has not significantly increased judicial enforcement. On the contrary, it seems that in each of the four aforementioned cases, the judgments actually restricted and reduced the limited rights and benefits from the plaintiffs. Moreover, practically in all four cases, even though Article 25 offers a clear provision, the RSS has tended to be seen as judicially unenforceable.** In the next section the different theories that may explain such tendency will be examined.

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<sup>550</sup> National Health Insurance Law [Law No. 192 of 27 December 1958, as amended through 10 December 1980].

<sup>551</sup> See Hiroshi Itoh & Lawrence Ward, *supra* note 536, at 260.

## 9.3 Theories of interpretation regarding article 25

With the limited case law and judicial scholarship studied in the last section, three main theories have been applied to interpret Article 25. Depending on the extent of the powers granted to the claimant and its relation with the state, they can be divided as follows:

### 9.3.1 Programmatic rights theory

The most commonly invoked theory asserts that Article 25 of the Japanese constitution imposes a mere moral obligation upon the legislative branch. Under this theory, no judicially enforceable right against the state is recognized, nor is any sanction or mandate provided in case the state fails to perform its obligation. The reasoning for the programmatic rights theory is as follows:

“Article 25 does not invest in individuals any concrete right, and a concrete right accrues to certain individuals **only after legislation is enacted** to implement the objectives prescribed in Article 25; whether such legislation should be enacted is completely a matter of the legislative policy of the state; and such legislation should carry the strongest presumption of constitutionality and thus cannot be easily overridden by evidence of competing concerns”.<sup>552</sup>

The ruling on the Food Supply Act Case of 1948<sup>553</sup> was the first one to introduce this theory. The theory was then applied again in the Asahi Case of 1967<sup>554</sup>. More recently, in the Asahikawa Health Insurance Case of 2006<sup>555</sup>, the SCJ maintained once more its programmatic interpretation of Article 25, and this time deferred not only to the legislative discretion but also to that of the mayor of Asahikawa. Thus, **in the three cases previously analyzed it is possible to trace a pattern that**

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<sup>552</sup> Akira Osuka, *supra* note 542, at 13-28 (**emphasis added**).

<sup>553</sup> *Ibid.* at 540.

<sup>554</sup> *Ibid.* at 545.

<sup>555</sup> *Ibid.* at 554.

**negates concrete existence to the RSS.** Moreover, for the interpretation of Article 25, the SCJ has repeatedly deferred to the other two branches of power.

### **9.3.2 Abstract rights theory**

The second theory criticizes the first one and asserts that the provision in Article 25 guarantees both: 1) the "legal right" by which it is possible to demand that the Diet enacts the laws necessary to maintain "the minimum standards of wholesome and cultured living" and, 2) the "legal obligation" for the state to establish such laws. Nonetheless, under this view, the courts can only declare the government's failure to provide the needy with a decent life as a violation of the constitution, and once they make such declaration they can go no further.

Therefore, under this theory, if no secondary legislation embodies Article 25 or sufficiently ensures the standard of living it protects, the people have no basis for bringing suits claiming that such omissions or deficiencies are unconstitutional (this is the reason why it is called the "Abstract Rights Theory").<sup>556</sup> However, unlike the first theory, the Abstract Rights Theory recognizes (but not mandates) that the Diet elaborates the corresponding laws to make the RSS justiciable, limiting (to some extent) legislative discretion.

### **9.3.3 Concrete rights theory**

The third theory asserts that, "given the principle that all actions of administrative agencies must have their basis in legislation, paragraph 1 of Article 25 of the constitution, even if not as clear and detailed as a legislative enactment that directly

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<sup>556</sup> *Ibid.* at 571.

binds administrative power, has sufficiently clear content to bind the legislative and judicial branches.”<sup>557</sup> In this theory, the right to subsistence is actually a concrete right by which the people can demand that the legislative branch enacts laws that give suitable embodiment to such right (hence its name of “Concrete Rights Theory”). If the court orders the legislative branch to fulfill this obligation and it doesn’t, the people have the right to obtain a judicial declaration that such legislative omissions and deficiencies are unconstitutional and that must be corrected as soon as possible.<sup>558</sup>

### 9.3.4 The subsidiarity of article 25

After having presented the three previous theories it is important to note that, in practice, different groups related to the interpretation of Article 25 support different theories regarding such right. Most Japanese constitutional law scholars, for example, support the Abstract Rights Theory's interpretation of Article 25 (since they consider that the Concrete Rights Theory is too extreme and interferes with the principle of separation of powers). The Japanese judiciary on the other hand almost unanimously defends and maintains the Programmatic Rights Theory. This research also found a few authors who defend the Concrete Rights Theory and argue that, even without legislative regulation, the right of subsistence is justiciable on the grounds of Article 25.<sup>559</sup>

However, and notwithstanding the aforementioned theories, **in the day to day claim and enforcement, the RSS is realized by executive measures such as social assistance programs and grants.** In this regard, the problem of systematic discrimination, partiality, political manipulation and underfunding are more real than

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<sup>557</sup> *Ibid.*

<sup>558</sup> The concrete rights theory reasoning resonates with the nature of strong substantive rights as explained in Chapter 3.

<sup>559</sup> See Hiroyuki Hata, “Comment on Social Security in Japan” (1990) 53:2 *Law and Contemporary Problems* 35, at 35-37.

the theoretical considerations from the courts. Of course, **Article 25 remains the constitutional basis (and because of it the most important legal foundation), to the rights of subsistence and social security, but its importance is secondary to the social security system and social assistance programs designed and enforced by the ministries and its bureaucracy.** Thus, it is now turn to analyze the causes of the poor implementation of the right to subsistence and the social security system itself.

## 9.4 Obstacles to making the RSS justiciable in Japan

**As seen in the previous sections, making the RSS justiciable has not lead to an active judicial protection or enforcement of such right in Japan.** In all fairness, not all the reasons for such problem lie in the judiciary, and it is also true that there are also other ways of enforcement other than adjudication. In this section, the reasons for both situations will be explained.

### 9.4.1 Restricting article 25 by the duty to work

Social rights were constitutionalized as a cluster in Articles 25 through 28 of the Japanese constitution. While Article 25 refers to the right to subsistence and social security, Article 27 paragraph 1 establishes the right AND obligation to work. According to a joint interpretation of both articles, the amended Public Assistance Act (PAA) states in its Article 4 paragraph 1 that: ***“Public assistance shall be provided based on a requirement that a person who is living in poverty shall utilize his/her assets, abilities and every other thing available to him/her for maintaining a minimum standard of living.”***<sup>560</sup>

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<sup>560</sup> Public Assistance Act (regulatory of Articles 25 and 27 of the Constitution) Act No. 144 of May 4, 1950, available at: <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/95143/111908/F-453613735/JPN95143.pdf>. ***(emphasis added)***.

This article has been the source of abuse at the bureaucratic offices which manage social assistance programs and is popularly known as the *labor dependency paradigm*. From the early 1980s, the welfare offices have indeed repeatedly and illegally denied requests for assistance based on a restrictive interpretation of the PAA. Yasuo Hasebe has criticized the *labor dependency paradigm* interpreted from the PAA since: a) the duty to work can be interpreted as strictly a moral duty; b) should work be interpreted as a positive right it would also establish a positive obligation for the state to guarantee; c) when the solicitor of welfare cannot find employment because of the job market, the state would have the obligation to provide it; d) if the state cannot provide it, neither can it restrict the unemployed living in poverty or the potential aid recipients and; e) in this line of reasoning, the only time that unemployment benefits may properly be limited is the case of an aid recipient refusing to work even as the state offers her a job within its capacity.<sup>561</sup>

A case where the *labor dependency paradigm* can be seen applied to its full extent is the Hayashi Case.<sup>562</sup> Such case has as plaintiff Mr. K. Hayashi who, after working in catering and as a construction worker, was laid off due to the economic downturn of the early 1990s. Since July of 1993 Hayashi was forced to live on the streets near Nagoya Station. Having finally applied for social assistance in the office of the district, he was only entitled to medical assistance (in the form of first aid), excluding any other form of assistance under the claim that “the doctor felt he could work and get by”.

Social assistance for Hayashi was denied for the sole reason that he was subjectively perceived as “capable of working”, not by a governmental welfare officer but by a private doctor. More importantly, until this point the state used to consider

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<sup>561</sup> Yasuo Hasebe, *Kenpō {Constitution}* (Tokyo: Shinseisha, 2004) at 103-104.

<sup>562</sup> Supreme Court, 3rd petty bench, 13 February, 2001, 211 Minshu, (Hayashi Case).



that a person able to work but unable to find a job despite his efforts to get one, could benefit from the PAA benefits. Hayashi therefore decided to resort to the courts.

The High Court of Nagoya<sup>563</sup> dismissed Hayashi's claim on the grounds that the situation of the labor market was not disastrous as to deprive him of any chance of finding a job. Hayashi died in the streets that same year of 1992 and following his death the SCJ terminated the trial.

Commenting the Hayashi case, Hiroshi Sasanuma<sup>564</sup> points that the office did not offer assistance to the plaintiff in his job search. This implied a double violation of Article 25: firstly, by refusing to grant social assistance; and secondly, for not helping in the job search. Sasanuma considers this case also constitutes an illegal act against the interest of work set out in Article 27 paragraph 1 of the Japanese constitution<sup>565</sup>. Unfortunately, the Hayashi case is not isolated, and stories like his have proliferated in the Lost Twenty Years, and continue to this day.<sup>566</sup>

#### 9.4.2 Courts and their interpretation of article 25

When Article 25 was included in the Constitution of Japan, it had a progressive view towards social rights, but this trend soon faded away. Even though the Japanese constitution could be updated by judicial interpretation, the courts in general and the SCJ in particular, remain passive and reactive to the lines drawn by the Cabinet and the Diet.

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<sup>563</sup> Nagoya High Court, 8 August, 1997, 4 Hanreishu, p. 10.

<sup>564</sup> Hiroshi Sasanuma, *supra* note 409, at 77-78.

<sup>565</sup> *Ibid.*

<sup>566</sup> But on a positive note, in a judgment of 9 October 1998, the high court of Fukuoka ruled that: "The welfare system which effectively guarantees the right to life under Article 25 of the constitution, is intended to ensure that possible aid recipients have a dignified life and that the conditions for a dignified life are material and institutional. Regarding material conditions to enable an individual to exploit his ability to work, certain goods as stable housing and basic nourishment are essential. Because of this, homeless people are not able to exploit their ability to work, and protective measures according to Article 4 paragraph 3 of the Act {PSA} must be interpreted along with Article 25 paragraph 1 of the Constitution". See Fukuoka High Court, 3<sup>rd</sup> petty bench, 9 October, 1998, 3, available at: [http://www.courts.go.jp/app/hanrei\\_en/detail?id=687](http://www.courts.go.jp/app/hanrei_en/detail?id=687).

Regarding the RSS, the SCJ has been extremely deferential, allowing wide legislative discretion and freedom of enforcement for governmental workers. In this fashion, the revolutionary social rights of the constitution have been left to changing policies and have also been subordinated to political interests. **By implementing the programmatic theory of interpretation, the courts have rendered the right to subsistence as a mere aspiration, instead of a solid rule.**

Part of the problem is the overreaching breadth of Article 25. It contains both the right to “minimum standards of wholesome living” (subsistence) and the right to “social welfare, security and public health” (social security). At the convenience of the courts, both paragraphs can be seen as either independent or substantially linked, denying in this way legal certainty. By using this method, courts have frequently dismissed social rights claims due to technicalities as opposed to making a study of the heart of the matter.

Given that the main contention for making Article 25 functional is defining the “minimum standards of wholesome and cultured living”, the courts, eluding their right and obligation of judicial review, have rendered such constitutional right as useless. Even more, their neglect has contributed to maintaining this concept’s ambiguity, both in secondary legislation and in administrative actions.

Due to all the previous reasons, this dissertation argues that including the RSS in the Japanese constitution has not turned it in a justiciable right (according to the SCJ interpretations), thus denying the constitutionalization hypothesis. Moreover, even though there have been a reduced number of cases in which such right was invoked, in all of those cases the interpretation was more restrictive and definitively didn’t improve judicial enforcement, thus denying the justiciability hypothesis. Finally, by applying the programmatic rights doctrine the courts have taken any importance that the RSS may receive from its constitutional status from the judicial realm. If any

improvement in welfare can be found in Japan related to Article 25 it is independent of its justiciability and judicial enforcement, thus denying the welfare hypothesis.

Furthermore, there is no evidence that the courts have a significant role in improving the welfare conditions for either the plaintiffs or the population of Japan in general. Rather, the improvement in welfare may be related to other non-judicial variables that exceed the scope of this dissertation such as policy and economic improvement. Only in such regard may the constitutionalization of the RSS could possibly be argued as basis for improvement of welfare in Japan but even then, such improvement has no causal relation with justiciability or the courts' intervention. In this last regard, Matsui indicates there may be positive effects for Article 25 such as "the enactment of the Life Assistance Law and the establishment of mandatory national health insurance system."<sup>567</sup>

Yet, to reiterate, what is clear is that these effects have nothing to do with the judiciary and are rather achieved by the ministries and administrative agencies that implement such laws and programs. In other words, justiciability of Article 25 is not the best way to fulfill the RSS in Japan, but there still may be some other more effective ways to improve the welfare of the Japanese people.

#### **9.4.3 Litigating the RSS with equality and the non-discrimination principle<sup>568</sup>**

Invoking Article 25 as grounds for the protection of the RSS is not the only (or even the best) option. One alternative that has proven to be more effective in achieving welfare protection is to litigate invoking equality and non-discrimination arguments

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<sup>567</sup> Shigenori Matsui, *supra* note 487, at 140-148.

<sup>568</sup> Other authors also suggest using other fundamental human rights to give strength to social rights claims. Yoshihiro Yamauchi, "The Current Problems of the Right to Minimum Standards of Living" (2012) 45:2, *Ryukoku University Law Society*, available at: <http://hdl.handle.net/10519/3155>.

and provisions. Equality rights have been commonly used by the judiciary to control legislative discretion regarding social security.<sup>569</sup> These findings are consistent with the strategy previously detailed in Chapter 8 and have been reflected in the case “to seek revocation of the decisions of changing public assistance” (*a.k.a.* Old Age Additional Rights case).<sup>570</sup>

In such case, the appellants had been Tokyo residents receiving livelihood assistance under the Public Assistance Act. In early 2009 such residents received a notice of changes to public assistance policies from the director of the MHLW himself, to the effect that the amount of livelihood assistance was going to get reduced. These changes were based on the abolition of "Old-age Additional Grants" that had, in principle, been given to those aged 70 and above, but that were eliminated by a revision from the MHLW.

The appellants argued that the aforementioned revision of the Public Assistance Standards violated Article 25, paragraph (1) of the Constitution, and Article 3, Article 8, Article 9, Article 56, (*et.al*) of the Public Assistance Act. They also argued that the reform discriminated people over 70 years old and should be considered unconstitutional and illegal and demanded that such reform be revoked.

In her judgment of February 2012, three important landmarks were set by the SCJ. First, the SCJ questioned the capacity for determining the minimum standard of living as an act of administrative discretion. The MHLW had to justify to the SCJ, with extensive reports from a special committee of experts, that the new information regarding livelihood of people over 70 years old did not require a special additional

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<sup>569</sup> Constitutional Challenges: Global and Local Constitutional Workshop, “4: Social rights and the challenges of economic crisis” (IXth World Congress of the Association in Oslo, 16 -20 th June 2014).

<sup>570</sup> Supreme Court, 3rd petty bench, February 28, 2012, 66 Minshu, p 2. (Old Age additional rights case), available at: [http://www.courts.go.jp/app/hanrei\\_en/detail?id=1150](http://www.courts.go.jp/app/hanrei_en/detail?id=1150).

grant for their expenses.<sup>571</sup> This is relevant because all the previous decisions by the SCJ did not question the administrative actions and instead conceded wide discretion by default. Nonetheless, for this case very technical and precise justifications were mandated to the MHLW.

Secondly, the SCJ did a *de facto* judicial review of the PAA, by stating that its provisions embody the spirit of Article 25 of the Constitution and that its revision in 2004 was constitutional. These reasons were based on Article 9 of the original AND revised Act which established that “a decision of reduction or abolition of additional grants should be made based on the determination on the existence or absence of any special demand among elderly persons...**from a specialized and technical perspective**”.<sup>572</sup> Since the technical perspective was sufficiently proved, the abolition was in line with the Act.

Thirdly and finally, the SCJ analyzed at length the claim of alleged discrimination against people aged over 70 years. This was part of the aforementioned strategy of *using equality and the principle of non-discrimination* (Article 14 of the Japanese Constitution), in order to give strength to social rights claims. The SCJ negated such claim on the grounds that welfare retrenchment was not an act of discrimination but on the contrary, *an act to avoid discrimination*. Indeed, the SCJ argued that the pension system reform was enacted precisely to maintain equality between those aged 70 and above, and those aged under 70.<sup>573</sup>

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<sup>571</sup> “The term “minimum standard of living” used in these provisions is an abstract, relative concept, which needs to be defined in consideration of the latest conditions, such as the economic and social conditions and the conditions of the livelihoods of the general public. In order to embody the minimum standard of living in the form of the Public Assistance Standards, highly-specialized and technical considerations and a political decision made based thereon are required. Supreme Court, grand bench, July 7, 1982, 36 Minshu, p 1235, (Case to seek revocation of the decisions of changing public assistance), available at: [http://www.courts.go.jp/app/hanrei\\_en/detail?id=1150](http://www.courts.go.jp/app/hanrei_en/detail?id=1150).

<sup>572</sup> Public Assistance Act (Public Notice of the Ministry of Health and Welfare No. 158 of 1963) Revised by the Public Notice of the Ministry of Health, Labour and Welfare No. 130 of 2004.

<sup>573</sup> In December 1983, the Central Social Welfare Council of the then Ministry of Health and Welfare published the “Livelihood Assistance Standards and Additional Grants (Opinion)” (hereinafter referred to as the “1983

In sum, and even though the appeal was dismissed, the fact of presenting discrimination and the right to equality as the main focus of this claim enabled a more thorough scrutiny by the SCJ. In turn, this led to a more stringent examination of the administrative authority. The SCJ also did an informal judicial review of the PAA and its revision, something not common for such Court. Although this is a rare case, what is certain is that when litigating the RSS, including the rights to equality and non-discrimination can make an important difference to get the courts' attention.

#### **9.4.4 Non-judicial activism**

In addition to the *equality and the non-discriminatory judicial strategy*, some other mechanisms that are more effective for the protection and enforcement of welfare rights are non-judicial at all. In the case of Japan, the role of NPOs and non-judicial activism has in many cases proven as a less litigious and more grassroots alternative to achieve protection and satisfaction for the RSS. Although Japanese NPOs remain somewhat manipulated by the state, they have also proven to be the best option for elderly and childcare protection, and as such, are a very valuable alternative to constitutional rights' justiciability.<sup>574</sup>

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Opinion"), which presented, among other things, the opinion, that a comparison between the households that are entitled to additional grants and the households that are not, has revealed that in order to meet the special demand among elderly persons, who suffer deterioration of the physical and psychological functions due to aging, the old age-related added expenses for food, utilities, health and hygiene, social activities, and nursing care should be subject to additional grants, and that such added expenses are currently covered, in large part, by Old-age Additional Grants. Based on the 1983 Opinion, since April 1984, the amount of Old-age Additional Grant has been revised in accordance with the growth rate of the Consumer Price Index applicable to the items that are covered by the Type 1 expenses. See Old Age additional rights case, *supra* note 570.

<sup>574</sup> Simon Andrew Avenell, "Civil Society and the New Civic Movements in Contemporary Japan: Convergence, Collaboration, and Transformation" (2009) 35:9 *Journal of Japanese Studies* 265.

In Japan, grassroots civic groups known as *zaitaku*,<sup>575</sup> which provide paid services for the elderly and disabled, are particularly important. *Zaitaku* “provide a wide range of services including house cleaning, meal delivery, bathing, home visits, and various organized outings for the elderly and disabled.”<sup>576</sup> They work in close connection with local communities under a membership system and have women as their main personnel.<sup>577</sup>

After the 1980s, *zaitaku* began a pragmatic activism known as “daily life proposal-style citizen movements” (*seikatsu teian-gata shimin undō*)<sup>578</sup>. Their motto is that suggesting and enabling proposals are more useful than criticism. Evidently, this style has been met with open arms by the government but scorned by other activists. Nevertheless, the truth is that *zaitaku* has produced more significant and tangible benefits for the unprivileged than judicial activism has ever done.<sup>579</sup>

Of course, there are also many “classic” welfare activists. Some of them, for example, submitted over 120 counter reports to the UNs Human Rights Committee criticizing the SCJ human rights enforcement, and ICCPR implementation. Other organizations like the JFBA and the Japanese Civil Liberties Union have publicly expressed similar concerns.<sup>580</sup> Moreover, although Japan is not known for particularly big or violent

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<sup>575</sup> They are known by the rather cumbersome name of “resident participation–style in-home welfare service groups” (*jūmin sankā-gata zaitaku fukushi dantai*) or *Zaitaku*, for short.

<sup>576</sup> Simon Andrew Avenell, *supra* note 574, at 268.

<sup>577</sup> The reason for choosing women is to give them some form of empowerment according with the situation described in Chapter 6.

<sup>578</sup> Simon Andrew Avenell, *supra* note 574, at 268.

<sup>579</sup> One example of judicial activism success is the implementation of a diverse system of paid services including token payments, transportation reimbursements, and even time accumulation schemes in which providers could “earn” future service “credits” for themselves or their families through work done now. In all cases, however, prices were set below market rates. Simon Andrew Avenell, *supra* note 574, at 270.

<sup>580</sup> Amelia Kegan, “As a Negative Right, Article 25 Can Have a Positive Effect Combating Japan’s Poverty” (2008) 17:3 *Pacific Rim Law & Policy Journal* 738.

demonstrations, Leonard Schoppa gives an account of Japan's Labor Unions rallies to protest the raising of pension premiums which reunited over 150,000 people.<sup>581</sup>

Some of the aforementioned points concur with the landmark quantitative study made by Tsujikata and Pekkanen in 2007. While surveying NPOs regarding their activities, these scholars found that "lobbying central bureaucracy through politicians" represented 31% of their time. And regarding the entity with which they reported having the most cooperative relationship, the central bureaucracy took the first place (4.67%), followed by academics (4.54%), local governments (4.48%), mass media (4.44%), welfare organizations (4.39%), political parties (4.35%) and big businesses (4.29%).<sup>582</sup>

Classic movements have sometimes also used the courts for reasons other than winning favorable judgments. Some of them try attracting publicity, garnering new supporters, increasing public awareness of alleged injustice, etc. Still, in the words of Eric Feldman:

"Rights inflation" in the sense of a widespread acceptance that all claims would soon be framed as legal rights turned out to be bankrupt; the transformation of legal consciousness reflected little more than wishful thinking and litigation as a vehicle to social evolution was stymied by a powerful and entrenched bureaucracy."<sup>583</sup>

#### **9.4.5 The RSS in Japan today**

In most of the cases analyzed, when claiming the existence of a constitutional RSS in court, such courts adopted either:

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<sup>581</sup> Leonard Schoppa, "Policies for an Ageing/Low Fertility Society" in Alisa Gaunder (ed.), *Routledge Handbook of Japanese Politics* (New York: Routledge, 2011).

<sup>582</sup> Yutaka Tsujinaka and Robert Pekkanen, *Civil Society and Interest Groups in Contemporary Japan* (Research Paper, University of Tsukuba and University of Washington, July 2007).

<sup>583</sup> Eric Feldman, *supra* note 365, at 40-44.



- a) A programmatic interpretation in which only a mere *moral obligation* is acknowledged and ***no justiciability is granted for the RSS as an enforceable constitutional right***. Such interpretation can be seen in the resolutions analyzed for the Food Supply Act, Asahi, Horiki and Asahikawa cases; or
- b) An abstract interpretation *by which no concrete existence of the RSS is recognized unless specific legislation embodies Article 25, which means that although the constitutional RSS may be justiciable it cannot be enforceable by itself*. Such interpretation was applied, to a certain extent, for the Hayashi and Old Age Additional Rights case.

From the research conducted in Japan, it became clear that including the RSS in the constitution has not increased the cases where such right has been adjudicated and enforced by the Japanese courts, but how could social security protection be improved in Japan by other means?

For one, the possibility of litigating by invoking equality and non-discrimination principles has proven to have more chances of success to indirectly increase welfare conditions. Invoking Article 25's protection by itself has not been effective, but including such right within a larger claim with more traditional justiciable rights may have better chances of success. Moreover, framing the claim in such terms may also be easier to understand and thus seize national and international support for a cause.

A second possibility coming from the recent history of Japanese civil society has proved that more significant, albeit smaller scale changes, might be achieved when adequately organized. The role of NPOs in Japan may be further empowered to make social rights work for the poor. The NPOs grassroots approach has given them a strategical position to serve as an equalizer of social welfare, and because of this, the Japanese government should enable and encourage them beyond manipulative intentions.

Finally, although it has not been discussed due to the limited scope of this research, political accountability could be another useful method for protecting the RSS. Since a large part of the Japanese electorate is interested in social welfare issues, a punishment vote against candidates from a political party which has been neglectful to such issues could enable more active participation. The specific case of pensions in Japan provides an ideal opportunity to use political accountability as a means to pressure both the party in power and the prospective candidates to offer concrete solutions for the RSS.

*Among the main conclusions of this chapter, is that the constitutionalization of the RSS in Article 25 of the Japanese Constitution has not implied an increase in the instances where such right has been adjudicated or enforced. Even though there exists a constitutional article that makes the RSS a justiciable right, in reality, the Japanese would rather litigate using arguments of reason, rather than those of entitlement. In such regard, this chapter demonstrated that oftentimes it is preferable to use other more “traditional” rights for establishing welfare claims or, even better, to rely on non-judicial mechanisms. The previous findings support the main arguments posited in this dissertation.*

### **PART III THE CASE OF MEXICO**

## **Chapter 10 Mexico as a welfare state**

*Parallel to the recount made for Japan, this chapter will describe the revolutionary origins of Mexico as a welfare state. In a similar fashion to Japan, the Mexican welfare state used welfare protectionism to keep the hegemonic party in power for more than 70 years, and then drastically changed towards neo-liberalism in the 1980s and, during the 1990s, privatized many goods and services including, to a large extent, the social security and pension systems. This chapter will also provide a first glance of social rights in Mexico and how the state has posed as its constitutional defender in theory, but has not actually protected them in practice. Such analysis will prove useful to understand why the constitutionalization of the RSS has not been the best method to improve welfare in Mexico.*

### **10.1 History of the Mexican welfare state before the 1980s**

Even from its prehispanic background, Mexico has been a country with strong unipersonal rulers as can be seen with its “tlatoani”<sup>584</sup>, “caciques”<sup>585</sup>, “caudillos”<sup>586</sup> and finally, Presidents. This tendency has affected Mexican national history to the point that it is oftentimes divided according to the presidential periods of government

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<sup>584</sup> The tlatoani was king among the city states of the Aztecs, he would be the high priest and military leader, considered commander and chief, and as such would make every decision for his city-state from taxes to warfare.

<sup>585</sup> In Colonial Mexico, caciques and their families were considered part of the Mexican nobility having entailed estates or cacicazgos. The derivative term “Caciquismo” has been used to describe a political system determined by the power of local bosses (caciques), who successfully influence the electoral process in their favor.

<sup>586</sup> Caudillos were military leaders that controlled the territories that used to belong to Spain before the Mexican Independence and who concentrated military and political power in their person.

called “sexenios”.<sup>587</sup> The development of the welfare state and its details after the revolution were no exception to such rules, and a strong executive power can be found in the following descriptions.

### **10.1.1 Separation between public and private beneficence (mid to late XIXth century)**

Before the Mexican Independence from Spain in 1821, most welfare institutions and norms were administrated and enacted by the Catholic Church. Even after the Mexican Independence, the church maintained such power that the new governments started looking for means to submit her to state control. After the triumph of the Mexican liberalism, the separation of church and state meant that the latter should take care of public welfare; but this stance would be opposed by the conservatives. The conservatives argued that the state should not intervene in welfare since the needy were weak due to their vices, and help would just foster their laziness. **Similarly to the case in Japan, assistance was only allowed to those in extreme poverty who had absolutely no means to work.**<sup>588</sup>

In the long government of Porfirio Díaz (1880-1911), also known as the “porfiriato”, the socioeconomic weak were granted the opportunity to receive governmental help. The beneficiaries were classified as orphans, mentally insane, felon minors and pregnant women.<sup>589</sup> Furthermore, in 1899 the Commission of Private Charity was created to promote and patrol individually funded establishments, and became the

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<sup>587</sup> Since the enactment of the 1917 Constitution, Mexico was established as a Representative, Democratic Republic with three branches of Power. The Executive branch is led by the President who may remain in office for **up to six years without possibility of reelecting** Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 89. This is the origin of the word sexenio.

<sup>588</sup> Francisco González Díaz Lombardo, *El Derecho de la asistencia y el Bienestar Social* (Mexico City: Instituto de Investigaciones Jurídicas - UNAM, 1970) at 228.

<sup>589</sup> Mario Luis Fuentes Alcalá, *La asistencia social en México: historia y perspectivas* (Mexico City: Ediciones del Milenio, 1998) at 54-55.

most important precedent for the participation of private entities into welfare institutions.<sup>590</sup>

Before the Mexican Revolution, there were only two examples of legislation regarding social security for the workers and their families: the laws about Work-related Accidents of Estado de Mexico (1904), and of Nuevo León (1906). These statutes established the obligation for employers to compensate workers in the cases of severe illness, accidents or death related to their work.<sup>591</sup> Regarding public assistance, it must be mentioned that welfare beneficiaries had to demonstrate their desperate situation as well as their need. In sum, it can be said that during the government of Díaz's, both social welfare and public assistance maintained their status as a form of charity.<sup>592</sup>

### **10.1.2 After the Mexican revolution (1910-1934)**

Since the revolutionary movement of 1910, and therefore, since the government of President Madero and until that of Calles, public welfare didn't have any important changes. The reason behind this stillness was that more urgent political and economic problems hindered public assistance programs.<sup>593</sup> It is important to note, as Gloria Guadarrama does, that these problems were related, to a great extent, to the lack of efficiency of both charity and welfare programs in addressing inequality and social injustice.

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<sup>590</sup> Gloria Guadarrama Sánchez, "El bienestar de la población mexiquense y los sistemas de protección social" in Pablo Mejía Reyes, Gladys Rivera Herrejón, David Iglesias Piña (et. al.), *La economía del Estado de México: Hacia una agenda de investigación* (Mexico City: El Colegio Mexiquense, 2004) at 11.

<sup>591</sup> Fernando Solís, & Alejandro Villagómez, *supra* note 205, at 58.

<sup>592</sup> Gloria Guadarrama Sánchez, "Condiciones de bienestar y políticas de protección social en el Estado de México hacia el final del siglo XX" (2001) *Documento de Investigación, El Colegio Mexiquense* 103.

<sup>593</sup> Mario Luis Fuentes Alcalá, *supra* note 589, at 62.

On those grounds, “the social justice movement argued that poverty was not due to the poor’s weakness, but due to the corrupt and undemocratic state which allowed low wages, did not provide sources for work and even enabled the exploitation of laborers.”<sup>594</sup> Therefore, along with the revolutionary agenda, public assistance changed in order to secure economic resources (according to the recently established minimum general wage), and try to empower the unprivileged by incorporating them to the labor market.<sup>595</sup>

Along with the Mexican Revolution, World War I was concluding and with it, many countries in Europe adopted social security systems. With the League of Nations and the creation of the ILO, an international crusade for labor protection was established. Mexico became one of the spearhead nations on labor protection due to its recent industrialization (during President Díaz’s regime), and the enactment of the Mexican Constitution of 1917.<sup>596</sup> The Constitution of 1917 introduced social rights that made “the revolution” a guiding principle for the state.

The constitution formally divided welfare into public (provided by the state) and private (provided by individuals, but detailed in specific laws). Beneficence institutions could no longer be administered by religious ministers or organizations.<sup>597</sup> But the most important constitutional provision regarding welfare rights is Article 123 Paragraph XXIX. In it, and its subsequent amendment of 1929, social security was included as a constitutional right in the following terms:

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<sup>594</sup> Gloria Guadarrama Sánchez, *supra* note 590, at 16.

<sup>595</sup> One requisite to receive support and benefits (as in the Japanese case) was that the recipients didn’t have any family that could help their sustenance. See Mario Luis Fuentes, *Vulnerabilidad social y política pública* (Mexico City: El Colegio de México, Centro de Estudios Sociológicos, 1996).

<sup>596</sup> José Díaz Limón, “La seguridad social en México un enfoque histórico (primera parte)” (1997) 2 *Revista de la Escuela Libre de Derecho de Puebla* 50.

<sup>597</sup> Mario Luis Fuentes Alcalá, *supra* note 589, at 75.

“XXIX. The enactment of a Social Security Law is of public interest and it shall include insurance against disability, life, illness and work related accidents and any other analogous circumstances.”<sup>598</sup>

However, after President Calles ended his administration in 1928, the succession of Presidents forming the “Maximato”<sup>599</sup> were once again passive towards welfare regulation. After the Maximato came the debate of the “extended state” in which two antithetical positions were confronted regarding the future of the Mexican state.<sup>600</sup> While, a) the social current of the revolution looked towards the establishment of a welfare state, b) the liberal current tried to develop a market economy on the grounds of competition. Because of such contradiction, while social legislation promoted the development of policies to increase conditions of equality, the liberal legislative veered towards policies oriented at strengthening the economic model which, *de facto*, was contrary to the goals of welfare.<sup>601</sup>

### **10.1.3 The social state, the first social security law, and the institute of social security (1934-1946)**

The aforementioned debate would be resolved during Lázaro Cárdenas’ administration (1934-1940).<sup>602</sup> Cárdenas would begin the political use of welfare legislation, replacing charity and beneficence institutions with “public assistance”.

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<sup>598</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 123, Par. XXIX as amended in January 29, 1929.

<sup>599</sup> *Maximato* was a period in the historical and political development of Mexico ranging from 1928 to 1934. That period was named after Plutarco Elías Calles, who was known as “el Jefe Maximo”. Elías Calles was President in the period 1924-1928, but throughout the next six years, Calles was Mexico’s *de facto* leader. There were three Presidents in this era, all of them subordinated, in a lesser or greater extent, to Calles. The Presidents and their respective mandates are the following: 1) Emilio Portes Gil (1928–1930), was designated by Congress to replace the elected President Álvaro Obregón, who was assassinated before taking office. Pascual Ortiz Rubio (1930–1932), who was elected to complete the term but resigned before its end. 2) Abelardo Rodríguez (1932–1934), was designated by Congress as substitute for Ortiz Rubio. 3) The influence of the former President ended when Lázaro Cárdenas del Río expelled him from the country in 1936.

<sup>600</sup> Carlos Sirvent Gutiérrez, *La sucesión presidencial de 1910, en 1988* (Mexico City: Partido Revolucionario Institucional, 1988) at 392.

<sup>601</sup> It is interesting to note the validity of this “extended state” in the current neo-liberal policies applied to Mexico in the last 20 years according to which only when extreme unemployment and low wages appear assistential programs are rolled out.

<sup>602</sup> This period is denominated by historians as “cardenism”.

The new welfare structure gave priority to maternity and childcare “congruent with the requirements of the demographic structure of Mexico.”<sup>603</sup> However, Cardenas’ policy would also place women and children as vulnerable individuals incapable of decision-making or political participation.

In a period of approximately thirty years between the porfiriato and the cardenism, welfare politics had oscillated from private to public; from individual to state responsibility; and from lowering the effects of poverty to recognizing it as a political duty. Such social welfare tendencies would continue under the administration of President Manuel Ávila Camacho (1940-1946).

Ávila Camacho was a mediator between the labor force and the employers. He began his administration by creating the Secretariat of Labor and Social Welfare in 1940, and very importantly the Social Security Law (SSL) in early 1943.<sup>604</sup> Moreover, since the 1940s a new project of nation, one that would change Mexico from an agricultural to an industrial economy, began taking form. With the advent of WWII, and due to the demand of various products by other countries, Mexico had a jumpstart towards advanced industrialization.<sup>605</sup> With the control of labor unions during this process of industrialization, **the PRI, parallel to what would later happen with the Japanese LDP, governed uncontested in the Presidency, Congress and even local states for another 54 years. The conditions that enabled such monopartidism will be further discussed in the period known as the “Mexican Miracle”.**

#### **10.1.4 The Mexican miracle (1946-1982)**

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<sup>603</sup> Gloria Guadarrama Sánchez, *supra* note 592, at 112.

<sup>604</sup> Ley del Seguro Social. Publicada en el Diario Oficial de la Federación el Martes 19 de enero de 1943.

<sup>605</sup> See Isabel Rueda Peiro, *México: Crisis, Reestructuración Económica Social y Política 1982-1996* (Mexico City: Universidad Nacional Autónoma de México - Instituto de Investigaciones Económicas - Siglo XXI, 1998) at 51.



Since 1946 the Mexican Gross Domestic Product (GDP) and its institutions sustained growth under a paternalist state which assumed welfare responsibilities according to Esping-Andersens' definition of a welfare state (including both social security and public assistance). During this period the centralization of power continued, and there was an enormous demographic movement from the countryside to Mexico City where the three branches of power resided. Due to the Cold War, Mexico was a strategic ally of the USA and a representative of all Latin America. Also because of this, Mexico signed all the relevant international declarations and became an important member of organizations such as the UN, and especially the ILO<sup>606</sup>.

It was until President Adolfo Ruiz Cortínez's *sexenio* (1952-1958) that the first economic crisis since the beginning of the "Mexican Miracle" occurred.<sup>607</sup> Nonetheless, regarding welfare policy for workers and their families, protectionism continued, the minimum wage was increased and was indexed to inflation for the first time. Cortínez's work would be continued by President Adolfo López Mateos (1958-1964) who created the Institute of Social Security for the Public Workers (ISSSTE), which took its current form in the next administration of President Gustavo Díaz Ordaz (1964-1970).

Since the beginning of President Luis Echeverría Álvarez's administration (1970-1976)<sup>608</sup> the paternalistic approach to welfare and the petroleum industries meant, unlike the case of Japan, a bonanza during both oil shocks of the 1970s. Echeverría created the Institute of the National Fund for Labor Housing (INFONAVIT), which further increased the notion of the state giving social rights and benefits for the unionized workers.

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<sup>606</sup> See Daniel Cosío Villegas, *La crisis de México [1947]* (Mexico City: El Colegio Nacional, 1997).

<sup>607</sup> Ruiz Cortínez had to devalue the peso from 8.50 to 12.50 per dollar to control such crisis. See Lorenzo Meyer, "La encrucijada" in *Historia General de México* (Mexico City: El Colegio de México, 1976) Vol. 4.

<sup>608</sup> See Elena Poniatowska, *La Noche de Tlatelolco* (Mexico City: Editorial Era, 2013).

By the beginning of the 1980's the welfare model that acknowledged state responsibility began to be abandoned in favor of a neo-liberal economic model. Such model was adapted in Mexico with a particularly strong reduction of the public sector. In this new model, social policy assumed a mere compensatory role for the strong macroeconomic adjustments.<sup>609</sup>

## **10.2 The end of the Mexican welfare state (1982-2000)**

Part of the almost 40 years of the Mexican Miracle had to do with the generalized confidence that the state would guarantee labor, welfare and economic conditions for commerce. With globalization, by the end of the XXth Century, this guarantee would become untenable. The presidentially protected monopolies and institutions would have to finally face competition from other sectors and other countries. This, in turn, ended the *dirigisme* by which companies and investors supported presidential decisions.

### **10.2.1 The rise of neo-liberalism and the December mistake (1982-1994)**

The three Presidents<sup>610</sup> that ended the protectionist welfare state had much in common, they were considered: a) New generation members of the PRI (having enrolled when the party had a post-revolutionary and pragmatic ideology); b) Technocrats (basing their decisions on macroeconomic numbers instead of ideology); c) Chicago boys (because of their postgraduate education in Political Administration at American universities {Harvard and Yale}, and their alleged influence by the postulates of Milton Friedman); d) Upper-middle class (perceived thus as distanced from the problems of the vast impoverished Mexicans) and;

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<sup>609</sup> Gloria Guadarrama Sánchez, *supra* note 592, at 126.

<sup>610</sup> Miguel de la Madrid Hurtado (1982-1988), Carlos Salinas de Gortari (1988-1994) and Ernesto Zedillo Ponce de León (1994-2000).

e) Neo-liberal (basing their policies in cost-benefit analysis, free competition and a reduced state).

Regarding this last point, by the beginning of the 1980s, there were clear signs of a neo-liberal restructuring of the Mexican state as a result of a) the deterioration of the corporative structure; b) the progressive weakening of the presidential power and particularly its ability to control the national economy and; c) the surge of plurality and competition in politics and commerce.

Along with these national issues, the international finance institutions had strong leverage over the Mexican state. From 1980 to 1982 Mexico's sovereign debt grew to unpayable proportions, and by August 12th, 1982 Mexico's Minister of Finance Jesús Silva Herzog informed the US government and the International Monetary Fund (IMF) that Mexico was unable to comply with the payment of its external debt of USD 80 billion.<sup>611</sup> Mexico then had to negotiate with the IMF a financing scheme to gradually pay its sovereign debt, which enabled such international organism to force reforms (including the pension reforms that will be subsequently discussed), enabling free-market capitalism in detriment of the impoverished<sup>612</sup>.

To comply with the aforementioned reforms, Miguel de la Madrid (1982-1988), began taking macroeconomic measures. In this context, the Mexican economy "traditionally closed and protected was forced to open quickly and definitively to compete in the international market."<sup>613</sup>

A strong backlash from the Mexican companies changed the previous submissive relationship they had with the state. The investors demanded less state regulation in

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<sup>611</sup> Federal Deposit Insurance Corporation, *The LDC Debt Crisis, An Examination of the Banking Crises of the 1980s and Early 1990s* (FDIC, 1997).

<sup>612</sup> Rosario Green, *Deuda Externa y Banca Transnacional en México 1970-1986. Pasado y Presente de la Deuda Externa* (Mexico City: Instituto de Investigaciones Dr. José María Luis Mora, 1988).

<sup>613</sup> Lorenzo Meyer, *supra* note 607, at 366.

exchange for fostering economic stability and not taking their money elsewhere. This was a hard blow to the Mexican government (*i.e.* President) since he could no longer maintain his dominating stance, but had to rather adopt one of support from a distance.<sup>614</sup>

Evidently, the change in the *status quo* would also affect social security, since the state could no longer sustain it by itself. The private companies would now be held accountable for making sure their workers were enrolled and protected by either a state-sponsored or a privately funded scheme of social security. **Similar to the case of Japan, social solidarity was now a burden shared by state and private companies in equal measure.**<sup>615</sup>

The relationship would also change within society at large. With the neo-liberal restructuring, the Mexican state's legitimacy was in jeopardy. The PRI began developing a new model of social security based on two principles: efficiency in the benefit distribution and co-participation. The measures taken to enact such model were politically costly, but would allow reducing the budget deficit by as much as 12%.<sup>616</sup>

After De la Madrid, the neo-liberal policies would gain full force in the government of Carlos Salinas de Gortari (1988-1994). Salinas would divide welfare in social security (for the employed), and limited and specifically targeted programs of public assistance (for the unemployed). **Furthermore, similarly to the “people's burden rate” of Japan,**<sup>617</sup> **the government circulated in the media the discourse that**

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<sup>614</sup> Sergio Bárcena Juárez & Diego Alejo Vázquez Pimentel, “From a Benefactor State, to a Poliarchy. A social Security Comparative Analysis in Mexico” (2010) 52:2 *Acta Sociológica* 99, at 112.

<sup>615</sup> See Chapter 6.2 and Chapter 6.3.

<sup>616</sup> See Gerardo Ordoñez Barba, “El Estado de Bienestar en Las Democracias Occidentales: Lecciones para Analizar el Caso Mexicano” (2002) 14:24 *Región y Sociedad* 100.

<sup>617</sup> See Chapter 4.

**“progress and stability were no longer only the responsibility of the state, and that they had to be shared by government and citizenship”<sup>618</sup>**

Salinas’ administration attracted massive foreign capitals by issuing short-term instruments backed by American dollars, and signing the North American Free Trade Agreement (*NAFTA*) with USA and Canada. However, in the last year of its term, Salinas faced a paramilitary indigenous uprising in Chiapas (by the EZLN), and the assassination of the PRI’s presidential candidate (and presumptive future president) Luis Donaldo Colosio. These circumstances sparked unrest among foreign investors who changed their assets before the Mexican market crashed. The Bank of Mexico had to buy American dollars to honor their debt to the multitude of creditors and this, along with the famous December Mistake,<sup>619</sup> created a ripple effect across Latin America.

When President Ernesto Zedillo (1994-2000) began his administration, GDP had decreased 6.2%, many banks went bankrupt and poverty rose in both rural and urban areas after the businesses that remained in Mexico downsized.<sup>620</sup> Overall household incomes plummeted by 30% and extreme poverty grew from 21% in 1994 to 37% in 1996, undoing the previous ten years of successful poverty reduction. The nation’s poverty levels would not begin returning to normalcy until 2001, and with households’ lower demand for primary healthcare, there was a 7% hike in mortality rates among infants and children in 1996.<sup>621</sup>

Zedillo’s administration also began depending on private capital to finance urgent measures of welfare. This, in turn, would change the status of social security rightholders and public assistance beneficiaries. Even though the state would not

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<sup>618</sup> Sergio Bárcena Juárez & Diego Alejo Vázquez Pimentel, *supra* note 614, at 114.

<sup>619</sup> The December Mistake consisted in the devaluation of the Mexican peso allowing it float freely in trade markets since December 20, 1994.

<sup>620</sup> Paola Pereznieto, *The Case of Mexico’s 1995 Peso Crisis and Argentina’s 2002 Convertibility Crisis: Including Children in Policy Responses to Previous Economic Crises* (UNICEF Report, 2010) at 10.

<sup>621</sup> *Ibid.* at 21-22.

cede welfare in its totality (because of its importance for political legitimation), it certainly redrew its boundaries. The new boundaries enabled what Sergio Bárcena and Diego Vázquez denominate as the *Mexican Polyarchy*: “a multiplicity of economic actors competing between them in the local markets”.<sup>622</sup> These new boundaries also led to Mexico’s First Phase of Privatization.

### 10.2.2 First phase of privatization (1990-2000)

Following the example of Chile, President de la Madrid had sold a few state-owned institutions with the argument of “reducing the obese government”.<sup>623</sup> However, it was during Salinas’ administration that fundamental and strategic industries such as steel,<sup>624</sup> telephony,<sup>625</sup> television,<sup>626</sup> and banking,<sup>627</sup> would be sold to the private sector. The nationalist zeal would also be forgotten since most of these industries were sold to foreign investors. Zedillo would continue such trend by auctioning the train transportation,<sup>628</sup> and satellite telecommunications industries.<sup>629</sup>

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<sup>622</sup> Sergio Bárcena Juárez & Diego Alejo Vázquez Pimentel, *supra* note 614, at 118.

<sup>623</sup> “In 1980, Chile took the unprecedented step of switching from a pay-as-you-go pension system to a substitutive pre-funded pension system. It continued to pay benefits promised under the old system by issuing recognition bonds and running budget surpluses during the initial years to finance these bonds. Chile was followed by Argentina and Colombia in 1994. With the publication of the landmark study *Averting the Old-Age Crisis* that same year, the World Bank and other leading international organizations were now officially encouraging individual pre-funded accounts. It set out the so-called three-pillar model:

Pillar 1. This was envisioned to be a small pay-as-you-go system that would act as a safety net.

Pillar 2. This was the main government mandated but privately run pre-funded system.

Pillar 3. This was the voluntary saving scheme.

Since then, the World Bank has helped more than 80 countries make changes in their pension systems. Of these, about a dozen countries in Latin America have passed laws introducing mandatory saving, while a similar number in Eastern Europe and central Asia – mainly in the post-Soviet “transition economies” – have also made legal provisions for individual accounts. Individual accounts represent the so-called second pillar of the three-pillar system first proposed by the World Bank. Nowhere in the world have such changes been more dramatic than in the countries of Latin America”. Tapen Sinha, “Latin America – privatized pension funds in Mexico compared with elsewhere”, (2009) April *Benefits & Compensation International*, at 3.

<sup>624</sup> The Mexican Steel Company was sold to Arcelor (a Spanish-German-Italian-Polish transnational).

<sup>625</sup> The Mexican Telephone Company was sold to Carlos Slim and became the new TELMEX.

<sup>626</sup> This Company was sold to Carlos Salinas Pliego and became Televisión Azteca.

<sup>627</sup> The Mexican Banks were sold to Canada (SCOTIABANK), Hong Kong (HSBC), Spain (BANAMEX and SANTANDER) and USA (BANAMEX-CITIGROUP and INBURSA-WALMART).

<sup>628</sup> 51% of the Mexican Train company was sold to Kansas City Southern and 49% was bought by Carlos Slim and his financial groups CARSO.

<sup>629</sup> The Mexican Telecommunications Company was bought by the French transnational EUTELSAT.

Privatization would cause constant protests by civil society and national businessmen alike since very little transparency was given to the auctions and sales. Nonetheless, the discourse of “better prices and services due to more competition” was used to counter every protest and demonstration.<sup>630</sup> The real problem began when once again, following Chile’s example; Salinas’ administration developed a series of structural reforms in welfare that would enable private investment and administration of social security.<sup>631</sup>

In late 1991 the System for Retirement Savings (SAR) was created and immediately took the pension funds (that up to this time were administered by the state) and transferred them to private administration and capitalization. Although many workers appealed the administrative action,<sup>632</sup> it was legalized with an amendment to the SSL in 1995. Such changes marked the official beginning of the process of welfare privatization in Mexico.

By July 1997, the National Pensions Scheme was eliminated and its administration by the IMSS was transferred to the private “Retirement Funds Administrators” (AFOREs) which were international banks and financial institutions. Once again, due to the overwhelming number of protests, President Zedillo announced in 1998 that “the State would not cease to protect and supervise social security for the welfare of all Mexicans.”<sup>633</sup> But the reality was that overnight, the new AFORE required 1,250 weeks of labor (instead of the previous 500) to allow access to an old-age pension. The change was almost threefold, rising from approximately 10 to 25 years. **Moreover, the age for pension entitlement was raised from 55 to 65 years**

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<sup>630</sup> Carlos Bazdreich & Victor Urquidí, (comps), *Privatización: Alcance e Implicaciones* (Mexico City: CIDE, 1992).

<sup>631</sup> This case can be compared to Japan as described in Chapter 5.

<sup>632</sup> Such claims and cases will be further examined in Chapter 13.2.

<sup>633</sup> “Firme e irrenunciable, el compromiso del Gobierno de la República con la seguridad social para los trabajadores mexicanos: Ernesto Zedillo”. Comunicado No. 1096. (Mexico City: Presidencia, octubre 12, 1998).

**immediately (not progressively like in Japan).** Finally, if a worker stops contributing to the pension scheme before accumulating 15 years of contribution, not even a proportional part of his contributions can be reimbursed.<sup>634</sup>

Due to the previous changes, thousands of workers lost their pension entitlements since many of their employers used the reforms to avoid paying pensions at all. Moreover, with the reform, the workers or their beneficiaries had to directly litigate against the AFOREs to get social security benefits. The litigation numbers increased to the point that in 1998 special tribunals and a Retirement Funds Supervisory Commission (CONSAR) had to be created as emergency measures.<sup>635</sup>

It is important to remember that Mexico had signed and ratified the ICESCR, and as a member state had even participated in the Commission in charge of elaborating GC19 in 1990. Although GC19 did not prohibit states from allowing private participation in welfare systems, it did include the following caveats: a) The involvement of the private sector should be consistent with democratic principles (particularly the right to participation and transparency); b) The private sector should be independently monitored and penalties should be imposed in case of non-compliance and; c) ***“The government should ensure that private actors take the necessary steps to assist in the realization of the RSS or accept the responsibility itself to correct market failures.”***<sup>636</sup>

In the case of Mexico, the three caveats went unattended. Only after many protests, did some remedial regulation partially address them. Regarding caveat a), although by 1999 a regulation for transparency in service costs and interest rates was mandated, such regulation only included charges and benefits, and up to this day

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<sup>634</sup> See AMPARO EN REVISIÓN 220/2008. QUEJOSA: \*\*\*\*\* Y OTROS. PONENTE: MINISTRA MARGARITA BEATRIZ LUNA RAMOS.

<sup>635</sup> See Perspectivas de la Consar, a Diez Años de su Creación (Práctica Fiscal Núm. 380 noviembre, 2004).

<sup>636</sup> Malcolm Langford, “Social Security and Implications for Law, Policy and Practice” in Eibe Riedel, *supra* note 223, at 51.



does not mandate a requirement to report on which financial instruments or in what amount have the funds been specifically invested (not even by making a formal petition addressed to the specific AFORE).<sup>637</sup> Caveat b) was addressed with the creation of the CONSAR, which nonetheless takes so much time in the litigating procedure that it actually deters many beneficiaries from demanding welfare rights. Finally, pertaining caveat c) no state regulation was created at all.

**Contrary to their mandate, and similarly to the delegation of responsibility that occurred in Japanese Style Welfare Society,<sup>638</sup> the Mexican state allowed for the AFORES to charge “the largest commissions in the world”<sup>639</sup> with very little competition between them.** Such change eroded the benefits of the first batch of pensioners and, once again, only after many protests, in the second half of the 2000s, the “free market approach to social security” began to be limited.

### 10.3 The change in power (2000-2012)

After 71 years of uncontested power, the PRI lost the 2000 election. The rightist party, “Partido Acción Nacional”, (PAN), in a coalition with the Green Party (Partido Verde), got President Vicente Fox Quezada (2000-2006) in office. The change in power was favored by many political negotiations that considered a truly democratic Mexico was required for economic purposes. Moreover, the many problems inherited by the Zedillo administration, and an enraged civil society that

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<sup>637</sup> “Consar Obstaculiza la Transparencia Sobre Inversiones de Afores” (Consar hinders transparency on investments Afores) El Financiero, Yuridia Torres, 28.03.2016, available at: <http://www.elfinanciero.com.mx/economia/consar-obstaculiza-la-transparencia-sobre-inversiones-de-afores.html>.

<sup>638</sup> The Japanese Style Welfare Society was analyzed in Chapter 5.

<sup>639</sup> “Las Afores que Operan en México Cobran las Comisiones más Altas del Mundo” (Afores operating in Mexico charge the highest fees in the world). La Jornada. México D.F. Domingo 13 de abril de 2003, available at: <http://www.jornada.unam.mx/2003/04/13/041n1soc.php?origen=soc-jus.htm>.

had to endure one of the worst economic crisis in Mexican history also enabled the change of government.<sup>640</sup>

Despite high hopes were laid on the Fox Presidency, in practice it made very few changes to the *status quo*, and instead compromised between smaller corporative benefits and half-made market reforms. Regarding welfare in particular, only three relevant institutional changes were made. First, subsidies for the AFORE providers (which had been granted as an adjustment stimulus for private investors until 2002) were canceled. Secondly, pension fund accounts for formal private workers were individualized, allowing each contributor to choose what percentage of their contribution would be used for: a) Old Age Retirement Pension, b) Housing Credits, and, c) Voluntary investment in state instruments. Third, regarding public assistance as part of social security for unemployed or informally employed people, *Seguro Popular* and *Oportunidades* came to existence.

These programs offered very limited medical and income replacement insurances respectively, and targeted only the poorest of Mexicans. According to Enrique Valencia, these changes “not only failed to overcome the fragmentation of welfare policy but actually incremented it”.<sup>641</sup> In the first “new *sexenio*” what in fact happened was that Mexico became a schizophrenic welfare state with both classic liberal institutions, and new residual institutions. Thus, after almost 50 years of solid and official social security institutions, by 2002 only 38.6% of the population had some form of health or pension insurance<sup>642</sup> (and up to this day no one has real unemployment insurance).<sup>643</sup>

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<sup>640</sup> Guadalupe Paz (ed.), *Mexico's Democracy at Work: Political and Economic Dynamics* (Colorado: Lynne Rienner, 2005) at 25.

<sup>641</sup> Enrique Valencia Lomelí, *La Política Social, Viejos y Nuevos Actores en Una Disputa de Estado*, Presentation given at the XXIII Congress of the Latin American States Association (Washington: September 2001).

<sup>642</sup> The aforementioned insurance was the privately paid or the once state administered and now AFORE administered employee/employer/state paid insurance.

<sup>643</sup> This is just half of the average of the countries studied by Esping-Andersen, see Carmelo Mesa Lago, *Las Reformas de Salud en América Latina y el Caribe: Su Impacto en Los Principios De Seguridad Social* (Chile: CEPAL, 2005) at 57.

Furthermore, the social security system in Mexico maintained its strong division and stratification. As an example, there are two main social security schemes for formal workers; those of workers in the private sector (IMSS), and those of workers in the public sector (ISSSTE), however, these two main schemes coexist with other distinctions regarding who the beneficiaries are, and therefore which institute will provide the services.

Among others, distinctions by: a) Political/administrative status (e.g. State of Durango, municipality of Chihuahua); b) Activity/Sector (e.g. the Army, Marine and Air Force, Mexican Petroleum (PEMEX) employees, Federal Electricity Commission (CFE) employees, local Universities, and Bank of Mexico all have their own scheme); c) Range of services (e.g. health or pension only or mixed models) and; d) Amount of payment (e.g. for the poorest there is usually a 100% exemption when affiliated to *Seguro Popular*, and a 90%-50% exemption for the beneficiaries of the social programs such as *Oportunidades*), can be found.<sup>644</sup>

Not only does such fragmentation translate into administrative chaos, it deters resource pooling and creates a great inequality according to each territory within Mexico. About this, Carmelo Mesa Lago commented:

“The distribution of the national budget spent within the states (as a total of public spending) showed that 21 of the 31 states were above the national average at 15.9% and 11 below. Rich states such as Nuevo León and Tamaulipas in the north received 23.5% and 16.3% respectively while poor states in the south received Chiapas (12%), Oaxaca (13.6%) and Guerrero (14%).”<sup>645</sup>

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<sup>644</sup> See Estudio de los Sistemas de Pensiones en México (OCDE, 2015), available at: [https://www.consar.gob.mx/otra\\_informacion/pdf/OECD-Review-Pension-Systems-Mexico-Highligbambhts-ESP.pdf](https://www.consar.gob.mx/otra_informacion/pdf/OECD-Review-Pension-Systems-Mexico-Highligbambhts-ESP.pdf).

<sup>645</sup> Carmelo Mesa Lago, *supra* note 643, at 107.

Additionally, in 2005, near the end of Vicente Fox's administration, of the 21 existing AFOREs, 10 of them had increased their commission charges by 200%, and the 11 other had increased their commission charges by an average of 77% according to a special CONSAR investigation.<sup>646</sup> Furthermore, the same investigation revealed that some of the AFOREs charged the equivalent of 25% from workers contributions. The timing of such revelations couldn't be worse since elections were happening next year.

The 2006 election was a historically close call between Felipe Calderón Hinojosa (PAN), and the contender for the leftist party, Partido de la Revolución Democrática (PRD), Andrés Manuel López Obrador. At the end, it was won by the former by less than 300,000 votes. According to Beatriz Magaloni, one of the reasons for Calderón's triumph, despite the previous PAN administration, had to do precisely with welfare and social policy.<sup>647</sup>

Although *Oportunidades* and *Seguro Popular* had small budgets, they effectively expanded health and income benefits in areas where the PRI had not done so in the previous years. Moreover, the design of these assistance programs as conditioned transfers, gave the sense of certain indebtedness towards the PAN that according to Magaloni could have gained them an estimated 5 million extra votes.<sup>648</sup>

During his administration, President Calderón (2006-2012) continued with the politically fruitful *Oportunidades* and augmented cash conditioned transfers in order

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<sup>646</sup> Aumentan Afores hasta 200 por ciento Comisión Sobre Saldo: Consar. (Afores increase up to 200 percent commission on balance: Consar) Notimex / La Jornada, 20 de abril 2007, available at: <http://www.jornada.unam.mx/ultimas/2007/04/20/aumentan-afores-hasta-200-por-ciento-comision-sobre-saldo-consar>.

<sup>647</sup> See Beatriz Magaloni, Alberto Diaz Cayeros & Federico Estévez-Abe, *Strategies of Vote Buying: Democracy, Clientelism, and Poverty Relief in Mexico (forthcoming)* (New York: Cambridge University Press).

<sup>648</sup> *Ibid.*

to increase clientelism.<sup>649</sup> However, after the crucial electoral boost, Calderon's administration changed its way towards the "war against drug trafficking". Hereafter, the national budget would be proportionally increased in military and police areas and reduced in welfare.

According to official data from the CONEVAL, since 2009 income fell due to the global financial crisis and did not recover until late 2012. The price of the basic basket alone rose to 5%, the real income average remained the same as in 1992, and the GNP per capita could not rise above 1.2% from 1992 to 2012. Moreover, by 2012 there were 53.3 million of people in poverty, representing 47.6% of the total population.<sup>650</sup>

Also, as in the previous administration, the social security and public assistance programs remained fragmented and conditioned. In 2011 the CONEVAL issued another report which pointed that federal social development programs were only effective in protecting people against conjunctural adversities, but were not effective at all regarding the creation of jobs.<sup>651</sup> Another independent study elaborated by the Center for Research and Higher Studies in Social Anthropology added that there were patterns of exclusion in the *Oportunidades* program which impeded access to

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<sup>649</sup> Clientelism must be understood in modern political settings, as associated with the selective use of public resources in the electoral process. The patrons, who can be individual politicians or political parties, selectively release various resources—jobs in state administration, titles, pension schemes, or building projects—to individuals or groups in order to "purchase" their vote. Petr Kopecký, "Clientelism" in Bertrand Badie, Dirk Berg-Schlosser & Leonardo Morlino (eds.), *International Encyclopedia of Political Science* (Los Angeles: Sage Publications, 2011).

<sup>650</sup> CONEVAL, Resultados de la Evolución de la Pobreza en México a Nivel Nacional y por Entidad Federativa 2008-2012, available at: [http://www.coneval.org.mx/Medicion/MP/Paginas/Resultados\\_nal\\_2008-2012\\_sin\\_combustible.aspx](http://www.coneval.org.mx/Medicion/MP/Paginas/Resultados_nal_2008-2012_sin_combustible.aspx).

<sup>651</sup> *Ibid.*

other social services linked to its affiliation.<sup>652</sup> Such exclusions had to do with ethnicity, migration and even religion.<sup>653</sup>

## 10.4 This *sexenio* so far

Notwithstanding the lack of a vigorous welfare policy, the Calderón presidency will be infamously remembered by the violence, insecurity, and deaths generated with his “war against drug trafficking”. The official (and probably underestimated) number of people killed in the *narcowar* (2016-2012) was 121,638.<sup>654</sup> As a punishment vote, and trying to return to more corrupt, but less violent times, the electorate voted for PRI’s return to power in 2012.<sup>655</sup>

Indeed, President Enrique Peña Nieto (2012-2018) defeated by a wide margin his contenders from the PAN (which implied continuing the *narcowar*), and PRD (which had a radical leftist agenda that frightened many voters). The PRI garnered the fear of the general society to a degree that allowed them to also gain a majority in both houses of the congress. Thus, similar to Japan’s situation after 2012, one party controls both the executive and the majority of the legislative branches, having thus ample decision-making powers.

As if that wasn’t enough, on December 2<sup>nd</sup>, 2012, just one day after Peña took the presidential seat, the three main parties, PRI, PAN, and PRD signed the famous “Pact for Mexico” in which they accorded a truce of political attacks until structural

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<sup>652</sup> *Ibid.*

<sup>653</sup> CIESAS “la calidad de la rendición de cuentas: transparencia y acceso efectivo al programa Oportunidades en México” (The quality of accountability: transparency and effective access to Oportunidades program in Mexico)” (Mexico City: CIESAS, 2012).

<sup>654</sup> “Más de 121 mil muertos, el saldo de la narcoguerra de Calderón: INEGI” (More than 121 thousand dead, the balance of the drug war of Calderon: INEGI) Proceso, July 30, 2013, available at: <http://www.proceso.com.mx/348816/mas-de-121-mil-muertos-el-saldo-de-la-narcoguerra-de-calderon-inegi>.

<sup>655</sup> This was the same year and month in which the Japanese LDP returned to power.

reforms were passed. These reforms were designed around 5 agreements: a) Extension of the rights and liberties of the Mexican citizens; b) Economic growth, increase in employment and competitiveness; c) Modernization of the police and justice systems; d) An increase in transparency, accountability and combat measures against corruption and; e) Democratic governance.<sup>656</sup> The goals were ambitious, ambiguous and varied, and at the time of writing, only 3 substantive reforms based on them have been enacted with poor levels of success.

From those 5, the Financial Reform of January 2014<sup>657</sup> was designed to boost savings and promote credits from the Development Bank. In this way, private projects related to sustainable welfare are being supported. In a strikingly similar manner to Japan's "Participatory Welfare Society",<sup>658</sup> Mexico has used such reform to gain legitimacy and at the same time delegate responsibilities of welfare services to private entities. Other of the reform's objectives include achieving more transparency in financial institutions and services and mandating AFOREs to disclose information regarding social security funds and its investment. Yet, according to recent reports the transparency and disclosure measures haven't been sufficient.<sup>659</sup>

As many expected, in 2013 the Pact for Mexico was abandoned by PAN when accusations of electoral fraud in the states of Veracruz and Chihuahua led to their distrust of the "same old PRI".<sup>660</sup> PRD also abandoned such Pact when President

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<sup>656</sup> The full Pact can be consulted at the Webpage of Pacto por Mexico, available at: <http://pactopormexico.org/PACTO-POR-MEXICO-25.pdf>.

<sup>657</sup> Official Journal of the Federation, January 9, 2014. (Mexico Internal Affairs Ministry).

<sup>658</sup> See Chapter 5.

<sup>659</sup> "Se fomenta la transparencia de las inversiones que realizan las AFORE" (Mexico City: 29, May, 2016, CONSAR) Retrieved at: <https://www.gob.mx/consar/prensa/nueva-radiografia-financiera-de-las-afore-para-estimular-mayor-competencia-en-el-sar?idiom=es>.

<sup>660</sup> See "El PRD deja el Pacto por México por el tema de la Reforma Energética" (Mexico City: EXPANSIÓN/CNN. November 28<sup>th</sup>, 2013), available at: <http://expansion.mx/nacional/2013/11/28/el-senado-entra-en-su-recta-final-con-el-destrabe-de-la-reforma-politica>.

Peña announced a sixth reform that would allow private investment in the petroleum and energy sector.<sup>661</sup> After these events, the PRI returned to use its scheme of *welfare for legitimacy* including new social assistance programs.

In this regard, by the end of 2014, the Presidency announced the new *Prospera* program, which replaced PAN's *Oportunidades* for poverty alleviation. Although it maintains the same benefits scheme for those already enrolled in *Oportunidades*, *Prospera* adds support with university scholarships, loans, as well as direct food rations through *Cruzada contra el Hambre* (Crusade Against Hunger).<sup>662</sup>

But the second half of 2015 was a time of even more national turmoil and the CONEVAL announced in August that the population in poverty increased from 53.3 million Mexicans in 2012 to 55.3m in 2014 (+2 million in 2 years).<sup>663</sup> This time a new welfare program targeted at the elderly population called "65 y más" (65 and more) was announced in September and has been progressively implemented since mid-2016.

*In this chapter, the Mexican welfare state was introduced, which unlike the case of Japan has a long tradition that goes back to the revolutionary movements and the 1917 Constitution. As in the case of Japan, welfare has played a crucial role in maintaining the hegemonic party (PRI) in power. With the advent of globalization and the loss of a strong state, specific social assistance programs replaced the more generous welfare benefits as a bargaining chip for the PRI.*

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<sup>661</sup> This reform allegedly started the "Second Phase of Privatization". See Jesús Zambrano, "PRD resquebraja Pacto por México; busca detener la reforma energética" (PRD crumbles Pact for Mexico; seeks to stop the energy reform) (Mexico City: Excelsior, December 13, 2013).

<sup>662</sup> See the webpage of Cruzada contra el Hambre, available at: <http://sinhambre.gob.mx/>.

<sup>663</sup> See "CONEVAL INFORMA LOS RESULTADOS DE LA MEDICIÓN DE POBREZA 2014", Press release No. 005 (Mexico City: CONEVAL, July, 23, 2015), available at: [http://www.coneval.org.mx/SalaPrensa/Documents/Comunicado005\\_Medicion\\_pobreza\\_2014.pdf](http://www.coneval.org.mx/SalaPrensa/Documents/Comunicado005_Medicion_pobreza_2014.pdf).



# Chapter 11 Social rights in Mexico

*This chapter will examine the protection of social rights in Mexico. First, it will be explained that the tradition of Social Constitutionalism has been essential for understanding, regulating and enforcing social rights since the Mexican Constitution of 1917. Secondly, this chapter will delve into two of the consequences that Social Constitutionalism generated in Mexico since the XXlst Century, namely, the lack of direct justiciability for social rights, and its limitation within the boundaries of social assistance programs. Thirdly, this chapter will also explain that even though Mexico has signed an impressive number of international treaties pertaining social rights, she has failed to give them practical effects. By the end of the present chapter, it will become evident why and how Mexico has arrived at the present era regarding the protection of the RSS.*

## 11.1 Social Constitutionalism and the Mexican Constitution of 1917

While the constitutions sanctioned in the XIXth Century followed the liberal model, a universal movement that defended and promoted the incorporation into the constitutions of social rights began to gain predominance after the Russian and Mexican Revolutions.<sup>664</sup> Such movement, known as Social Constitutionalism, proposed to include the positive role of the state in assuring the welfare of its citizens

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<sup>664</sup> Jorge Reinaldo Vanossi, *El Estado de Derecho en el Constitucionalismo Social* (Bueno Aires: EUDEBA, 1994) at 27.

in the constitution<sup>665</sup> and arguably took its first concrete form in the Mexican Constitution of 1917.<sup>666</sup>

The Mexican Constitution of 1917 represents the first constitution to specifically include social rights in labor and social security matters. The Mexican constitution then influenced other constitutional texts directly or through the Peace Treaty of Versailles.<sup>667</sup> But even though being a pioneer regarding social rights, Mexico left specific provisions regarding the RSS in vague terms and remitting its justiciability and enforcement to a law that would not be enacted until 25 years later.

The reason for this has to do with a central question that underlies Social Constitutionalism: is the State the best agent to decide who and how should the marginalized citizens be compensated? The answer to this question is fundamental in Mexico and other Latin American states since it enables many contradictions which ultimately degenerate Social Constitutionalism into populism.<sup>668</sup>

These contradictions are easy to identify within the Mexican Constitution when comparing, for example, Article 1<sup>669</sup> to 29<sup>670</sup> (universal entitlement vs. limited

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<sup>665</sup> "...including social responsibility of capital, the economic rights of the worker, and the protection and security of the family and the physical and mental welfare of all citizens and its classes". Manuel García Pelayo, *El Estado Social y sus Implicaciones* (Madrid: Tecnos, 1997) at 14.

<sup>666</sup> The Mexican Constitution was enacted 2 years before the better known and often cited Weimar Constitution.

<sup>667</sup> Jorge Sayeg Helú, *El Constitucionalismo Social Mexicano* (México City: UNAM, 1987) at 154.

<sup>668</sup> Daniele Albertazzi and Duncan McDonnell define populism as an ideology that "pits a virtuous and homogeneous people against a set of elites and dangerous 'others' who are together depicted as depriving (or attempting to deprive) the sovereign people of their rights, values, prosperity, identity, and voice". Daniele Albertazzi & Duncan McDonnell, "Twenty-First Century Populism" in Daniele Albertazzi, & Duncan McDonnell, (eds.), *Twenty-First Century Populism: The Spectre of Western European Democracy* (Basingstoke: Palgrave MacMillan, 2008) at 3.

<sup>669</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 1. Par.1. "In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights".

<sup>670</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 29. Par. 1 "In case of invasion, serious breach of the peace or any other event which may place society in severe danger or conflict, only the President of the Republic can suspend, throughout the country or in a certain region, those constitutional rights and guarantees which may constitute obstacles for the State to face the

entitlement of human rights) , Article 5<sup>671</sup> to 28<sup>672</sup> (free markets vs. protectionist markets) or Article 27<sup>673</sup> to Article 28<sup>674</sup> (public vs. private land ownership). The problem is not only the contradiction in itself, but the fact that should doubt exist, it is the state who has the final word in the matter according to those same constitutional articles which allegedly protect “the people”.

Hence, in many cases, Social Constitutionalism is used as an argument to legitimize the state’s arbitrary decisions. And this is not just a theoretical problem; there have been many concrete examples where, as it will be explained in the next chapter, the courts have used such contradictions to confirm presidential decisions.

In this regard, Javier Rincón considers the perversion of Social Constitutionalism into populism as “a political attitude that seeks to rely on the reform of the Constitution to defend the interests and aspirations of the people and meet their immediate demands, without having a long-term goal.”<sup>675</sup> On this subject, (explained in Chapter 4.3.3 as the trivialization of social rights), the fondness for constitutional reforms has been particularly acute in Mexico where the 1917 Constitution has been

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situation easily and rapidly as required by the emergency”. Valid until before the New Human Rights Reform of 2013.

<sup>671</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 5. Par. 1 “No person may be prevented from performing the profession, industry, business or work of his choice, provided that it is lawful”.

<sup>672</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 28, Par. 2-3. “The laws shall establish bases to set maximum prices for articles, commodities or products considered as essential for the country’s economy or for popular consumption. Such laws shall also define distribution of said articles, commodities and products, in order to prevent that unnecessary or excessive intermediation cause shortage or price increases. The law shall protect and promote the organization of consumers for the better protection of their interests”.

<sup>673</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 27, Par. 1 “The property of all land and water within national territory is originally owned by the Nation, who has the right to transfer this ownership to particulars. Hence, private property is a privilege created by the Nation”.

<sup>674</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 28 Par. 1 “The State can grant concessions for the provision of public services or for the exploitation and use of property owned by the Nation, except for the exceptions established by the law. The laws shall set forth the requisites and conditions to guarantee that licensed services will be efficient and goods will be used for society’s interest”.

<sup>675</sup> Javier G Rincón Salcedo, “Las Democracias Andinas, Entre Constitucionalismo Popular y Populismo Constitucional” (2006) 3 *Visages d’Amérique Latine, Sciences Po Paris* 33, at 35.

reformed more than 700 times since its promulgation,<sup>676</sup> with a steady increase each *sexenio*.<sup>677</sup> Although some amendments have been mere textual corrections, many others have been substantial to the point of reversing its previous content (and not always in favor of the socially disadvantaged). Such tendency fits the description given for the three arguments against constitutionalizing social rights (as analyzed in Chapter 3.3) and in particular, the arguments against justiciability of social rights (as analyzed in Chapter 4.3.).

**Thus, in contrast to the case of Japan with its static constitution, Mexico has such a dynamic constitution that oftentimes it is impossible to keep track of all the relevant changes in its content. Even though a qualified majority in both houses of the congress is also needed, unlike Japan, the requisite of a popular referendum doesn't exist in order to reform the Mexican Constitution.** This has meant, for all the time the PRI had a majority in the congress and in the federal states (1929-1997, and now again since 2012 to the moment of writing this), that the constitution has been, to a large extent, a legal document to confirm the policies of the hegemonic party.

Because of all the aforementioned circumstances, it is very difficult, if not impossible, to have an entitlement approach to social rights in Mexico. Instead, the most common paradigm can directly or indirectly be found within the boundaries of assistential and clientelistic policies. Recently, such practices have been generalized and now not only does the PRI use the term “Social Constitutionalism” to promise

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<sup>676</sup> There have been 702 amendments as of the time of writing. Information retrieved from the Webpage of the Chamber of Deputies from the Mexican Congress, available at: [http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum\\_per.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_per.htm).

<sup>677</sup> An online series of graphs representing these reforms is also available at: <http://cartografica.mx/graficas/refxanio/>.

constitutional reforms and welfare programs in exchange for support and votes, but so does the PAN, PRD and the new populist party, MORENA.<sup>678</sup>

More importantly, since the 1980s the capricious protectionism of Social Constitutionalism has been contrary to the reality of the globalized Mexico. Mexico is one of the countries with more bilateral and multilateral trade agreements in the world.<sup>679</sup> It is also an active member in many multilateral and regional organisms and forums such as the World Trade Organization (WTO), the Asia-Pacific Economic Cooperation (APEC), the Organization for Economic Cooperation and Development (OECD), and the Latin American Integration Association (ALADI). In sum, social policy in Mexico is now limited by both national and international interests not necessarily compatible with an equitable distribution of wealth.

It is no surprise that today, Mexico imports more corn than it exports (even though for more than 600 years it has been a staple of the Mexican nutrition)<sup>680</sup>. Neither is it that the once privileged farmer cooperatives lost almost all their benefits during the PAN's administrations (which could not gain their votes) and that now they are being controlled by drug cartels that give them protection in exchange for cooperation.<sup>681</sup> In other words, the problem of Social Constitutionalism is that with today's global markets it has been reduced to a mere ideal reserved for the demagogues or the utopian. Unfortunately for Mexico, there seems to be more of the former than the latter.

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<sup>678</sup> For an extensive and independent analysis of electoral clientelism in Mexico see the report from the NGO, CEYG. *Fortalezas y debilidades del Sistema Electoral Mexicano (2000-2012)* (México: Centro de Estudios Espinosa Yglesias, 2013), available at: <http://www.ceey.org.mx/fortalezas-debilidades-sistema-electoral-mexicano-2000-2012>.

<sup>679</sup> Mexico has a network of 10 FTAs with 45 countries, 32 Reciprocal Investment Promotion and Protection Agreements (RIPPAs) with 33 countries, 9 trade agreements (Economic Complementarity and Partial Scope Agreements) and is a member of the Trans-Pacific Partnership Agreement (TPP). Official Information and the detailed list of Treaties and Agreements can be found at the Website of the International Trade Institute from the Economy Secretariat, available at: <http://www.promexico.gob.mx/en/mx/tratados-comerciales>.

<sup>680</sup> Susana González, "Se importa 12.8 veces más maíz del que se exporta" (Periódico La Jornada, Lunes 4 de julio de 2016).

<sup>681</sup> Alberto Nájjar, "México: Campesinos en Las Redes Del Narco" (BBC Mundo, México), available at: [http://www.bbc.com/mundo/america\\_latina/2009/11/091104\\_2339\\_narco\\_campesinos\\_irm.shtml](http://www.bbc.com/mundo/america_latina/2009/11/091104_2339_narco_campesinos_irm.shtml).

## 11.2 Social programs

By the 1990s Social Constitutionalism was becoming a mere historical reference for Mexico. In its stead, the search for new mechanisms that may help the impoverished population led to a series of reforms that enabled the Mexican social programs. Unlike Social Constitutionalism with its universalistic approach, the scope of these programs would be focalized (by territories, groups or individuals), and targeted those in extreme poverty to offer opportunities in basic education, health and, sometimes, housing.<sup>682</sup> The reason for such limitation has to do with the weak economy of the country, and with the need to elevate the measurable poverty indicators, instead of the abstract and general benchmarks of welfare.

### 11.2.1 Clientelism

Mexican social programs inherited an important vice from Social Constitutionalism; its tendency to enable clientelism. The Mexican welfare system had a strong political dimension, with social benefits closely tied to support for the PRI. Under this clientelist system, relatively generous health, education, pension, and other social programs were created for unionized workers and were conditioned to supporting the ruling party.<sup>683</sup> However, after adopting a neo-liberal paradigm in the early 1990s, the benefits were cut to a minimum with the National Solidarity Program (PRONASOL) introduced by President Salinas in 1990.

PRONASOL sought to address the most pressing needs for food, housing, education and health of the urban poor, rural poor and indigenous population. It also attempted

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<sup>682</sup> Myriam Irma Cardozo Brum, "Neoliberalismo y Eficiencia de Los Programas Sociales en México" (2005) 24 *Política y Cultura* 169, at 170-173.

<sup>683</sup> Edgar Hernández Muñoz, "El Clientelismo en México: los Usos Políticos de la Pobreza" (2006) 9:17 *Espacios Públicos* 17.

collaborative projects with program beneficiaries, establishing coordination and shared responsibility for the construction or repairing of homes, hospitals, schools and streets. The Program, however “quickly became subject to widespread criticism because the projects were often wasteful, and funds were directed to foster PRI political support rather than distributed on the basis of community need.”<sup>684</sup>

In 1997, and in order to avoid the previous criticism, PRONASOL was redesigned under President Zedillo and renamed as Program of Education, Health, and Nutrition (PROGRESA). The aim of PROGRESA was to break intergenerational cycles of extreme poverty, associated with high levels of malnutrition, infant mortality, and school dropout while increasing access to health services.<sup>685</sup> More importantly, PROGRESA introduced Cash Conditioned Transfers (CCT), according to which cash stipends were given to mothers in extremely poor families. In return, those mothers had to ensure that their children were attending school and health clinics regularly, in addition to other requirements.<sup>686</sup>

The CCT system was innovative and was later copied by other Latin American countries for various reasons. First, targeting mothers empowered women within their communities and reduced the chances of men exploiting them for the stipends. Secondly, CCT were not mere handouts, but required a self-development goal (school attendance, health checkups, etc.) from the beneficiary. Finally, CCT gave a sense of entitlement without having to legally establish a right to said benefits.<sup>687</sup>

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<sup>684</sup> Lucy Luccisano & Laura Macdonald, “Mexico and Social Provision by the Federal Government and the Federal District: Obstacles and Openings to a Social Protection Floor” (2014) 14:3 *Global Social Policy* 335, at 336.

<sup>685</sup> Felipe Torres & Agustín Rojas, “Economic and Social Policy in Mexico: Disparities and Consequences” (2015) 46:182 *Problemas del Desarrollo: Revista Latinoamericana de Economía* 50.

<sup>686</sup> Lucy Luccisano and Laura Macdonald, “Neo-liberalism, Semi-Clientelism and the Politics of Scale in Mexican Anti-Poverty Policies” (2012) 8:1 *World Political Science Review* 115.

<sup>687</sup> See *Cash Transfer Programs, Poverty Reduction and Empowerment of Women: A comparative Analysis Experiences from Brazil, Chile, India, Mexico and South Africa* (ILO, Working Paper 4, 2013) at 14.

With the opposition party's rise to power, *PROGRESA* was rebranded as *Oportunidades* to separate its image from the previous PRI government. More importantly, with President Calderón *Oportunidades* extended beyond the rural sector and began reaching marginalized urban sectors, previously unidentified by economic and demographic indicators. Once again, trying to distance itself from PRI's corporatist system, PAN tried to restructure *Oportunidades* with locks and caveats that indicated that "social programs shouldn't be used for political means."<sup>688</sup> However, a resurgence of what Jonathan Fox denotes as "semi-clientelistic practices" could be identified in the municipal and state levels.<sup>689</sup>

Even more clearly, clientelism seems to have returned along with the PRI. President Peña renamed the program *Oportunidades* as *Prospera* and now included a few university scholarships along with the controversial, *Cruzada contra el Hambre*.<sup>690</sup> The *Cruzada* was launched since 2013 and is praiseworthy for aiming to reduce extreme hunger for 7 million Mexicans in 40 municipalities. Critics note however that:

*Cruzada contra el Hambre* displays the PRI's return to its clientelistic past, as many of the municipalities listed among the 400 selected would not qualify as among the poorest in the country, including cities in the state of Baja California, where the poverty rate is only 3.5%, compared with some municipalities in the south of the country where almost the whole population would qualify as poor. Baja California was the site, however, of a closely contested gubernatorial election where the PRI was hoping to displace the PAN government.<sup>691</sup>

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<sup>688</sup> Beatriz Gracia Lopez, "A Social Protection Floor" in UNDP-International Labour Office (eds.), *Sharing Innovative Experiences: Successful Social Protection Floor Experiences* (New York: UNDP, Special Unit for South-South Cooperation and ILO, 2011).

<sup>689</sup> Semi-clientelism involves less coercive, less pervasive, and less obvious forms of political manipulation than the traditional strategy but it still involves the linking of receipt of benefits to support for a specific party. See Jonathan Fox, "The Difficult Transition from Clientelism to Citizenship: Lessons from Mexico" (1994) 46:2 *World Politics* 151.

<sup>690</sup> [www.sinhambre.org](http://www.sinhambre.org).

<sup>691</sup> Ruth Gil Zuarth, (2013) "Los Silencios de la Cruzada" La Silla Rota, 25 April, available at: <http://www.lasillarota.com/loesencial/item/66168-los-silencios-de-la-cruzada>.



But the Mexican populist tendencies are not limited to a specific political party, nor to a specific level of government. Imke Harbers studied the social programs of the center-left governments of the PRD in Mexico City. According to him, citizens' participation in community initiatives and events is oftentimes conditioned by the fear to lose welfare benefits and thus, "many citizens perceive the assistance as a favor that requires some kind of repayment rather than their right as citizens".<sup>692</sup>

A more recent analysis by Tina Hilgers<sup>693</sup> suggests that despite the PRD's strong rhetorical commitment to political democratization, in its internal practices the party has adopted clientelist, factionalist, and personalist styles of governance traditionally associated with the PRI.<sup>694</sup> In this regard, since 2012 in Mexico City, where the Federal and Local levels coexist, there has been a tense relationship between President Peña's PRI and Governor Miguel Ángel Mancera's PRD. More precisely, *Cruzada contra el Hambre* has not only gained complaints from the PAN, but Mancera has also denounced it for vote-buying, coercion and its links to multinational food corporations. The accusation rests on the federal government's plan to implement *Cruzada contra el Hambre* in four boroughs of Mexico City which together sum 48% of its population, and that could get the PRI as many as 3.7 million votes.<sup>695</sup> Although the validity of this accusation can not be judged until the next election in 2018, the "inter-jurisdictional conflict illustrates the highly political and partisan nature of social policy and the continued relevance of clientelism at both {federal and state} scales."<sup>696</sup>

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<sup>692</sup> Imke Harbers, "Democratic deepening in Third Wave democracies: Experiments with participation in Mexico City" (2007) 55:1 *Political Studies* 885.

<sup>693</sup> Tina Hilgers, "Causes and Consequences of Political Clientelism: Mexico's PRD in Comparative Perspective" (2008) 50:4 *Latin American Politics and Society* 123.

<sup>694</sup> It is no coincidence that all of the founding members of the PRD used to be PRI militants. Tina Hilgers, *supra* note 693.

<sup>695</sup> Carlos García, (2013) "PRD y PRI Chocan por Plan Contra Hambre". *El Universal*, 4 February, available at: <http://www.eluniversal.com.mx/ciudad/115331.html>.

<sup>696</sup> Lucy Luccisano and Maria MacDonald, *supra* note 686, at 346.

### 11.2.2 Social assistance vs. social insurance

Although resources to combat poverty and social inequality have increased, paradoxically, the level and magnitude of poverty have increased too. This is because social programs “arose from the open-economy model, a situation in which social policy no longer plays its historic role as a counterweight for the adversities of economic development”.<sup>697</sup>

In this context, while the policies of the 90s focused on social insurance reforms, since 2000 Mexico has seen an expansion in social assistance (via social programs), with relative positive effects. Nonetheless, the fact that social insurance and social assistance remain completely separated and administered by different state institutions cause duplicity in tasks, unnecessary costs and misses the opportunity to articulate CCT and resource pooling as tools for both systems.<sup>698</sup>

In plain numbers, the *Oportunidades/Prospera* programs are now available for 1/4 of extremely impoverished households, a mediocre number when compared to other OECD countries, but a remarkable one when compared to Mexico’s public assistance budget in the late 1980s.<sup>699</sup> Unfortunately, the road to the future of social programs will depend essentially “in the political projects in debate, the positioning

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<sup>697</sup> Felipe Torres & Agustín Rojas, *supra* note 685.

<sup>698</sup> Armando Barrientos, “Dilemas de las Políticas Sociales Latinoamericanas ¿Hacia una Protección Social Fragmentada?” (2012) 239 *Nueva Sociedad* 512.

<sup>699</sup> Notwithstanding the previous criticism, there is also an important group of scholars who argue that *Oportunidades/Progres*a and CCT Programs in general have been essential to reduce the GINI coefficient of Latin-American countries. Particularly for the case of Mexico the GINI coefficient declined by 5.9 percent between 1994 and 2006 as explained in Luis Felipe López-Calva & Nora Lustig (eds.), *Declining Inequality in Latin America: A Decade of Progress?* (Washington: Brookings Institution Press, 2010) at 10. On the same line of reasoning see also Evelyne Huber, “Globalization and Social Policy Developments in Latin America” in Miguel Glatzer and Dietrich Rueschemeyer (eds.), *Globalization and the Future of the Welfare State* (Pittsburg: University of Pittsburgh Press, 2005) at 75-105; Gerardo Esquivel Hernández, *Growth, Protectionism and Crises: Latin America from a Historical Perspective* (Chicago: NBER-University of Chicago Press, 2007); and Gerardo Esquivel Hernández, *Desigualdad Extrema en México: Concentración del Poder Político y Económico* (México: Oxfam, 2016).

of the principal socioeconomic actors and the strength of the political parties and possible coalitions to back the different alternatives of social integration”.<sup>700</sup>

Finally, it is important to mention that unlike subsidies destined to social assistance, those destined to social security only provide a limited effect on poverty and inequality due to its strict boundaries within the formally employed. Public assistance, therefore, has nowadays the advantage of income redistribution, less inequality, and a common Social Protection Floor.<sup>701</sup>

## 11.3 Incorporation of international treaties

Mexico is famous for signing a lot of international instruments. Just regarding human rights, Mexico signed the following number of multilateral treaties, conventions, and protocols per decade: 1920s (7), 1930s (8), 1940s (11), 1950s (14), 1960s (10), 1970s (5), 1980s (11) and 1990s (11).<sup>702</sup> This adds up to an impressive number of 77, not including bilateral treaties, and only before the beginning of this millennium.

### 11.3.1 Before the New Human Rights Reform of 2011

Before the New Human Rights Reform (NHRR) of 2011, the aforementioned all-signing tendency did not include the treaties that ceded jurisdiction. In the case of the ICESCR for example, Mexico did not sign or ratify it until 1981 under the argument that “the Constitution had already regulated such matters and that international

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<sup>700</sup> Carmen Midaglia, “Un Balance Crítico de los Programas Sociales en América Latina. Entre el Liberalismo y el Retorno del Estado” (2012) 239 *Nueva Sociedad* 82.

<sup>701</sup> Emmanuel K. & Joseph Lindert, “Globalization and the Role of Public Transfers in Redistributing Income in Latin America and the Caribbean” (2010) 38:6 *World Development* 895.

<sup>702</sup> Information taken from the Webpage of the Secretariat of Foreign Relations, available at: <http://tratados.sre.gob.mx/index.php>.

human rights were a politicized topic that could affect Mexico's national sovereignty and the principle of no-intervention."<sup>703</sup> This nationalist attitude was supposedly based on the Mexican Constitution's Article 133:

"This Constitution, the laws derived from and enacted by the Congress of the Union, and all the treaties made and execute by the President of the Republic, with the approval of the Senate, shall be the supreme law of the country."<sup>704</sup>

Nonetheless, there was not a clear hierarchy established by Article 133 or any other provision, so its interpretation before the NHRR depended on the political climate of the times. Thus, from its origins and until fairly recently, the nationalist interpretation from one of the most respected doctrinaires of post-war Mexico, Mario de la Cueva, prevailed. De la Cueva argued that the normative hierarchy was as follows: a) Constitution; b) Federal laws and International Treaties; c) Secondary Law.<sup>705</sup>

The reasoning behind De la Cueva's interpretation was that, since the constitution is the founding document for all the other laws, the Mexican constitution should **override** any other national or international provision according to the logic of Constitutional Supremacy.<sup>706</sup> More importantly, international treaties and federal laws should have an equal secondary hierarchy. It is relevant to note that De la Cueva's argument was also maintained consistently by the Supreme Court of Mexico (SCM) in its decisions until at least 1992.<sup>707</sup>

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<sup>703</sup> Luis González Sousa, "La política exterior de México: razones y perspectivas de su faceta progresista" (1987) 38:1 *Relaciones Internacionales* 62, at 77.

<sup>704</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 133. Valid until before the New Human Rights Reform of 2013.

<sup>705</sup> Mario de la Cueva, *Derecho Constitucional* (México City: Lex, 1965) at 87-88.

<sup>706</sup> "La supremacía constitucional parte del supuesto de que un Estado es soberano y, por ende, capaz de establecer sus normas jurídicas fundamentales por sí mismo mediante una constitución". Carlos Baez Silva, "La Omisión Legislativa y su Inconstitucionalidad en México" (2002) 35:105 *Boletín Mexicano de Derecho Comparado* 741, at 793.

<sup>707</sup> See "FEDERAL LAWS AND INTERNATIONAL TREATIES. THEY HAVE THE SAME HIERARCHY" PC / 92 thesis, Gaceta Judicial Weekly of the Federation, Number 60, for December 1992, page 27.

Yet, in the 90s a series of reforms slowly but steadily began incorporating international law within constitutional provisions. In 1988, Articles 89 and 76 were reformed to respectively allow the President to celebrate, and the Senate<sup>708</sup> to approve international treaties celebrated with other states and international organisms.<sup>709</sup> In 1993, Article 119 began changing the strict theory of sovereignty by including international treaties as part of the regulation to be consulted in the extradition of a person.<sup>710</sup> Very significantly, in 1998 the SCM's jurisprudence also changed their previous "subsidiary hierarchy" canon to one that privileged international treaties immediately after the constitution, but above the rank of federal law.<sup>711</sup>

### 11.3.2 Since the New Human Rights Reform of 2011

The second batch of constitutional reforms with a focus on international human rights began to be enacted in the late 2000s. The series began with the constitutional

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<sup>708</sup> The Senate is considered in Mexico a direct representative of the population.

<sup>709</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 79 and 86.

<sup>710</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 119, par. 3 "Calls for extradition, made by a foreign State, shall be processed by the President of the Republic, with the intervention of the judicial authority **in accord** with the provisions stated in this Constitution, in **the applicable international treaties** and in the statutory laws".

<sup>711</sup> "...the Supreme Court of Justice considers that international treaties are immediately under the Basic Law and above federal and local law. This interpretation of Article 133 of the Constitution, derives from the fact that international commitments are assumed by the Mexican State as a whole and bind all its authorities towards the international community; therefore the Constituent Assembly has authorized the President to sign international treaties in his capacity as head of state and, in the same way, the Senate intervenes as representative of the will of the states and, through ratification, obliges its authorities. Another important aspect in considering this hierarchy of treaties, is the provision that there is no limitation on powers between the Federation and the states in this area. **The Supreme Court is aware of its different position in the PC / 92 thesis**, published in the Gaceta Judicial Weekly of the Federation, Number 60, for December 1992, page 27, named as: "FEDERAL LAWS AND INTERNATIONAL TREATIES. THEY HAVE THE SAME HIERARCHY"; **however, the Supreme Court considers it appropriate to abandon that view** and assume that considered the top hierarchy of treaties even against federal law. "INTERNATIONAL TREATIES. HIERARCHICALLY ARE LOCATED ABOVE FEDERAL LAWS AND ON A SECOND PLANE WITH RESPECT TO THE FEDERAL CONSTITUTION" (AMPARO EN REVISIÓN 1475/98).

recognition of the International Criminal Court jurisdiction in 2008,<sup>712</sup> but would reach critical and unseen levels of internationalization for Mexico with the ambitious New Human Rights Reform (NHRR).

The first part of the NHRR began on June 11, 2011, with the inclusion of the *pro personae* principle as the basis for the interpretation and application of legal norms. This principle implies that if the interpretation of an international treaty signed by Mexico has a wider protection for a human right than constitutional norms, such interpretation must prevail over national law. **The idea was to make international human rights directly justiciable, and in order to achieve this, a specific consideration of international human rights was included in Articles 1,<sup>713</sup> 3,<sup>714</sup> and 105<sup>715</sup>.**

The second part of the NHRR began to be enacted in April 2nd, 2013, and mainly concerns the “Amparo writ”. Amparo is the protective institution of fundamental rights

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<sup>712</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art. 21, par. 8 “The President of the Mexican Republic can **accept the jurisdiction of the International Criminal Court**, provided that he has obtained Senate’s approval.

<sup>713</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art. 1. In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution **and the international treaties signed by the Mexican State**, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.

**The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times.**

All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalize and rectify violations to Human Rights, according to the law.

<sup>714</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art. 3. Education provided by the State shall develop harmoniously all human abilities and will stimulate in pupils the love for the country, **respect for human rights and the principles of international solidarity**, independence and justice.

<sup>715</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art. 105. **The Supreme Court of Justice of the Nation shall resolve the cases related to** the following topics, in accordance with the provisions established by the applicable statutory law:

g. **The National Human Rights Commission**, against federal or state laws or laws enacted by the Federal District Government; as well as law **against international treaties signed by the President of the Republic and approved by the Senate, which hamper the human rights system established in this Constitution and in the international treaties that Mexico has ratified.**

*par excellence* in Mexico, and is established in Article 103 of the Constitution.<sup>716</sup> **With the reform to Article 103 and its regulatory law, the protection against violations of human rights was extended from just those contained in the Mexican Constitution, to include those enshrined in the international treaties to which the Mexican state is a party.**<sup>717</sup>

Of course, since Mexico has signed over 60 treaties pertaining human rights, an urgent need arose to have a list of those treaties. But although a national database of treaties was created and allocated in a public website,<sup>718</sup> at the moment of writing this the invoking of international treaties remains very infrequent. Even more infrequent has been its acceptance by most of the Mexican courts as will be detailed in the next chapter.

*In parallel to the analysis of Japan, but also in contrast to it, in this chapter social rights were discussed beginning with their revolutionary origin and its vanguardism even before the establishment of the ILO. This vanguardism, however, was marred by Social Constitutionalism which paradoxically made social rights, by definition destined for society at large, a privilege controlled by the PRI establishment. In such regard, although social programs have been internationally praised, its discretionary, unarticulated and disorganized nature makes them prone for the problems of inequality, corruption, lack of formal work and poverty in Mexico.*

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<sup>716</sup> The writ of amparo (called recurso, juicio de amparo or just amparo in Spanish) is a remedy for the protection of constitutional rights created in Mexico and found in certain jurisdictions. Amparo, generally granted by a supreme or constitutional court, serves a dual protective purpose: it protects the citizen and his basic guarantees, and protects the constitution itself by ensuring that its principles are not violated by statutes or actions of the state that undermine the basic rights enshrined therein (judicial review). It has been translated as injunction, judicial review or habeas corpus according to the context.

<sup>717</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 103. The federal courts shall resolve all disputes concerning:  
I. Laws or acts issued by the authority, or omissions committed by the authority, **which infringe the fundamental rights** recognized and protected by this Constitution **and the international treaties signed by Mexico.**

<sup>718</sup> The national database of international treaties can be found in the webpage of the SCM, available at: <http://www2.scjn.gob.mx/red/constitucion/TI.html>.

# Chapter 12 The judiciary, judicial review and litigation in Mexico

*This chapter will explain the Mexican judiciary, the role of judicial review including its long historic trajectory, and its methods and doctrines. Moreover, the phenomenon of “the many Mexicos and their many courts” will be addressed where inequality, corruption, and a lack of understanding between the rich and the poor became ingrained in the judicial system. As in Japan, the subordinated relationship to the executive power is described in detail, and a qualitative analysis of the independence and range of action of the courts is provided. Finally, this chapter examines the social attitudes towards law, litigation and the courts, where the surveys and statistical information point towards a shared sense of distrust, lack of legal consciousness, and preference for alternative dispute resolutions.*

## 12.1 The Mexican judiciary

The 1917 Constitution, established in its Article 40 that:

“It is the will of the Mexican people to constitute into a representative, democratic, secular, federal, Republic, made up by free and sovereign States in everything related to its domestic regime, but united in a federation established according to the principles of this fundamental law.”

And in Article 49 that:

“The political authority or power is divided into the Executive, the Legislative and the Judiciary branches.”

Thus, **unlike Japan, the Mexican Judiciary has a long history of being equal to the other branches of power.** Moreover, since its origins, the judges of certain local



states were particularly active, to the point that a Justice in the state of Yucatán,<sup>719</sup> along with another one in Mexico City,<sup>720</sup> invented the “Amparo”<sup>721</sup> since they considered “there was not an efficient resource for protecting basic individual guarantees”.<sup>722</sup>

In the Constitution of 1917, Chapter IV (Articles 94-107) defines the Mexican Judiciary, which consists of the Supreme Court of Mexico (SCM) consisting of 11 Justices, having one of them designated as Chief Justice. The Justices work in 1 Great Bench and 2 Petty Benches (the first Petty Bench specializes in civil and criminal matters, while the second Petty Bench specializes in administrative and labor matters), and the Chief Justice does not participate in any Petty Bench but rather only in the Great Bench.<sup>723</sup>

Justices are nominated by the President and approved by a vote of two-thirds of the members present in the Senate. In the past, Justices served for life, but since the reform, Justices serve a maximum period of 15 years.<sup>724</sup> The President of the SCM is elected from among its members to hold office for a 4-year term and while there is a possibility for re-election, such re-election cannot be for the next immediate term, while other judges of the superior and regional courts serve staggered, single-renewable 9-year terms.<sup>725</sup>

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<sup>719</sup> Manuel Crescencio García Rejón (1799-1849).

<sup>720</sup> Mariano Otero y Mesetas (1817-1850).

<sup>721</sup> Which implies both *habeas corpus* and judicial review as will be explained later.

<sup>722</sup> See Jesus Reyes Heróles, *Obras. Mariano Otero* (México: Editorial Porrúa, 1967).

<sup>723</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 94.

<sup>724</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 96.

<sup>725</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 99.

Below the two higher tribunals come the lower courts divided at the federal level in circuit, collegiate, and unitary courts, and at the state level in state and district courts.<sup>726</sup> Vertically, there are low instance judges and appellate magistrates, both of which hold their charge for 6 years, but can be re-elected an indeterminate number of times.<sup>727</sup> **Unlike Japan, Mexico has specialized tribunals for administrative, agrarian, credit, family, labor, military, pensions, taxes and telecommunications matters.**<sup>728</sup>

**Also unlike Japan, with reference to their internal organization, the SCM is only responsible for herself and is not responsible for determining the rules of procedure of the subordinate courts.** In its place, a special autonomous organ called “*Consejo de la Judicatura*” supervises and disciplines all the magistrates and judges below the SCM.<sup>729</sup> This organ has enabled more independence and creativity in the decisions of lower courts.

## 12.2 Judicial review in Mexico

Amparo is the institution that most closely resembles judicial review in Mexico. It can be invoked by any appellate court, or to the SCM itself when a human right contained in the constitution or, since the reform of 2013, an international treaty signed by Mexico is violated. **An important difference with Japan’s case is that Amparo (both as *habeas corpus* and judicial review), has been used in Mexico for more than 100 years.** Therefore, an extensive doctrine has developed in close

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<sup>726</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art.103.

<sup>727</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art. 97.

<sup>728</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art.104.

<sup>729</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art. 100.

relation to the presidential *sexenio* in turn, and as such, the doctrine has alternated between progressist and conservative eras.

### 12.2.1 The foundations of judicial review

Although the institution of Amparo has existed since before the Constitution of 1917, it began to take its current form as judicial review after several amendments to the constitution in the XXth Century. After the 1994 judicial reform, the judiciary in general, and the SCM in particular, could decide controversies between individuals, individuals and the state, and between the states themselves, but only if they clearly contravened the constitution.<sup>730</sup> Such restriction would change with the NHRR of 2011 which introduced the justiciability of international treaties as follows:

“ARTICLE 103

The federal courts shall resolve all disputes concerning:

I. Laws or acts issued by the authority, or omissions committed by the authority, which infringe the fundamental rights recognized and protected by this Constitution **and the international treaties** signed by Mexico...”

Thus, **as in the Japanese case, the SCM can determine the final interpretation of the Mexican constitution, as well as strike down unconstitutional laws and administrative actions.** In addition, the federal courts can also sanction the negligence of government officials or organizations which are contrary to either the Mexican constitution **or the international human rights treaties signed by Mexico.**

The NHRR of 2013 furtherly amended the Law of Amparo to allow the writ of amparo to: a) be used in defense of the constitutionally recognized human rights; b) be used by the organizations of civil society in defense of collective rights to health,

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<sup>730</sup> Raymundo Riva Palacio, “Reforma Judicial: un Golpe de Estado”, Periódico Reforma, 12 de diciembre de 1994.

in preservation of the environment, or for historical patrimony; c) be available to challenge official arbitrariness and failure to comply with legal mandates; d) be available to protect injured parties in addition to successful amparo plaintiffs; and e) be employed to obtain the benefits of a law's declaration of unconstitutionality.<sup>731</sup>

The scope of changes brought by the NHRR of 2011 and 2013 astonished many Mexicans that having been used to a restrained judiciary were now expecting a league of “Herculean Judges”. But the reality has been less impressive if it is taken into consideration that, **since the NHRRs and until the moment of writing this, only 5 cases have accepted international treaties as a source of law (and only one of them has to do with social rights).**<sup>732</sup> To be fair, it may be too early to measure the real significance of these reforms for social rights since proper methods and a doctrine of judicial review is still developing. However, there is a clear tendency to remain conservative in social rights adjudication.

### 12.2.2 Methods and doctrines of judicial review

Until the aforementioned reforms, Mexico had very similar methods and doctrines to those of Japan.<sup>733</sup> This is logical since both have a civil law tradition that gives much importance to the text of the law. However, after the NHRR reforms of 2011 and 2013, those traditional standards have allegedly been changed. In its place the new method that should be used is the *conventionality control* and the doctrine applied is that of *pro personae*.

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<sup>731</sup> Patrick Del Duca, (et. al.) “International Legal Developments Year in Mexico” (2013) 46:1 *The International Lawyer, American Bar Association* 580.

<sup>732</sup> Consulted at the webpage of the SCM, available at: <http://sjf.scjn.gob.mx/SJFSist/paginas/tesis.aspx>.

<sup>733</sup> Among other Methods and Doctrines of Interpretation that Mexico and Japan share are the Method of analyzing adequate means to ends in statutes, the Doctrine of reasonable distinction/unreasonable discrimination and particularly the Doctrine of Public Welfare.

### a) Conventionality control

Even though Mexico has been prolific in signing international treaties, it has failed to implement them in practice. When the international organisms and the national plaintiffs denounce this lack of coherence, the judges argue “the superiority of national legal instances”. To address such problem, the conventionality control was implemented to mandate judges, magistrates, and justices to analyze *ex officio* the international norms applicable to a national controversy, *even if the international treaty is not invoked by the plaintiff or defendant*.<sup>734</sup> In an extreme case, when the national rule is more stringent against human rights, the court may even exclude such rule to privilege the international standard.

Although the Interamerican Court of Human Rights (CoIDH) had been developing the aforementioned conventionality control since 1997, in Mexico this method wasn't implemented until the case “Rosendo Radilla Pacheco v. Mexico” (Judgment of the CoIDH, 2009; par. 339), and then it was generally established in the domestic judgment “FULFILLMENT OF THE SENTENCE OF THE CoIDH IN THE CASE ROSENDO RADILLA PACHECO”<sup>735</sup> (*a.k.a* Varios 912/2010). These judgments developed the following important procedural changes for human rights justiciability and adjudication in Mexico:

First, the SCM recognized that the resolutions of the CoIDH resulting from cases in which Mexico is a state party would be considered mandatoy “according to the terms of the CoIDH”. This means that the domestic judges and authorities cannot change, have reservations or obstruct such resolutions from its fulfillment. However, a common criticism is that judges of the CoIDH may not be aware of the conditions (economical or of infrastructure) that their resolution would require being complied

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<sup>734</sup> Miguel Carbonell, “Introducción general al control de convencionalidad” in *El constitucionalismo contemporáneo. Homenaje a Jorge Carpizo* (Mexico City: UNAM, 2013) at 68-69.

<sup>735</sup> (Sentencia Varios 912/2010. 14 de julio de 2011. Unanimidad de diez votos).

with, a common argument against justiciability as detailed in Chapter 4.3.2. Such fact has given Mexican judges a perfect excuse to “not comply at all since they can’t comply in full”.

Secondly, regarding the criteria of the CoIDH that derived from cases in which Mexico has been a party, the Mexican courts must consider them as “indicative” principles for their own resolutions. This mandate has been controversial since each judge may decide which case to include as “indicative” at her own convenience. Moreover, this implies yet more information to process in an already overwhelming study which includes national and international law, jurisprudence and doctrine to be pondered by the courts. Such fact implies a problem of polycentricity as explained in the aforecited Chapter 4.3.2.

Thirdly, the SCM makes it clear that the conventionality control is applicable to all the judges in Mexico. Miguel Carbonell considers that this “gives a significant step in dismantling the monopoly of federal judges and courts of appeal over the rest.”<sup>736</sup> However, a criticism of this statement is that it is not as universal as it appears since practical differences remain between local and federal judges.

Fourth, the SCM distinguishes between the different degrees in which the interpretation of the constitution must be done according to the new method of conventionality control. A low degree would imply interpreting the law in conformity with the human rights contained both in the constitution and international treaties. A medium degree would imply the case when the court cannot make a valid interpretation that harmonizes the national and the international statute, and thus decides to exclude the national norm. Finally, a high degree occurs when the SCM

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<sup>736</sup> Miguel Carbonell, *supra* note 734, at 84.

has the power to expel with general effects (*erga omnes*) the national norm that is considered contrary to the conventionality control.<sup>737</sup>

### **b) *Pro personae* doctrine**

Closely related to the conventionality control, the *pro personae*<sup>738</sup> doctrine implies that legal interpretation should always seek the greatest benefit for individuals. The doctrine was famously recognized by Article 29 of the American Convention on Human Rights. Concisely, the doctrine states that regarding the protection of human rights, the widest interpretation must be applied, whereas regarding limits and prohibitions to such rights, the minimum standards must be used.<sup>739</sup>

In the Mexican constitution, Article 1 in its second paragraph establishes: “The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, **working in favor of the broader protection of people at all times**”; this is the constitutional expression of the *pro personae* doctrine. But the phrasing of the doctrine poses an important question: Which provisions may be considered human rights provisions? Since there are many and diverse provisions that explicitly or inadvertently affect human rights, but not all of them are labeled as such, a problem arises in the case of leaving them out of the conventional control, and thus breaching the *pro personae* doctrine.

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<sup>737</sup> Eduardo Ferrer MacGregor, “Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano” in Miguel Carbonell & Pedro Salazar (coords.), *La Reforma Constitucional en Materia de Derechos Humanos: Un Nuevo Paradigma* (México: Porrúa-UNAM, 2012) at 390-391.

<sup>738</sup> This principle is also known in some jurisdictions as the *pro-homine* principle.

<sup>739</sup> Henderson considers three practical applications: “First, in cases in which stakes the application of various rules concerning human rights, should be applied that contain better or more favorable protection for the individual. Secondly, in cases where you are in the presence of a succession of rules it must be understood that the subsequent rule is not repealed earlier if it establishes better protections or greater to be retained for people. Thirdly, in the case of the application of a standard, it must always be interpreted in a way that better protects the person”. Humberto Henderson, “Los Tratados Internacionales de Derechos Humanos en el Orden Interno; La Importancia Del Principio Pro Homine” (2004) 39 *Revista IIDH, Instituto Interamericano de Derechos Humanos* 89.

### 12.2.3 Judicial review in practice

Before the reforms, judicial review in Mexico had been a tame and not very significant instrument for protecting human rights since, as in the case of Japan, it was strictly limited by the written provisions of national law. The NHRR of 2011 and 2013 were supposed to be revolutionary in giving wide powers to the courts to protect against laws or acts that violate human rights. Objectively, only five years have passed since the enactment of the reforms, however, in these five years the changes have been less than spectacular and still point towards maintaining the *status quo*.

In plain numbers, since the enactment of the NHRR, the SCM has only judged upon four statutory provisions under constitutional grounds. Moreover, **as in the case of Japan, such judgments have been conservative, did not strike down the provision in dispute, and decided in favor of the authority and not the plaintiff.**

The controversial statutory provisions have been:

**a) The right of access to justice according to Article 17 of the Mexican Constitution and the Amparo Law.** Just after the reforms, the SCM took a progressive stance and decided that the right of access to justice comprised the wider standards of the American Convention of Human Rights,<sup>740</sup> but one year later returned to its conservative stance and limited it by the formal procedures of the aforementioned Article 17.<sup>741</sup>

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<sup>740</sup> ACCESO A LA IMPARTICIÓN DE JUSTICIA. LAS GARANTÍAS Y MECANISMOS CONTENIDOS EN LOS ARTÍCULOS 8, NUMERAL 1 Y 25 DE LA CONVENCIÓN AMERICANA SOBRE DERECHOS HUMANOS, TENDENTES A HACER EFECTIVA SU PROTECCIÓN, SUBYACEN EN EL DERECHO FUNDAMENTAL PREVISTO EN EL ARTÍCULO 17 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS. Época: Décima Época Registro: 2001213 Instancia: Tribunales Colegiados de Circuito Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Libro XI, Agosto de 2012, Tomo 2 Materia(s): Constitucional Tesis: VI.1o.A. J/2 (10a.) Página: 1096.

<sup>741</sup> ACCESO A LA JUSTICIA. ES UN DERECHO LIMITADO, POR LO QUE PARA SU EJERCICIO ES NECESARIO CUMPLIR CON LOS PRESUPUESTOS FORMALES Y MATERIALES DE ADMISIBILIDAD Y



**b) The right to be elected according to Article 35 of the Mexican Constitution and the Federal Electoral Law.** The most common criterion of both the old and the newly empowered SCM is to avoid intervening in electoral matters and, if strictly obliged to do so, maintain things without change. Therefore, the SCM maintained the prohibition for citizens to run in the election as independent candidates<sup>742</sup> (*i.e.* without affiliation to an established political party).<sup>743</sup>

**c) Social security rights<sup>744</sup> according to Article 123, the INFONAVIT law<sup>745</sup> and the Amparo Law.<sup>746</sup>** This is the *pièce de résistance* to the argument that, even with the NHRR, the SCM has not given better protection to social rights. The privatization of social security led to an immediate payoff for the beneficiaries of the state-run pension insurance in order to quickly introduce the new AFORE system. Because of this, thousands of beneficiaries of the old scheme demanded various adjustments to their lump payments, so the IMSS issued “electronic payment certificates” to comply with such adjustments. However, various beneficiaries (particularly old age pensioners) complained that they did not have access to the electronic devices to cash such certificates within the 30 days allotted before their expiration. The matter reached the SCM which asserted that “the non-compliance of payment was not attributable to the aforementioned authorities since the process was clearly

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PROCEDENCIA, ASÍ COMO DE OPORTUNIDAD PARA LA PRESENTACIÓN DE LA DEMANDA DE AMPARO. Época: Décima Época Registro: 2004823 Instancia: Tribunales Colegiados de Circuito Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Libro XXVI, Noviembre de 2013, Tomo 1 Materia(s): Constitucional Tesis: XI.1o.A.T. J/1 (10a.) Página: 699.

<sup>742</sup> This would change with a new Electoral Law from February 2015.

<sup>743</sup> JUICIO DE AMPARO INDIRECTO. ES IMPROCEDENTE EL PROMOVIDO POR UN CIUDADANO SIN PARTIDO POLÍTICO CONTRA EL ARTÍCULO 116, FRACCIÓN IV, INCISO E), DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS. Época: Décima Época Registro: 2002821 Instancia: Segunda Sala Tipo de Tesis: Aislada Fuente: Semanario Judicial de la Federación y su Gaceta Libro XVII, Febrero de 2013, Tomo 2 Materia(s): Común Tesis: 2a. III/2013 (10a.) Página: 1163.

<sup>744</sup> This decision will be explored fully in Chapter 13.

<sup>745</sup> Ley del INFONAVIT. Publicada en el Diario Oficial de la Federación el 24 de abril de 1972.

<sup>746</sup> Ley de Amparo. Publicada en el Diario Oficial de la Federación el 4 de febrero de 2013.

established by the reformed INFONAVIT Law”.<sup>747</sup> Thus, the supposed guarantor of human rights retroactively applied the recently reformed law in detriment of Mexican citizens.

**d) In a case pertaining old-age pension and the ISSSTE Law**, the SCM considered that even if a pensioner (a government employee) invoked international treaties to widen the calculus of her pension (based on calculations regarding non-government employees), the applicable law was the ISSSTE Law<sup>748</sup>.<sup>749</sup> This limitation is a clear breach of both the “conventionality control” and the “*pro personae* doctrine” by the instance that is supposed to uphold them. Thus, it is not that the NHRR wasn’t revolutionary, but rather that the courts decide not to respect it.

Regarding government acts, the SCM has decided in similar terms even after the celebrated and alleged revolutionary 2013 reforms:

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<sup>747</sup> CUMPLIMIENTO DE SENTENCIAS DE AMPARO. MEDIOS IDÓNEOS PARA ACREDITARLO RESPECTO DE LAS QUE CONCEDAN LA PROTECCIÓN CONSTITUCIONAL CONTRA EL ARTÍCULO OCTAVO TRANSITORIO DEL DECRETO POR EL QUE SE REFORMAN Y ADICIONAN DIVERSAS DISPOSICIONES DE LA LEY DEL INSTITUTO DEL FONDO NACIONAL DE LA VIVIENDA PARA LOS TRABAJADORES, PUBLICADO EN EL DIARIO OFICIAL DE LA FEDERACIÓN EL 6 DE ENERO DE 1997, Y DE SUS ACTOS DE APLICACIÓN. Época: Décima Época Registro: 2001883 Instancia: Pleno Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Libro XIII, Octubre de 2012, Tomo 1 Materia(s): Común Tesis: P./J. 16/2012 (10a.) Página: 10.

<sup>748</sup> Ley del ISSSTE. Published in Diario Oficial de la Federación el 27 de diciembre de 1983.

<sup>749</sup> PENSIÓN JUBILATORIA. SI AL INTERPRETAR LA LEY DEL INSTITUTO DE SEGURIDAD Y SERVICIOS SOCIALES DE LOS TRABAJADORES DEL ESTADO EN EL JUICIO DE NULIDAD, SE LLEGA A LA CONVICCIÓN DE QUE UN PENSIONADO NO COTIZÓ POR DIVERSOS CONCEPTOS QUE PRETENDE SEAN INTEGRADOS A LA BASE DE COTIZACIÓN PARA SU CÁLCULO, AUN CUANDO ARGUMENTE TRANSGRESIÓN A TRATADOS INTERNACIONALES, NO SE VULNERA DERECHO ALGUNO QUE TENGA RECONOCIDO NI SE MENOSCABAN SUS DERECHOS FUNDAMENTALES. Época: Décima Época Registro: 2003682 Instancia: Tribunales Colegiados de Circuito Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Libro XX, Mayo de 2013, Tomo 2 Materia(s): Constitucional, Laboral Tesis: II.8o.(I Región) J/1 (10a.) Página: 1368.

In January 2014, the SCM mandated that local formalities and judicial procedures from each of the Mexican states must be complied with before invoking international treaties.<sup>750</sup>

In April of the same year, another step back was taken when the SCM ruled that “when there is an explicit restriction in the Mexican Constitution the protection of international treaties is rendered ineffective”<sup>751</sup> in the cases of detention, extradition and visa cancellation for suspects of drug trafficking.<sup>752</sup>

And in November, the SCM established that the judge of appeals in a federal case was not liable when he did not analyze *ex officio* the international human rights treaties to the detriment of the plaintiff.<sup>753</sup>

In sum, there have been few transcendent changes derived from the NHRR. After the initial progressive fervor, the courts in general and the SCM in particular, seem to have returned to their limited interpretation in favor of the authorities.

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<sup>750</sup> TRATADOS INTERNACIONALES DE DERECHOS HUMANOS. EL HECHO DE QUE SE APLIQUEN EN DETERMINADA INSTITUCIÓN JURÍDICA POR CONTEMPLAR UNA PROTECCIÓN MÁS BENÉFICA HACIA LAS PERSONAS, NO IMPLICA INOBSERVAR LOS PRESUPUESTOS PROCESALES QUE LA REGULAN ESTABLECIDOS EN LA LEGISLACIÓN LOCAL APLICABLE. Época: Décima Época Registro: 2005268 Instancia: Tribunales Colegiados de Circuito Tipo de Tesis: Jurisprudencia Fuente: Gaceta del Semanario Judicial de la Federación Libro 2, Enero de 2014, Tomo IV Materia(s): Constitucional Tesis: IX.1o. J/4 (10a.) Página: 2902.

<sup>751</sup> DERECHOS HUMANOS CONTENIDOS EN LA CONSTITUCIÓN Y EN LOS TRATADOS INTERNACIONALES. CONSTITUYEN EL PARÁMETRO DE CONTROL DE REGULARIDAD CONSTITUCIONAL, PERO CUANDO EN LA CONSTITUCIÓN HAYA UNA RESTRICCIÓN EXPRESA AL EJERCICIO DE AQUÉLLOS, SE DEBE ESTAR A LO QUE ESTABLECE EL TEXTO CONSTITUCIONAL. Época: Décima Época Registro: 2006224 Instancia: Pleno Tipo de Tesis: Jurisprudencia Fuente: Gaceta del Semanario Judicial de la Federación Libro 5, Abril de 2014, Tomo I Materia(s): Constitucional Tesis: P./J. 20/2014 (10a.) Página: 202.

<sup>752</sup> The name of the plaintiff was censored in the files due to the Law of Transparency and Access to Information.

<sup>753</sup> AMPARO DIRECTO EN REVISIÓN. ES IMPROCEDENTE CUANDO SÓLO SE ATRIBUYE AL TRIBUNAL COLEGIADO DE CIRCUITO LA OMISIÓN DE ANALIZAR, DE MANERA OFICIOSA, LOS TRATADOS INTERNACIONALES DE LOS QUE ES PARTE EL ESTADO MEXICANO, AUN CUANDO SE ALEGUE LA VIOLACIÓN A UN DERECHO HUMANO. Época: Décima Época Registro: 2008032 Instancia: Segunda Sala Tipo de Tesis: Jurisprudencia Fuente: Gaceta del Semanario Judicial de la Federación Libro 12, Noviembre, 2014, Tomo I Materia(s): Común Tesis: 2a./J. 124/2014 (10a.) Página: 81.

## 12.3 The many Mexicos and their many courts

Something important to consider in the case of Mexico is the fact that inequality also permeates the judiciary. In this fashion, a Justice of the SCM who lives with luxury in Mexico City, and is only dedicated to the analysis of the theoretical and practical reach of constitutional stipulations, has a very different scope to that of a judge ascribed to a remote court in Michoacán for example.<sup>754</sup> Such contrast, division, and segmentation begin with the constitution itself and continues along the corresponding regulatory laws.

On one hand, **unlike the Japanese judges, the Mexican ones are ascribed to a specific territorial jurisdiction and are not relocated even when they ascend according to their judicial career.** Only in some very rare cases (as when one of them becomes a Justice of the SCM or is nominated for one of the specialized federal tribunals), will a judge leave the jurisdiction where he began his career. In some cases, this means a concentration of power and complicity with other local authorities. In other cases, this means working with members of the organized crime.

On the other hand, the NHRR was very ambitious in including not only the constitutional, but also the international laws protecting human rights. This notion sounds innovative when having in mind the aforementioned Justices of the SCM, but it is not so feasible for the judge of Michoacán who on a day to day basis has to solve administrative, criminal and civil law cases, without the possibility of specialization. More alarmingly, such judge has little resources to study those cases, and even fewer resources to enforce her resolutions.

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<sup>754</sup> Michoacán is a rural and poor state recently afflicted by competing drug cartels.

For the aforementioned reasons, Mexico is an excellent example of how inequality affects the law in theory and in practice. Even if the SCM boasts of having created a website that includes all the international treaties to be considered for “better protecting human rights”,<sup>755</sup> it seems they have not considered that there are still places where the internet is not even available. Such kinds of problems represent the many Mexicos and their many courts.<sup>756</sup>

### 12.3.1 Limited range of remedies

Although the Mexican constitution does not define the type of judicial resolutions or the effects of not complying with them, the Amparo Law does<sup>757</sup> and provides an explicit legal remedy known as the “remedy of non-compliance of order”.<sup>758</sup> An investigation released in late 2015 proved that from 1996 to 2014, of the 15 thousand remedies invoked, only 15 public servants (0.1%) were processed and separated from office.<sup>759</sup> This has put in tangible numbers the common perception that the Mexican courts remain at the service of the executive.

But even when federal judges mandate compliance, the process may take several years. The reason for such delay is that the authority can argue that she has not taken “unreasonable time” to comply. According to Article 105 of the Amparo Law, there is not a legal definition of “unreasonable time”, but the aforementioned investigation pooled 46 cases and got an average of 3-5 years.<sup>760</sup>

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<sup>755</sup> An abridged version of the webpage is available at: <http://www2.scjn.gob.mx/red/constitucion/TI.html>.

<sup>756</sup> This Chapter was titled paraphrasing the book “Many Mexicos” by the historian Lesley Byrd Simpson, *Many Mexicos* (Oakland: University of California Press, 1960). In it he argues that Mexico must be understood more as a geographical, ethnic, social and cultural mosaic than as a concentered nation. Regarding the administration of justice, Mexico remains an unfinished project with disturbing patches of inequality.

<sup>757</sup> The remedy of non-compliance of order is detailed in articles 77, 78 (types of judgments) 125, 126 (injunction) and 192-198 (effects and non-compliance) of the Amparo Law.

<sup>758</sup> *Incidente de inejecución de sentencia*.

<sup>759</sup> Published in [Contralinea.com.mx](http://www.contralinea.com.mx) with information of the Archives of the SCJN, available at: <http://www.contralinea.com.mx/archivo-revista/index.php/2015/11/24/poder-judicial-sometido-al-ejecutivo/>.

<sup>760</sup> *Ibid.*

Additionally, the advocates of the NHRR praise the innovative inclusion of individuals as subject to Amparo sanctions when they act as authorities.<sup>761</sup> In the past, Amparo only protected against acts and laws of the state authorities that violated human rights, so this reform appeared as revolutionary. In practice, however, the sanctions are futile since the court does not have the power to remove a CEO or legal representative of a company that does not comply with an amparo judgment for example. Due to all of these considerations, it is safe to say that even after the NHRR, the courts still have a limited range of remedies.

### **12.3.2 The requirement of “legitimate” interest**

Before the NHRR a legal interest was required for standing in court. With the reforms, the concept of “legitimate interest” was introduced to complement legal interest. Nonetheless, this new concept is not clear to the SCM itself as can be seen in its decision of 2014 transcribed *in extenso* due to its explicit confusion:

“...The legitimate interest is distinct and broader than the legal interest category, and also different to the generic interests of society included in simple interest, that is, it is not about the generalization of a class action, but about access to the competent courts for possible legal injury to legally relevant and therefore protected interests. In this logic, through the legitimate interest, the applicant is in an identifiable legal situation, arising from a specific relationship to the subject of the claim and argues that, either by personal circumstances or a sector or group regulation, he is affected in his rights. However, a specific legal situation were collective or diffuse interests and the legitimate interest may arise does not mean that such interests are absolute, since it is not necessary that a situation is shared by a formally identifiable group, but can also be applied when a particular person does not belong to that group...”

The SCM acknowledged its own perplexity and added in the final paragraph:

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<sup>761</sup> Article 5, II Amparo Law.

“In sum, because of its rules configuration, the categorization of all possible situations and circumstances of legitimate interest must be the result of the daily work of the various amparo judges that apply it. The guidelines issued by this Supreme Court, must be interpreted according to the nature and functions of amparo, *i.e* seeking the highest protection of fundamental rights.”<sup>762</sup>

In sum, the SCM still doesn't define what legitimate interest is, and as such, the requisite of legal interest remains as the defining precondition for standing.

### **12.3.3 The courts at the service of the executive**

Even after the change of government in 2000, the subservient position of the judiciary branch in Mexico seems to have continued. It is true that with Zedillo's reform of 1994 the SCM harnessed more power, but that power was given to override mainly the legislative and didn't make substantial changes regarding the executive (and no change at all regarding the President). Thus, the “deference” of the courts towards the executive in general, and the President in particular, still violates the separation of powers doctrine and confirms the argument against the justiciability of social rights because of a lack of independence (detailed in Chapter 4.3.1).<sup>763</sup>

To give substance to this argument, the figures published by the SCM itself in their 2014 Annual Work Report will be cited. Regarding the remedy of forced compliance against members of the executive branch, of a total of 1062 cases: 89.9% of cases, *i.e.* (955 cases) were discarded; 6.1% (65 cases) were returned to the inferior court; 1.9% (20) were declared unfounded; 1.1% (12) were declared unsubstantiated by the 9<sup>th</sup> General Agreement of the SCM of 12/2009; 0.4% (4) ordered a re-trial and;

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<sup>762</sup> INTERÉS LEGÍTIMO. CONTENIDO Y ALCANCE PARA EFECTOS DE LA PROCEDENCIA DEL JUICIO DE AMPARO (INTERPRETACIÓN DEL ARTÍCULO 107, FRACCIÓN I, DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS). Época: Décima Época Registro: 2007921 Instancia: Pleno Tipo de Tesis: Jurisprudencia Fuente: Gaceta del Semanario Judicial de la Federación Libro 12, Noviembre de 2014, Tomo I Materia(s): Común Tesis: P./J. 50/2014 (10a.) Página: 60.

<sup>763</sup> The argument of lack of independence within the SCM will be further developed in Chapter 14.

0.2% (2) were declared clearly non-proceeding.<sup>764</sup> Only 0.3% (3) claims were declared founded, and 0.1% (1) complied.<sup>765</sup> **That is a meager 0.37% (4 out of 1062) judicial efficiency rate against the non-compliance of the executive, and that rate is even after the NHRR.**

In the same period (2012-2014), and with various crime convictions against high-ranking federal functionaries (such as governors and ministers of state), not one of such functionaries has been removed from their charge (even though the 1994 reform explicitly provides the judicial resources to do so).<sup>766</sup> Furthermore, since the enactment of the Constitution of 1917 and until the NHRR, the SCM had investigative powers that could be exercised *ex officio* when there was “the violation of any individual guarantee or the violation of the public vote or some other crime punishable by federal law.”<sup>767</sup> In such period (1917-2011) said powers were exercised only 6 times.

The cases in which the investigative powers were invoked by the SCM where: León (1946),<sup>768</sup> Aguas Blancas (1996),<sup>769</sup> Puebla/Lydia Cacho (2006),<sup>770</sup> Atenco

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<sup>764</sup> Justice Juan N Silva Meza, *Informe Anual de Actividades* (Mexico City: SCJN, 2014) at 19.

<sup>765</sup> *Ibid.* at 20.

<sup>766</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art.109 and 110.

<sup>767</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 97 Par. 2 Valid until June 2011.

<sup>768</sup> See Suprema Corte de Justicia de la Nación. *La Facultad de Investigación de la Suprema Corte de Justicia de la Nación, los casos León y Aguas Blancas*, (México City: Suprema Corte de Justicia de la Nación, 2003) at 11.

<sup>769</sup> Even when the SCM originally refused to intervene, it was mandated by President Zedillo to do so in terms of Art. 97 (Const. of Mex). When the SC determined the responsibility of the governor he had already escaped and couldn't be brought to justice. See *Ibid.* and Lucio Cabrera Acevedo, *El Constituyente de 1917 y el Poder Judicial de la Federación una visión del siglo XX*, (México City: Suprema Corte de Justicia de la Nación, 2003) 173.

<sup>770</sup> The case was opened when the then Governor of Puebla, Mario Marín, was exonerated of the charge of enabling child abuse. See Justice Juan Silva Meza, *Dictamen que Valora la Investigación Constitucional Realizada por la Comisión Designada en el expediente 2/2006* (Mexico, SCJN, 2007), available at: <http://archivo.eluniversal.com.mx/notas/511533.html>.



(2007),<sup>771</sup> Oaxaca (2007),<sup>772</sup> and Guardería ABC (2009).<sup>773</sup> Moreover, in these cases the investigation was done by “petition” of the President of the Republic, and even then, only when 1) the official procedures of containment had lost their legitimacy (León, Aguas Blancas); 2) a governor was exonerated as a result of the investigation (Puebla, Atenco, and ABC) or; 3) due to technicalities couldn’t proceed against the governor even if found guilty (Oaxaca). Thus, the argument of judicial subservience to the President applies to the six cases.

### 12.3.4 So many laws so little time...

The conventionality control that every judge, magistrate and Justice in Mexico must apply is composed by the following normative elements: a) human rights enshrined in the Federal Constitution (on the basis of articles 1 and 133), and the jurisprudence of the courts of the Judicial Power of the Federation (SCM and circuit courts); b) human rights contained in international treaties to which the Mexican state is a party; c) the binding criteria of the CoIDH arising from judgments in which the Mexican state has been a party and, d) the guiding criteria of jurisprudence and precedents of the CoIDH when the Mexican state has not been a party.<sup>774</sup>

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<sup>771</sup> In this case the SCM considered by a majority of its Justices that “responsibility in the violation of human rights could not be attributed to the authorities **including the then governor of Estado de México and now President of the Republic Enrique Peña Nieto**” See Tribunal Pleno de la Suprema Corte de Justicia de la Nación, *Investigación Constitucional Número 3/2006 “Caso Atenco”* (Mexico, SCJN, 2009), available at: [https://www.scjn.gob.mx/Cronicas/Cronicas%20del%20pleno%20y%20salas/cr\\_casoAtenco.pdf](https://www.scjn.gob.mx/Cronicas/Cronicas%20del%20pleno%20y%20salas/cr_casoAtenco.pdf).

<sup>772</sup> Nicole Elizabeth Illand Murga, *Crónica de la Facultad de Investigación 1/2007 Tribunal Pleno de la Suprema Corte de Justicia de la Nación: Investigación de Posibles Violaciones Graves a los Derechos Humanos “Caso Oaxaca”* (Mexico: SCJN, 2008), available at: <https://www.scjn.gob.mx/Cronicas/Cronicas%20del%20pleno%20y%20salas/cr-caso-oaxaca.pdf>.

<sup>773</sup> “It was determined by a majority of 6 votes that **neither the Governor of the state of Sonora nor the local Minister of Finances were to be held responsible**”. Saúl García Corona, *Crónica de la Facultad de Investigación 1/2009, “Facultad de Investigación para Averiguar la Violación Grave de Garantías Individuales, Caso Guardería ABC”* (Mexico City: SCJN, 2010), available at: <https://www.scjn.gob.mx/Cronicas/Cronicas%20del%20pleno%20y%20salas/cr-guarderia-ABC.pdf>.

<sup>774</sup> Tesis aislada P. LXVIII/2011 (9.ª). Mayoría de 7 votos; votaron en contra los ministros Aguirre Anguiano, Pardo Rebolledo y Aguilar Morales.

Once again the NHRR postulates differ from the reality of the judicial branch in Mexico. The official webpage that compiles the aforementioned elements<sup>775</sup> has at the moment of writing, 210 international human rights treaties ratified by Mexico. This number doesn't even include the precedents derived from the CoIDH. So far, it has been argued in this dissertation that the courts are slow, powerless against the executive, and unsure of the cases where they can or should intervene. It is difficult to believe that the study of these new international provisions would lead to a greater number of efficiently enforced judgments when judges are already overwhelmed and underpowered.

### 12.3.5 The new *jurisprudencia*

Regarding the aforementioned national binding precedents, in Mexico, the most similar concept of *stare decisis* cases would be that of "*Jurisprudencia*". Since Mexico and Japan have civil law traditions, statutes have the highest importance and judicial resolutions are seen as limited to the contours of statutory application. Moreover, "the early years of Mexico's legal system did not develop the concept of precedent that in some way resembled the *stare decisis* principle characteristic of the common law tradition."<sup>776</sup> It was until 1967, with the reformed Article 94 of the Mexican constitution<sup>777</sup> and then in 1968, with the Amparo Law, that binding precedents were allowed and mandated at a federal level.

Whereas previously only federal magistrates and justices of the SCM could elaborate *Jurisprudencia* when 5 cases were solved using the same criteria, the

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<sup>775</sup> *Tratados internacionales de los que el Estado Mexicano es parte en los que se reconocen derechos humanos*, available at: <http://www2.scjn.gob.mx/red/constitucion/TI.html>.

<sup>776</sup> José María De la Garza Serna, "The Concept of *Jurisprudencia* in Mexican Law" (2006) 1:2 *The Mexican Law Review* 131, at 132.

<sup>777</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 94 "Statute law shall determine the terms in which the *jurisprudencia* from Federal Judicial Branch Courts on the interpretation of the Constitution, federal and local statutes and rulings, and international treaties entered into by the Mexican State is binding, as well as the requirements for its interruption and modification".

NHHR (particularly the Amparo reform), has complicated matters significantly. As of 2013 there are now three different types of procedures: a) the previously mentioned **reiteration** *Jurisprudencia* (when 5 cases are solved with the same criteria); b) the **contradiction** *Jurisprudencia* (when the SCM solves a contradiction between two lower courts or the great bench solves contradictions within the SCM and the result is considered as the winning or applicable new *Jurisprudencia*); and c) the completely new **substitution** *Jurisprudencia*, which allows a 3/4 majority of judges, magistrates or justices to change the criteria to be applied to a specific type of cases.<sup>778</sup>

There is also a new organization for binding precedents, by which some of them are obligatory for inferior courts, but not for equal or superior courts. These complex rules create doubts of applicability in both litigants and courts themselves, as up to 6 different configurations may arise depending on hierarchy, territory and subject matter. Thus, the NHRR has enabled a type of segmentation that generates legal uncertainty, discrimination for lower courts, impossible progressive interpretation of judicial precedents, and overall difficulty for the justiciability of human rights.

The opinion herein posited is that such problem originated from trying to graft the *stare decisis* models of both common law and international law. In such logic, the *Mexican Polyarchy* at the State level seems to be also a *Judicial Polyarchy* at the judicial one. Within the plurality of possible actors, the spheres of competence and jurisdiction are still not completely clear to the courts themselves. The NHHR would have been a great opportunity to realign the judicial system to be more transparent, simple and efficient. However, the reform was actually just a temporary patch within a wider problem of justice.

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<sup>778</sup> MODIFICACIÓN DE JURISPRUDENCIA DEL PLENO DE LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN. TIENE LEGITIMACIÓN PARA FORMULARLA EL PROPIO ÓRGANO. Novena Época; Pleno; SJFG; Tomo XXVIII, septiembre de 2008; p. 7.

## 12.4 Judicial restraint

By this point, this dissertation's position regarding the independence (or lack thereof) of the judiciary, and its special relationship with the executive has been mentioned regarding both countries. It is now relevant to describe the particular ways in which the judiciary has helped the executive instead of supporting the aggravated citizens, despite being the guarantor of human rights. This section will try to unravel how this came to be, and how it has been perpetuated.

### 12.4.1 Reasons for judicial restraint

In December 2015 three new Justices were appointed to the SCM. Although the President requires the approval of the Senate to name Justices,<sup>779</sup> President Enrique Peña Nieto unilaterally named Eduardo Medina Mora (a key figure for Peña's government having experience as minister of intelligence and ambassador in the U.K. and U.S.A.), Javier Láynez Potisek (former legal advisor for the presidency), and Norma Lucía Piña Hernández (the only Justice appointed with a judicial career). The appointment was made even though there was also a strong opposition by civil society and, more importantly, by *the judiciary itself*.

Since the candidates were announced in March 2015, the National Association of Judges and Magistrates specifically requested for Medina Mora not to be appointed Justice. The Association considered that Medina Mora's designation would severely affect the independence of the SCM. As Ana Cárdenas comments:

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<sup>779</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 89, Par XVIII and 76, Par. IV.

“Taking into consideration that judges and magistrates are obliged to follow the criteria and *Jurisprudencia* of the SCM, if their own resolutions are emitted in a logic of questionable impartiality and independence it is hard to maintain its legitimacy when tried to be enforced.”<sup>780</sup>

Indeed, as can be seen from the previous example, the judiciary in Mexico has an institutional and practical weakness versus the President. Its members can be named and removed from their lowest levels up to the Justices of the SCM. The appointments are even more discretionary than in Japan, and a judicial career is not necessary if there is a strong relationship with a mayor, governor, or the President of the Republic.

Also, as in Japan, courts have a tactical reason for restraint. Since lower judges are overwhelmed with cases, and they know that their superiors may overturn their decisions without any legal requirement, they decide not to take innovative stances. But the case of Mexico is even worse than Japan since the new rules of *Jurisprudencia* oblige lower judges to blindly follow the conservative criteria established by higher courts.

Unlike Japan, however, **Mexico has a very flexible constitution, so in many instances, it is better to advocate change with the legislators instead of using judicial activism.** In sum, an adequately balanced SCM could enable important changes for Mexico, but if the executive maintains its uncontested power, this will be difficult to achieve.

#### **12.4.2 Conservatism by presidential design**

**In Mexico as in Japan, there is a frequent change of Justices** (one new Justice every 4 years). This, along with the power of appointment by the President, makes

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<sup>780</sup> Ana Cárdenas, “La Independencia Judicial: Una Lucha Permanente”, *Animal Político* Centro de Análisis de Políticas Públicas, Diciembre 17, 2015.

it difficult to have independent courts. Before 1994 the servitude towards the executive was unquestionable, but after the reforms, the judicial dependency design was less obvious. Furthermore, as previously explained in Chapter 4.3.1, sometimes it is better to have a judiciary appearing to be defiant and independent to gain legitimacy and control social unrest.

In the Mexican case, Jodie Finkel considers that president Zedillo's strategy for judicial reform empowered Justices, but limited such power with written statutes.<sup>781</sup> In this way, even should the PRI lose the presidency (as it happened in the following elections), it could still control the Justices with their majority in the Senate,<sup>782</sup> and impede them from changing their loyalties towards the new PAN. At the same time, the reform gave the impression of enabling the "democratic transition" of 2000 but blocked any judgments against the PRI. Zedillo's was a truly masterful design that paid off with PRI's return to power in 2012 along with the control of the judiciary.

### **12.4.3 A qualitative analysis of independence in the judiciary**

Trying to test Finkel's argument, Josafat Cortéz elaborated a qualitative analysis of the judgments against the president's policies and acts.<sup>783</sup> The analysis encompassed the period where the judiciary was supposed to be more independent (2000-2012) since the President did not belong to the PRI. Cortéz applied the theory of judicial strategic studies<sup>784</sup> to his hypothesis, which states that it is more probable that the SCM rule against the President when a case: a) is not about an important issue for the President's agenda, b) refers to a legislative process or, c) when few or none of the serving Justices were appointed by the current President.

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<sup>781</sup> Jodi Finkel, "Judicial Reform as Insurance Policy: Mexico in the 1990s" (2005) 47:1. *Latin American Politics and Society* 87.

<sup>782</sup> Since the origin of the PRI it has only temporarily lost its majority in the Senate from 2006 to 2012 (including coalition with other parties).

<sup>783</sup> Josafat Cortez Salinas, *La Suprema Corte de Justicia en México. ¿Cuándo Vota Contra el Presidente?* (Mexico City: UNAM-IJJ, 2014).

<sup>784</sup> See Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington: CQ Press, 1998).

Cortéz findings confirm that **the SCM only votes against the president in those cases of little or no importance for the presidential agenda, and that allow the SCM to be perceived as defiant and independent. Such pattern is very similar to that of Japan as presented by Ramseyer and Ramsusen.**

## 12.5 Social attitudes towards law and litigation

Social attitudes towards Law in Mexico have been widely studied, but a good starting point would be the National Survey of Corruption and Legal Consciousness (2010).<sup>785</sup> In this, the biggest independent survey made in Mexico, 92% of the surveyed considered there is corruption in Mexico compared to 5.8% that consider there is not; 73.8% considered that there is more corruption in the public sector compared to 10.1% in the private sector, and 8.5% in NPOs. Regarding the Law itself, 66.7% considered that norms were not adequate for the current reality of Mexico, 95% considered that the laws are poorly respected or not respected at all.<sup>786</sup>

These findings are not limited to this particular survey, since according to Transparency International, Mexico got 35 out of 100 possible points in the Corruption Perception Index.<sup>787</sup> It also ranked 39 (of a 100 total) in the control of corruption index, and 39% in the rule of law indicators of the World Bank.<sup>788</sup> OECD statistics place Mexico in a ranking of 0.5 (out of 1) in the rule of law, and 66% (out of 100%) in corruption perception. Finally, Mexico is 25% below the average in the protection of human rights indicators.<sup>789</sup>

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<sup>785</sup> Transparencia Mexicana, *Índice Nacional de Corrupción y Buen Gobierno*, (May 10, 2011), available at: <http://www.tm.org.mx/wp-content/uploads/2013/05/01-INCBG-2010-Informe-Ejecutivo1.pdf>.

<sup>786</sup> *Ibid.*

<sup>787</sup> Transparency International, *Mexico, Country Profile*. Retrieved from Transparency International website, available at: <https://www.transparency.org/country/#MEX>.

<sup>788</sup> World Bank, *Worldwide Governance Indicators*, Mexico, available at:

<http://databank.worldbank.org/data/reports.aspx?source=Worldwide-Governance-Indicators>.

<sup>789</sup> OECD, *Economic Surveys: Mexico 2015*, available at: <https://www.oecd.org/eco/surveys/Mexico-Overview-2015.pdf>.

### 12.5.1 Lack of trust in the judiciary

**Although not as litigation-averse as Japan, Mexico is still far away from reaching the levels of other OECD nations.** Since jurisdiction in Mexico is much segmented in first instance courts, the Judicial Power's Statistics Office only has indicators for the appellate jurisdictions which, when adding the data of the SCM, is representative of the total. In this manner, since 2007 the litigation index (an average of cases per 100,000 habitants) has been slowly increasing and in 2012 it reached 1.89%<sup>790</sup>, which is small when compared to USA (5.8%) or the UK (3.6%), but a little bigger than Japan (1.76%).<sup>791</sup>

Similar considerations to those described for the case of Japan can also be found in Mexico. An important difference, however, is that, according to polls and surveys, the low levels of litigation in Mexico have almost exclusively to do with lack of economic resources to file a suit. Access to justice is free, but the administrative and time-consuming costs lead many Mexicans to forego their claims.

On the other hand, Mexico has more judges per habitants when compared to Japan. By July, 2015 there were 4.2 judges for every 100,000 habitants in Mexico (which was about 1.5 more judges than Japan<sup>792</sup>) and, in addition, 200 special courts specialized in labor and social security disputes. Compared with Japan, Mexico has a significant numerical advantage, nonetheless, when compared with other Latin American countries, Mexico still has a relatively insufficient number of judges per habitants.

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<sup>790</sup> Dirección General de Estadística Judicial, *Indicadores Generales*, Suprema Corte de Justicia de la Nación, available at: [http://www.dgepj.cjf.gob.mx/Indicadores/acuerd\\_nal\\_ini.asp](http://www.dgepj.cjf.gob.mx/Indicadores/acuerd_nal_ini.asp).

<sup>791</sup> Mark J. Ramseyer & Eric B. Rasmusen, *Comparative Litigation Rates*, Discussion Paper No. 681, 11/2010, (Cambridge: Harvard, 2012).

<sup>792</sup> UNODC Administration of Justice Statistics (2011-2013), available at: <http://knoema.es/ltsbnbe/unodc-administration-of-justice-statistics-2011-2013?tsId=1016810>.



Moreover, local judges are perceived as poorly prepared and prone to corruption in favor of the party with more money. 49% of the general public consider that the whole judiciary is still not independent from the executive branch, and while the SCM is the segment of the judiciary with higher public trust at 51%, local judges and state magistrates don't get more than 45% of trust.<sup>793</sup> Because of this, alternate dispute resolutions are preferred by many Mexicans. This is especially frequent in everyday matters such as divorces, work-related claims, and low sum controversies.

### 12.5.2 Too many lawyers too little justice

**The difference between the numbers of judges in Mexico compared to Japan is significant, however, regarding the number of lawyers, the difference is immense. In fact, the quantity of lawyers in Mexico more than doubled those of Japan.** In 2014, Mexico had 66 certified lawyers per 100,000<sup>794</sup> compared to Japan's 27 lawyers per 100,000 habitants.<sup>795</sup> Another previously cited poll show even more contrasting numbers. For the same year, 2014, there were at least 321,000 lawyers, around 1 for every 375 people, in Mexico compared to only 35,031 attorneys, around 1 for 4300 people, registered with bar associations in Japan.<sup>796</sup> Since bar exams are not obligatory in Mexico, the real number of lawyers may actually be even bigger.

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<sup>793</sup> Local judges are perceived to be less supervised and in closer contact with local delinquency. Ulises Beltrán y Alejandro Cruz, "Se dividen las opiniones sobre la Suprema Corte", *Excelsior*, 14/12/2015, available at: <http://www.excelsior.com.mx/nacional/2015/12/14/1063268>.

<sup>794</sup> Encuesta Nacional de Ocupación y Empleo (ENOE), *Número de abogados en México, Primer trimestre de 2014* (Mexico City: INEGI, 2014).

<sup>795</sup> Japan Federation of Bar Associations, *White Paper on Attorneys, 2014*, (Japan: JFBA, 2015), available at: <http://www.nichibenren.or.jp/library/en/about/data/WhitePaper2014.pdf>.

<sup>796</sup> "日弁連 – 弁護士実勢調査 (Translation: JFBA – Lawyer Survey)" (in Japanese) Japanese Federation of Bar Associations. Retrieved at: <http://www.nichibenren.or.jp/en/>.

However, the high number of lawyers does not necessarily represent an increase of justice for the vast majority of the Mexican population. With data from 2014, the World Justice Project's survey shows that only 36% of the polled people considered there was an effective access to justice with reasonable administrative costs.<sup>797</sup> Furthermore, according to Transparency International<sup>798</sup>, 55% of the Mexican population said they had to pay bribes in a judicial process (besides the lawyer's fees), which makes the cost of a trial too expensive for the average citizen.

Finally, for those who can't pay for defense, public attorneys are clearly insufficient with a total number of 3,239 attorneys, and an average of 25 cases per attorney per month.<sup>799</sup> In sum, inequality can also be seen in Mexico's too many lawyers but too little justice.

### 12.5.3 The national and local human rights commissions

Since 1992 the National Commission of Human Rights (CNDH) was created first as a NHRI and, since a reform of 1999 to Article 102, as an autonomous but publicly financed entity dedicated to protecting and promoting human rights in Mexico. As in the case of the SCM, such independence is hindered by the fact that its president (*ombudsman*) is elected by the majority in the Senate (with the aforementioned political considerations). Also, the CNDH resolutions (named *Recomendaciones*) do not have any enforcing power and serve only as a shaming mechanism against federal and local human rights violations.<sup>800</sup>

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<sup>797</sup> The World Justice Project, *Rule of Law Index* (2014).

<sup>798</sup> Transparencia Internacional, *Barómetro Global de la Corrupción 2014: México*, (Reino Unido: TI, 2014).

<sup>799</sup> This number has to be compared to a private attorney who has an average of 5-7 cases per month. INEGI *Censo Nacional de Gobierno, Seguridad Pública y Sistema Penitenciario 2014* (Mexico City: INEGI, 2014).

<sup>800</sup> {The Human Rights Comissions} shall receive all the complaints against administrative actions or omissions committed against human rights by any public office or employee, except for the officials working for the federal judicial branch. These agencies shall issue public **recommendations, which shall not be compulsory**. All public servants are obliged to answer the recommendations issued by these agencies. When the authorities or public servants responsible do not accept or enforce these recommendations, they must substantiate such

With the NHRR, the CNDH now has the investigative powers that previously corresponded to the SCM. The local state governments were also mandated to create local human rights commissions with political and financial independence. In practice, the tame and unimportant role of human rights commissions in Mexico has remained even after the reform. Moreover, the report of Human's Right Watch regarding the commission's labor in general,<sup>801</sup> and the cessation of support from the most important human rights NPOs in Mexico indicates that, although in advantage to Japan, the CNDH is formally independent, its powers are quite limited.

*In parallel to the case of Japan, this chapter studied the judiciary with special emphasis on its powers and limitations. Although Mexico has had a long tradition of judicial review, more than double the judges, and many more lawyers than Japan, its decisions have been conservative and frequently overpowered by the executive and legislative branches. Inequality and corruption have been common problems for the plaintiffs when dealing with the courts. The foregoing is relevant to the present study since the constitutionalization of the RSS does not seem to have enabled the "transformative powers of the courts", and there seems to be an absence of judicial activism similar to that presented in Japan (even when the Mexican population is not so averse to litigation). In the next chapter, an analysis of how all these elements affect the RSS in the Mexican constitution and in actual practice will be made.*

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refusal and make their refusal public. In addition, **the Senate, the Permanent Committee or the state legislatures, as appropriate, may call, at the request of these agencies, the authorities or public servants responsible to appear and explain the reasons of such refusal.** (Art. 102 B Const. of Mex).

<sup>801</sup> Human Rights Watch, *Mexico's National Human Rights Commission a Critical Assessment* (Mexico City: Human Rights Watch, February 12, 2008).

# Chapter 13 Article 123 Par. XXIX of the Mexican Constitution

*This chapter will focus on the RSS in the Mexican constitution and the corresponding reforms that led to its actual form under the NHRR of 2011 and 2013. The chapter will begin by explaining the origin and evolution of Article 123 Par. XXIX, and how it has been interpreted up to this day. A common problem shared with Japan regarding enforcement of the RSS, has been the labor dependency, even though as will be explained, since 1974 the RSS has not been constitutionally limited to the workers and their families. Finally, this chapter will analyze other non-judicial ways in which the RSS can provide benefits for those persons who are not formally employed.*

## 13.1 Origin and evolution of article 123 Par. XXIX

One of the three main revolutionary contentions that were acknowledged by the Mexican Constitution of 1917 had to do with labor rights. Since workers had been extremely abused and seldom protected during the Porfiriato regime, the 1917 Constitution included in Article 123 a very thorough and advanced provision that established labor rights. Among such rights, the original version of said article considered that: “worker and popular insurances which protected life, invalidity, and labor accidents were considered of public interest”.<sup>802</sup> This meant, according to the Diary of Debates for the Constitution that there was a clear intention to consider social insurance as a right but, due to the ongoing revolution, its clearer definition and entitlement would have to wait for some years.<sup>803</sup>

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<sup>802</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 123.

<sup>803</sup> José Díaz Limón, *La Seguridad Social en México un Enfoque Histórico* (México: IIJ-UNAM, 1987) at 54.

After the revolution and the consolidation of a stable power with the PRI, the clearer definition for the RSS would come with a reform to Article 123 Par. XXIX enacted in January 29, 1929. Such previously cited reform would establish that:

“XXIX. The enactment of a Social Security Law is of public interest and it shall include insurance against disability, life, illness and work related accidents and any other analogous circumstances.”<sup>804</sup>

As can be seen, for the case of Mexico the RSS appears to have been originally included **within the right to work and its corresponding labor rights**. Moreover, when reading paragraph XXIX, the RSS is mandated to be detailed by a SSL (that would not exist until early 1943) which must include insurance against disability, life, illness and work related accidents. The previous fact seems to suggest that even in its origin, such disposition was clearly reserved for workers and, possibly, to some of their economic dependents (work related life insurance for example).

On one hand the previous wording is more detailed regarding the minimum elements that shall be included in the RSS when compared to Japan. On the other hand, the fact that the RSS was contemplated as part of Article 123 (which is generally considered as the article protecting the right to work and labor rights), and mentions “work related illness and accidents” seem to be limited to workers rather than “all people”, as in the case of Japanese Article 25. In addition, the fact that the RSS was referred for its detailed specification to a secondary law, allowed the Mexican government to hinder the justiciability of such right for more than a decade until the promulgation of the SSL.

Finally, in early 1942 the SSL was enacted, and in the first paragraph of its Preamble mentioned that:

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<sup>804</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 123, Par. XXIX as amended in January 29, 1929.

“The State must protect the health and life of people that do not have enough resources to do so by themselves, nor do they have the preparation for future contingencies. Such protection must be achieved by the Social Insurance and should include, in a sustainable manner, as much persons as possible”.<sup>805</sup>

Although, at first glance this law seems to include among its beneficiaries “all people without resources”, or at least, in a stricter interpretation, “as much of such people as possible”, in its other 9 paragraphs the Preamble consistently limits its benefits to the workers and their families. Thus, those entitled to the RSS are defined programmatically at best and vaguely at worst. The rationale seemed to be “workers and their families will be covered first, and at some indeterminate later point the rest of the population will be included too”.

But why didn't the Mexican legislators clearly establish such rationale? The reason was political and had to do with the use of welfare promises in exchange for votes and preventing social unrest. More specifically, by this moment the labor unions were the second most important pressure groups, surpassing the church and rural cooperatives, and just below the now completely consolidated hegemonic party (PRI). The PRI worked closely with labor unions to achieve enough votes and remain in power, but in exchange, the workers and their leaders had to receive preferential treatment, thus, they were the first beneficiaries of the RSS.<sup>806</sup>

In such line of reasoning, the SSL in turn gave origin to the (IMSS) and (ISSSTE), which covered privately and publicly employed workers respectively and to the Secretariat of Health and Assistance (SSA for its acronym in Spanish), which would intend to cover some of the population that wasn't considered by the previous two.<sup>807</sup> In this manner, social security began to distance from social assistance, and the forms of addressing poverty became intrinsically linked to the regulation of labor. Put

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<sup>805</sup> Exposición de motivos de la Ley del Seguro Social de 1942. Ley del Seguro Social. Publicada en el Diario Oficial de la Federación el Martes 19 de enero de 1943.

<sup>806</sup> José Manuel Lastra Lastra, “El sindicalismo en México” (2009) 15 *Anuario Mexicano de Historia del Derecho* 37.

<sup>807</sup> Maximiliano García Guzmán, “Derecho a la Seguridad Social” (2014) 32:9 *Estudios Políticos* 83.

in simpler words, ***the labor dependency paradigm became the dominant paradigm in Mexico.***

The next important reform to the constitutional RSS would come in 1974. During President Echeverría's term,<sup>808</sup> Article 123 Paragraph XXIX of the Constitution was reformed to include old age, involuntary unemployment and childcare services for workers, but more importantly now included **peasants, non-salaried persons and other social sectors and their families:**

"XXIX. The Social Security Law is of public interest and it shall include insurance against disability, **old age**, life, **involuntary unemployment**, illness and work related accidents, **childcare services** and any other intended for the protection and welfare of workers, **peasants, non-salaried persons and other social sectors and their families.**"<sup>809</sup>

As will be revealed by the cases and *Jurisprudencia* that will be analyzed in the next section, even though those new groups of persons were now formally entitled to the RSS, such entitlement was not recognized by the Mexican courts. Hence, although the reform boasted making the constitutional right to social security justiciable for non-workers, it remained non-justiciable in practice. Furthermore, the previously discussed NHRR of 2011<sup>810</sup> specifically mandated the *pro personae* and conventionality control in the interpretation of the constitution, however, the invoking of international treaties has been scarce and the justiciability of such treaties pertaining the RSS has been non-existent. In the next section, the cases denying justiciability to any form of the RSS that is not based on a labor relationship will be analyzed.

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<sup>808</sup> See Enrique Krauze, *La presidencia Imperial* (Mexico City: Editorial Tusquets, 1997).

<sup>809</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 213 as of December, 31, 1974.

<sup>810</sup> See Chapter 11.3.

## 13.2 Principal cases of *Jurisprudencia*

As has been explained, Article 123 Par. XXIX has a very succinct wording which refers to secondary legislation and judicial interpretation. Thus, it is in the interpretation of the constitution along with the SSL that a more realistic picture of the RSS in Mexico can be found. In the case of Mexico, in contrast to Japan, there are more than triple the cases regarding the constitutional RSS. Nonetheless, for comparative purposes, only the most recent and currently applicable interpretations that had led to official criteria (known in Mexico as *Jurisprudencia*), will be mentioned. Very interestingly, although there has been much more litigation in Mexico, the courts' resolutions share many elements with the ones of their Japanese counterparts. The most recent and currently applicable *Jurisprudencia* regarding the RSS are: 1) The RSS is conditioned by the existence of a previous labor relationship; 2) Deference towards the legislative and executive branches; 3) Limitation of social security benefits and; 4) The status of Article 123 Par. XXIX is subsidiary to other considerations.

### 13.2.1 The RSS is conditioned by the existence of a previous labor relationship

As has been previously discussed, although the Reform of 1974, and more recently the NHRR of 2011, formally allow for persons other than workers to be entitled for the constitutional RSS, the *Jurisprudencia* has consistently denied such right. Not only that, but even after acknowledging the more encompassing definition of the international treaties regarding human rights (such as the Pact of San José for example) the courts have maintained that: “regarding social security, the existence of a previous labor relationship is an essential element for such right”.

The previous criterion can be found across a large number of claims including:



- 1) The assessment of social security contributions: in which the SCM has ruled that “in conformity with Article 123 Par. XXIX of the Mexican Constitution and the SSL, for social security contributions to be considered, a previous formal labor relationship must be proved. If such relationship can not be demonstrated, there is an essential omission, which renders such contributions as not valid”.<sup>811</sup> Such resolution was applied to the plaintiffs which paid contributions to the IMSS, but whose employer had not registered them accordingly and thus, those contributions were considered invalid until it could be proven (by their employer or by themselves), that they were formally employed.
- 2) The assessment for old age pensions: this criterion was even more stringent than the previous one. A number of plaintiffs tried to establish entitlement to their old age pensions (which requires at least 60 years of age and 1250 weeks of contributing to social security), by continuing contributing the remaining weeks (until reaching the 1250), even when they were dismissed from their jobs. The SCM established that, “the cessation of a labor relationship implies a lack of an essential element for social security benefits and thus, even though the contributions were paid by the ex-worker by its own account, the benefit of old age pension may not be granted without continuing the labor relationship”.<sup>812</sup>
- 3) The claim of work related accident benefits: a common practice with Mexican employers is to delay as much as possible the registry of their employers into the IMSS. Such practice has oftentimes caused an employee to claim

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<sup>811</sup> REVISIÓN FISCAL. LA DECLARATORIA DE NULIDAD LISA Y LLANA DE UNA RESOLUCIÓN EN MATERIA DE APORTACIONES DE SEGURIDAD SOCIAL, POR NO HABERSE ACREDITADO LA RELACIÓN LABORAL, ES UNA CUESTIÓN DE FONDO. Época: Décima Época Registro: 2011991 Instancia: Segunda Sala Tipo de Tesis: Jurisprudencia Fuente: Gaceta del Semanario Judicial de la Federación Libro 32, Julio de 2016, Tomo I Materia(s): Administrativa Tesis: 2a./J. 77/2016 (10a.) Página: 713.

<sup>812</sup> PENSIÓN POR VEJEZ. EL REQUISITO RELATIVO A LAS SEMANAS DE COTIZACIÓN PARA SU RECONOCIMIENTO, CONFORME AL ARTÍCULO 183 DE LA LEY DEL SEGURO SOCIAL DEROGADA, DEBE SUSTENTARSE NECESARIAMENTE EN EL DESEMPEÑO DE UNA EFECTIVA RELACIÓN DE TRABAJO. Época: Novena Época Registro: 181505 Instancia: Tribunales Colegiados de Circuito Tipo de Tesis: Aislada Fuente: Semanario Judicial de la Federación y su Gaceta Tomo XIX, Mayo de 2004 Materia(s): Laboral Tesis: VIII.3o.17 L Página: 1810.

accident related benefits without knowing she hasn't been formally insured and therefore is denied of such benefits. In such cases the plaintiffs have claimed ignorance and lack of bad faith trying to get entitlement to the aforecited benefits. However, and even though the SCM has acknowledged that it is not their fault but rather their employers', they also declared that granting such benefits without previously being insured would imply a higher risk for the IMSS since "there is a risk that the service of the IMSS will be rendered in a very deficient way and that the stability and permanence of the system can be endangered".<sup>813</sup> In practice, the SCM has ordered the employer to pay directly to the employee for the work related accident, but has allowed the IMSS to legally deny those services.

- 4) Trying to prove the labor relationship to obtain social security benefits: As the three previous criteria established, the formal labor relationship is essential to social security entitlement. In Mexico however, it is sometimes difficult to adequately demonstrate such relationship, and even though the courts have explicitly acknowledged the RSS both in the constitution and in the ICESCR, they have also established that "the job offer before formal employment does not grant entitlement to social security benefits in any case".<sup>814</sup> This has allowed another common practice by Mexican employers to offer a "job with a trial period" before signing the corresponding employment documents for the "candidate". In such manner, should the "candidate" require social security services (such as medical or childcare services for example) she cannot claim them since she has only a "job offer" and not a "labor relationship". More importantly, and similar to the case of Japan, the SCM has established that if

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<sup>813</sup> SEGURO SOCIAL, ARTICULO 48 DE LA LEY DEL. NO VIOLA EL ARTICULO 14 CONSTITUCIONAL. Época: Séptima Época Registro: 233050 Instancia: Pleno Tipo de Tesis: Aislada Fuente: Semanario Judicial de la Federación Volumen 67, Primera Parte Materia(s): Administrativa, Laboral Tesis: Página: 73.

<sup>814</sup> SEGURIDAD SOCIAL. LA OFERTA DE TRABAJO NO ES UN MECANISMO JURÍDICO PARA HACER EFECTIVO ESE DERECHO HUMANO. Época: Décima Época Registro: 2004105 Instancia: Tribunales Colegiados de Circuito Tipo de Tesis: Aislada Fuente: Semanario Judicial de la Federación y su Gaceta Libro XXII, Julio de 2013, Tomo 2 Materia(s): Constitucional, Laboral Tesis: XXXI.10 L (10a.) Página: 1575.

they ceded in benefit of the “candidates” “such benefit will privilege a few claimants but in turn would negatively affect the IMSS, an institution of public welfare, and in such way the larger population”.<sup>815</sup> In other words, similarly to the previous *Jurisprudencia*, the IMSS as a public welfare institution is considered more important and worthy of protection than the individual worker.

### **13.2.2 Deference towards the legislative and executive branches**

As in the case of Japan, in cases involving social rights the Mexican judiciary has acted as “weak courts”. Not only has the Mexican judiciary abstained from adjudicating social rights for the plaintiffs, but on the contrary, it has frequently been deferential to both the legislative and executive branches in providing, enforcing and limiting the RSS. The “economic sustainability” and the “public welfare” arguments have been common reasonings to defer RSS claims to the other two branches of power as can be seen in the following examples:

- 1) Modification of requirements for entitlement to the RSS: Regarding old age, work related accidents and death insurances and their benefits, the SCM has established that “since the constitution doesn’t specify conditions for entitlement, the legislative branch has no limitations to establish those conditions that it considers reasonable.” But the SCM has also interpreted that such omission “along with the fact that the recent financial crisis of the IMSS and ISSSTE represent a need to limit benefits for the greater welfare and economic sustainability of both social security institutes allows the

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<sup>815</sup> SEGURO SOCIAL. EL ARTÍCULO 151, FRACCIÓN III, DE LA LEY RELATIVA, NO VIOLA LOS PRINCIPIOS DE SOLIDARIDAD SOCIAL Y UTILIDAD PÚBLICA CONTENIDOS EN EL NUMERAL 123, APARTADO A, FRACCIÓN XXIX, CONSTITUCIONAL. Época: Novena Época Registro: 167170 Instancia: Segunda Sala Tipo de Tesis: Aislada Fuente: Semanario Judicial de la Federación y su Gaceta Tomo XXIX, Mayo de 2009 Materia(s): Constitucional, Laboral Tesis: 2a. XLVII/2009 Página: 275.

legislative branch to use ample discretionary powers to change the age of retirement, the amount of benefits and the population to be covered without violating the constitution”.<sup>816</sup>

- 2) Legitimation of the old age pension privatization: Perhaps the most recent, infamous and representative example of the court’s deference to the executive came with the change of regime regarding retirement pensions. As was previously explained in Chapter 10.2.2, the retirement pension fund of all Mexicans employees was privatized in 1997. From such date and up to the time of writing this, there had been hundreds of Amparo actions trying to overturn such decision. Nonetheless, the SCM has maintained that: a) The transfer of funds from a public to a private scheme does not violate property rights since such rights are considered of national importance and public interest.<sup>817</sup> b) The transfer of funds from a public to a private scheme does not violate due process since “even though the worker is the rightowner of his contributions, such contributions are limited by the principle of public welfare”.<sup>818</sup> In the cited cases, the SCM considered that the principle of public welfare implied the economic sustainability of the IMSS and ISSSTE and therefore overruled the individual objections against such transfer.

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<sup>816</sup> ISSSTE. LA MODIFICACIÓN DE LOS REQUISITOS PARA TENER DERECHO A UNA PENSIÓN DE JUBILACIÓN, DE RETIRO POR EDAD Y TIEMPO DE SERVICIOS O DE CESANTÍA EN EDAD AVANZADA, NO VIOLA LA GARANTÍA DE SEGURIDAD SOCIAL (ARTÍCULO DÉCIMO TRANSITORIO DE LA LEY VIGENTE A PARTIR DEL 1o. DE ABRIL DE 2007). Época: Novena Época Registro: 168631 Instancia: Pleno Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Tomo XXVIII, Octubre de 2008 Materia(s): Constitucional, Laboral Tesis: P./J. 123/2008 Página: 46.

<sup>817</sup> SEGURO SOCIAL. LA TRANSFERENCIA DE RECURSOS DE LA SUBCUENTA DE RETIRO, CESANTÍA EN EDAD AVANZADA Y VEJEZ AL GOBIERNO FEDERAL, NO VIOLA LA GARANTÍA DE AUDIENCIA. Época: Novena Época Registro: 175434 Instancia: Segunda Sala Tipo de Tesis: Aislada Fuente: Semanario Judicial de la Federación y su Gaceta Tomo XXIII, Marzo de 2006 Materia(s): Constitucional, Laboral Tesis: 2a. XX/2006 Página: 535.

<sup>818</sup> SEGURO SOCIAL. LA ENTREGA DE FONDOS DE LA SUBCUENTA DE RETIRO, EN LOS RAMOS DE CESANTÍA EN EDAD AVANZADA Y VEJEZ, AL GOBIERNO FEDERAL, PREVISTA EN EL ARTÍCULO DÉCIMO TERCERO TRANSITORIO DE LA LEY DEL SEGURO SOCIAL, NO VIOLA LA GARANTÍA DE AUDIENCIA. Época: Décima Época Registro: 160751 Instancia: Segunda Sala Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Libro I, Octubre de 2011, Tomo 2 Materia(s): Constitucional Tesis: 2a./J. 165/2011 (9a.) Página: 1134.

- 3) Discretionary limitation of beneficiaries for social assistance programs: In 2009, the SCM definitely established that: “regarding social rights, the Mexican Constitution allows wide discretionality at the Federal and Local levels regarding the financing, limitations and eligible beneficiaries for social assistance programs as long as those discretionality tends to achieve a general level of welfare to which the Mexican state is obligated. Thus, each local state may choose the selection and implementation mechanisms of social assistance programs”.<sup>819</sup> The previous *Jurisprudencia* partially explains the broad differences in the protection of citizens from the North and South of Mexico. In practice this *Jurisprudencia* has further enabled clientelism and the vote capturing strategies which were discussed in Chapter 11.2.

### 13.2.3 Limitation of social security benefits

The Mexican courts have also established *Jurisprudencia* with very similar reasoning to the Asahi and Horiki cases from Japan.<sup>820</sup> Even though after the NHRR of 2011 social rights should be interpreted in its widest and most comprehensive sense, the following paradigmatic resolutions have actually done the contrary:

- 1) The SCM, regarding the beneficiaries of a worker who dies during his time of employment, has consistently interpreted that in case of multiple pensions and benefits, their amounts must be limited. In one particularly recent case from April, 2017 the beneficiaries claimed both a widowhood and orphanhood

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<sup>819</sup> DESARROLLO SOCIAL. EL ARTÍCULO 15 DEL REGLAMENTO DE LA LEY GENERAL RELATIVA QUE PREVÉ UN MODELO SOCIAL ÚNICO DE FOCALIZACIÓN RADICAL PARA LA ATENCIÓN A GRUPOS EN DESVENTAJA, NO VIOLA LA CONSTITUCIÓN FEDERAL. Época: Novena Época Registro: 166969 Instancia: Pleno Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Tomo XXX, Julio de 2009 Materia(s): Constitucional Tesis: P./J. 90/2009 Página: 1538.

<sup>820</sup> See Chapter 9.2.2 and 9.2.3.

pension. In such case, the court decided that since the sum of both pensions would imply a 120% of the salary that the worker was receiving, the sum of pensions should be limited to an amount that did not exceed the 100% of the regular salary.<sup>821</sup> As can be seen, similarly to the Horiki case, the rationale that there were two completely different beneficiaries with different rights and claims was overridden by the need to maintain “a fair distribution of burdens and benefits”.<sup>822</sup>

- 2) A series of Amparos coming from 2008 and until this year have claimed the coexistence of private and public social security systems regarding money and service benefits. The SCM however adamantly opposes such interpretation and has consistently argued that “although a worker may have contributed simultaneously during his working life to the IMSS (private work) and ISSSTE (public work), it is not unconstitutional that only one of them, the one in which he contributed more, provides pension and health services exempting the other one in which he made contributions in a lesser amount”.<sup>823</sup> Just in the year 2008, the aforementioned resolution had been previously challenged five times<sup>824</sup> for being considered grossly unconstitutional and

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<sup>821</sup> PENSIONES POR VIUDEZ Y ORFANDAD. CUANDO COEXISTEN NO DEBEN REBASAR EL 100% DEL MONTO DE LA PENSIÓN DE INVALIDEZ, DE VEJEZ O DE CESANTÍA EN EDAD AVANZADA QUE DISFRUTABA EL ASEGURADO FALLECIDO, O DE LA QUE LE HUBIERE CORRESPONDIDO POR INVALIDEZ. Tipo de Tesis: Aislada Fuente: Gaceta del Semanario Judicial de la Federación Libro 41, Abril de 2017, Tomo II Materia(s): Laboral Tesis: (IV Región) 2o.20 L (10a.) Página: 1774.

<sup>822</sup> *Ibid.*

<sup>823</sup> ISSSTE. LOS ARTÍCULOS 141 Y 142 DE LA LEY RELATIVA, NO SON INCONSTITUCIONALES, AL DISPONER QUE CUANDO SE COTICE DE FORMA SIMULTÁNEA CON EL IMSS, LA ASISTENCIA MÉDICA DEBERÁ PRESTARSE POR EL INSTITUTO AL QUE EL PENSIONADO HUBIERE COTIZADO DURANTE MAYOR TIEMPO. Época: Novena Época Registro: 168625 Instancia: Pleno Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Tomo XXVIII, Octubre de 2008 Materia(s): Constitucional, Administrativa Tesis: P./J. 161/2008 Página: 55.

<sup>824</sup> 1. Amparo en revisión 218/2008. José Luis Olivares Cervantes y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: Olga Sánchez Cordero de García Villegas. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Carmen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.  
2. Amparo en revisión 219/2008. José del Carmen de la Torre Mendoza y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: José Ramón Cossío Díaz. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Carmen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

unjust. Nonetheless, the before-mentioned criterion stands to this day. Thus, similar to the Asahi case, two concurrent benefits may not concur, but even worse that in the Japanese case, according to this *Jurisprudencia* the plaintiffs who contributed to both public and private security systems during their working life have a right to only one of them.

### 13.2.4 The RSS as a social responsibility

Similar to the Japanese case of “Participatory Welfare Society”, as a euphemism for government unburdening in the late 1980s, since the rise of neoliberalism in the 1990s, the privatization of various goods and services in the 2000s, and the triumph of self-reliant welfare since 2012 and up to this *sexenio*, the courts have served for legitimating the *status quo*. More clearly, since 2008 the SCM issued a *Jurisprudencia* derived from five similar cases claiming the right to health services as part of the RSS.<sup>825</sup> The resulting *Jurisprudencia*, in a wording similar to the case

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3. Amparo en revisión 220/2008. Alma Rosa Sandoval Rodríguez y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: Margarita Beatriz Luna Ramos. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Carmen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

4. Amparo en revisión 221/2008. Socorro Fregoso Fragoso y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: Sergio A. Valls Hernández. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Camen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

5. Amparo en revisión 229/2008. Rosa Carmina Barrera Salinas y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: Juan N. Silva Meza. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Carmen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

<sup>825</sup> 1. Amparo en revisión 218/2008. José Luis Olivares Cervantes y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: Olga Sánchez Cordero de García Villegas. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Carmen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

2. Amparo en revisión 219/2008. José del Carmen de la Torre Mendoza y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: José Ramón Cossío Díaz. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Carmen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

3. Amparo en revisión 220/2008. Alma Rosa Sandoval Rodríguez y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: Margarita Beatriz Luna Ramos. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Carmen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

of Japan made a distinction between the different sectors of society and their duties. The resolution is quoted next, *in extenso*, due to its importance to understand the justiciability and enforcement of the RSS in Mexico:

"The health services, attending to the providers of these services, are classified in: a) public services to the general population, known as social assistance which are provided in public health establishments to the residents of the country, governed by criteria of universality and gratuity, whose recovery fees shall be based on principles of social solidarity and shall relate to the income of users, and shall be exempt from collection where they lack the resources to cover them; b) services to beneficiaries of public social security institutions, which are those provided to persons who are taxed or who have contributed according to their laws, c) private services such as private insurance, which are provided by natural or legal persons subject to civil and commercial laws and, d) others that are provided in accordance with the health officers, as are those that make up the System of Social Protection in Health, intended for people who are not entitled to social security institutions or do not have any other social welfare mechanism in health, which will be financed jointly by the Federation, the States, and the beneficiaries themselves through family quotas that will be determined according to the socioeconomic conditions of each family. Thus, the right to health protection is translated into an obligation for the State to establish the mechanisms necessary for all people to have access to health services. Therefore, social security is a responsibility shared by the State, society and stakeholders. Moreover, the financing of the respective services is not the responsibility of the State alone, since even public health services acknowledges recovery quotas, which are determined considering the cost of services and the socioeconomic conditions of their users, exempting from their collection those who lack the resources to cover them."<sup>826</sup>

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4. Amparo en revisión 221/2008. Socorro Fregoso Fragoso y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: Sergio A. Valls Hernández. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Camen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

5. Amparo en revisión 229/2008. Rosa Carmina Barrera Salinas y coagraviados. 19 de junio de 2008. Unanimidad de diez votos. Ausente: Genaro David Góngora Pimentel. Ponente: Juan N. Silva Meza. Secretarios: Georgina Laso de la Vega Romero, Sofía Verónica Ávalos Díaz, María Marcela Ramírez Cerrillo, Carmen Vergara López, Gustavo Ruiz Padilla y Luciano Valadez Pérez.

<sup>826</sup> SALUD. EL DERECHO A SU PROTECCIÓN CONFORME AL ARTÍCULO 4o., TERCER PÁRRAFO, DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, ES UNA RESPONSABILIDAD SOCIAL. Época: Novena Época Registro: 168549 Instancia: Pleno Tipo de Tesis: Jurisprudencia Fuente: Semanario Judicial de la Federación y su Gaceta Tomo XXVIII, Octubre de 2008 Materia(s): Constitucional, Administrativa Tesis: P./J. 136/2008 Página: 61.



The previous *Jurisprudencia* marked the definitive end of welfare protectionism by the Mexican state in a similar fashion to what happened in Japan since the 2000s. More recently, another very significant *Jurisprudencia* went even further and, instead of limiting to the health services as a component of the RSS, referred to the right of a minimum standard of living in its whole, a term that is explicitly used by Article 25 of the Japanese constitution. In such *Jurisprudencia*, supported by at least 5 previous resolutions since 2014 on very similar terms,<sup>827</sup> the SCM has established that: “Although it is true that the obligation to provide a minimum standard of living –including proper nourishment– is of public order and social interest, and even though the State has the duty to monitor that such assistance is actually given, the fulfillment of such obligation resides within the family.”<sup>828</sup>

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<sup>827</sup> 1. Amparo directo en revisión 1200/2014. 8 de octubre de 2014. Mayoría de cuatro votos de los Ministros Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo y Alfredo Gutiérrez Ortiz Mena. Disidente: Olga Sánchez Cordero de García Villegas, quien reservó su derecho para formular voto particular. Ponente: Arturo Zaldívar Lelo de Larrea. Secretario: Javier Mijangos y González.

2. Amparo directo en revisión 230/2014. 19 de noviembre de 2014. Cinco votos de los Ministros Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, quien formuló voto concurrente, Jorge Mario Pardo Rebolledo, quien formuló voto concurrente, Olga Sánchez Cordero de García Villegas y Alfredo Gutiérrez Ortiz Mena. Ponente: Arturo Zaldívar Lelo de Larrea. Secretario: Javier Mijangos y González.

3. Amparo directo en revisión 2316/2014. 10 de junio de 2015. Cinco votos de los Ministros Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo, Olga Sánchez Cordero de García Villegas y Alfredo Gutiérrez Ortiz Mena. Ponente: Olga Sánchez Cordero de García Villegas. Secretario: Ignacio Valdés Barreiro.

4. Amparo directo en revisión 3929/2013. 8 de julio de 2015. Mayoría de cuatro votos de los Ministros Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo y Alfredo Gutiérrez Ortiz Mena. Disidente: Olga Sánchez Cordero de García Villegas. Ponente: José Ramón Cossío Díaz. Secretaria: Luz Helena Orozco y Villa.

5. Amparo directo en revisión 1340/2015. 7 de octubre de 2015. Cinco votos de los Ministros Arturo Zaldívar Lelo de Larrea, quien reservó su derecho para formular voto concurrente, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo, Olga Sánchez Cordero de García Villegas y Alfredo Gutiérrez Ortiz Mena. Ponente: José Ramón Cossío Díaz. Secretaria: Luz Helena Orozco y Villa.

<sup>828</sup> DERECHO A ACCEDER A UN NIVEL DE VIDA ADECUADO. LA OBLIGACIÓN DE ASEGURAR LA PLENA EFICACIA DE ESTE DERECHO RECAE TANTO EN LOS PODERES PÚBLICOS COMO EN LOS PARTICULARES. Época: Décima Época Registro: 2012504 Instancia: Primera Sala Tipo de Tesis: Jurisprudencia Fuente: Gaceta del Semanario Judicial de la Federación Libro 34, Septiembre de 2016, Tomo I Materia(s): Constitucional Tesis: 1a./J. 40/2016 (10a.) Página: 298.

## 13.3 Theories of interpretation regarding Article 123 Par. XXIX

**Instead of a theory regarding the progressive, concrete or abstract nature of the RSS, in Mexico such right is governed by four simple principles arising from the previous judicial precedents.** The four principles are: a) Work is the *conditio sine qua non* for the RSS; b) The legislative and executive branches have discretionary attributes regarding the RSS; c) Social security benefits are always limited and; d) The status of Article 123 Par. XXIX is subsidiary to other considerations.

### 13.3.1 Work is the *conditio sine qua non* for the constitutional RSS

In Japan, Article 25 does not explicitly mandate work as a condition for access to social security. Yet in Mexico, both the secondary laws (IMSS and ISSSTE) and its interpretation by the courts, have clearly established that the RSS is a work-derived right. As recently as 2014, the *Jurisprudencia* has established that “the act that conditions the existence of the RSS is a labor relationship”<sup>829</sup>. As can be seen in the previous *Jurisprudencia*, the RSS is uncontestedly labor dependent. Therefore, only when the labor relationship has been proved, then, and only then, can the benefits of the RSS be demanded. **Unlike Japan, in Mexico there has been a unanimous and clear judicial criterion: without formal employment there can be no constitutional RSS.**

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<sup>829</sup> SEGURIDAD SOCIAL. EL ACTO JURÍDICO QUE CONDICIONA EL DERECHO A ELLA ES LA RELACIÓN LABORAL, POR LO QUE ACREDITADA ÉSTA, ES IMPROCEDENTE LA PRESCRIPCIÓN RESPECTO DE LA INSCRIPCIÓN O INCORPORACIÓN RETROACTIVA DEL TRABAJADOR AL RÉGIMEN CORRESPONDIENTE, Y DEL PAGO DE LAS APORTACIONES RESPECTIVAS. Época: Décima Época Registro: 2007279 Instancia: Tribunales Colegiados de Circuito Tipo de Tesis: Aislada Fuente: Gaceta del Semanario Judicial de la Federación Libro 9, Agosto de 2014, Tomo III Materia(s): Laboral Tesis: VII.3o. P.T.6 L (10a.) Página: 1954.

In addition, the IMSS and ISSSTE, as the agencies in charge of providing social security services for the privately and publicly employed, are consistently considered more important than the individual claims due to their nature as institutions of public welfare. Those two characteristics are essential to understand the justiciability of the RSS in Mexico and its enforcement (or lack thereof).

### **13.3.2 Discretionary powers of the legislative and executive branches regarding the RSS**

Even though theoretically in Mexico there isn't a "dual supremacy of Court and Diet", due to the equal division between the three branches of power, the *Jurisprudencia* has shown that the courts too frequently defer their decision making powers to the legislative or executive. There are also many cases where the judges delegate their powers even before officially hearing the claim from the plaintiffs.<sup>830</sup> Due to the limited phrasing of Article 123 Par. XXIX the judiciary has systematically acted as "weak courts" in the sense that when any doubt in interpretation regarding eligibility, limitations and boundaries for the RSS and its related benefits arise, they defer to the other two branches of power. In simpler words, in case of doubt within the courts, they almost always defer their decisions to the other branches of power.

### **13.3.3 Social Security benefits are limited**

Contrary to the spirit and rationale of the NHRR of 2011, the Mexican courts have consistently ruled in favor of the most limited interpretation of the RSS instead of the broadest one. Notwithstanding the difference in beneficiaries, causes or justifications, the courts have limited benefits for rightholders arguing the risk posed to the economic sustainability of the social security institutions. Even when the rightholders have rightfully contributed both in the private and public schemes they

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<sup>830</sup> See Chapter 12.4.

are forced to choose one scheme over the other. The blanket term “public interest” has also been used frequently in order to deny social benefits in many of the claims previously analyzed. Perhaps more importantly, the denial of such benefits has not been sufficiently elaborated, and has also frequently meant a legitimization of the discretionary powers of the legislative and executive branches.

#### **13.3.4 The status of Article 123 Par. XXIX is subsidiary to other considerations**

The Mexican courts not only avoid adjudicating Article 123 XXIX of the constitution, but they also denounce the UDHR, ESCR and American Human Rights Conventions as open-ended. Because of such line of reasoning, judges, magistrates and justices frequently consider that “since none of these norms establish rules of entitlement to social security they leave to the ordinary legislator the regulation of such aspects.”<sup>831</sup> This is the reason why, in practice, the vast majority of cases invoking the RSS are solved by referring and limiting to the secondary law, that is, the SSL, without contemplating neither the constitution, nor the international human rights treaties.

Additionally, Article 123 Par. XXIX has also become subsidiary *de facto* to the everyday practice of the RSS. According to such practice the state has only but a small fraction of responsibility when compared with the family and self reliance. This is the new paradigm since the RSS became interpreted as a social responsibility. **Thus, as in Japan’s case, residualism and dependence on the family are the predominant criteria for both social security and social assistance in Mexico.**

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<sup>831</sup> TRABAJADORES AL SERVICIO DEL ESTADO. ALCANCE DEL DERECHO A LA SEGURIDAD SOCIAL RESPECTO AL MONTO DEL SALARIO DE COTIZACIÓN. Época: Décima Época Registro: 2008425 Instancia: Segunda Sala Tipo de Tesis: Jurisprudencia Fuente: Gaceta del Semanario Judicial de la Federación Libro 15, Febrero de 2015, Tomo II Materia(s): Constitucional Tesis: 2a./J. 7/2015 (10a.) Página: 1531.

## 13.4 Obstacles to making the RSS justiciable in Mexico

As seen in the previous sections, the few cases where the RSS has been invoked without a previous labor-relationship has not led to an active judicial protection or enforcement of such constitutional right. In all fairness, not all the reasons for such problem lie in the Mexican judiciary, and it is also true that there are ways of enforcement other than adjudication. In this section, the reasons for both situations will be explained.

### 13.4.1 Restricting the right to social security by the duty to work

Article 123 Par. XXIX, the SSL, along with the day to day judicial practice, has established the duty to work as an indispensable condition for granting the RSS. Therefore, it is safe to say that such right is *de facto* limited and restricted by the need to have an employment relationship.

Indeed, even more stringently and clearly than in Japan, work is the requirement that determines the justiciability for the RSS in Mexico. However, the inequality that permeates the political and economic system has generated different benefits for those workers whose union or personal relationship with the executive power allow them extra benefits.<sup>832</sup> The second kind of worker inequality derives from activity privileges and, similarly to the case in Japan, urban employed workers comprise 65% of welfare beneficiaries compared to only 3-6% of rural workers.<sup>833</sup>

But yet another effect of work derived rights is that since their status is imprescriptible, and they are so strongly protected when compared to non-work derived rights, employers don't want to risk having to comply with such strong vested rights.

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<sup>832</sup> See the report: ILO, *Aplicación de las Normas Internacionales del Trabajo 2009* (Ginebra: ILO, 2009) at 132.

<sup>833</sup> Enrique Valencia Lomelí, *supra* note 641.

Therefore, informal employment is eased, creating a vicious circle where no formal jobs are offered, and no social security rights are recognized. Thus, it would be better to have gradients in social security benefits, instead of just a strong unnegotiable right for some, and no right at all for others.

### **13.4.2 Courts and their interpretation of Article 123 Par. XXIX**

Article 123 was ahead of its time regarding social rights, however as has already been explained, to achieve justiciability the RSS would require a later SSL and two more constitutional amendments. Moreover, the courts have systematically produced conservative rulings which since the beginning of its constitutional existence and up to today deny justiciability without a previous labor relationship.

Even though after the NHRR of 2011, all the Mexican courts should apply the *pro personae* and conventionality control doctrines, meaning the wider interpretation of the RSS as defined by international treaties, in resolution after resolution, and even in *Jurisprudencia*, such right remains labor dependant, limited as much as possible, or an element of discretionary assistentialism.

In addition, the SCM has been very deferential, allowing wide legislative discretion and ample interpretative powers by the executive branches implementing social assistance programs. In a particularly relevant case, regarding the privatization of pension plans at the end of the XXth Century, the SCM went even further and dismissed more than a hundred claims invoking the violation of property rights and due process in order to legitimate the Presidential decree which put the corresponding pension funds in the hands of private institutions. This was a clear case exemplifying the argument against justiciability of social rights due to its lack of real independence as described in Chapter 4.3.1, and several other cases demonstrate that such is not an isolated phenomenon within the Mexican courts.

Part of the operative problem for Article 123 Par. XXIX is the abovementioned referral to secondary law. Since such law was created mainly considering workers, and since the courts have considered for more than 50 years that such law contains the adequate regulation of the constitutional provision, a vicious cycle is formed by interpreting there is no entitlement without work. In such fashion, the Mexican courts have practically dismissed all claims pertaining the RSS from the unemployed.

Due to all the previous reasons, this dissertation argues that including the RSS in the Mexican constitution has conditioned its justiciability to having an employment relationship (according to the SCM and regular courts interpretations), thus severely limiting the constitutionalization hypothesis due to such condition. Moreover, in the cases without a labor relationship in which the RSS has been claimed as part of social assistance programs such as *Oportunidades*, *Prospera* and *Seguro Popular*, the SCM has consistently denied any justiciability to such right, thus denying the justiciability hypothesis for any non-work supported claim. Additionally, on the numerous cases in which the RSS has been invoked with the required labor relationship, such right is frequently interpreted in a narrow sense and with important limitations if beneficiaries or benefits concur.

Furthermore, there is no evidence that the courts have a significant role in improving the welfare conditions for either the RSS' plaintiffs or the general Mexican population. Rather, the improvement in welfare may be related to other non-judicial variables that exceed the scope of this dissertation such as non-justiciable social programs and economic considerations. Only as the legal basis for such programs may the constitutionalization of the RSS could possibly be argued as relevant for improvement of welfare in Mexico. However, and even then, such improvement has no causal relation with justiciability or judiciary intervention.

To conclude, what is clear is that these effects have nothing to do with the judiciary and more probably have to do with the ministries and administrative agencies that

implement the RSS' secondary laws and programs. In other words, justiciability of Article 123 Par. XXIX is not the best way to fulfill the RSS in Mexico, at least not for the non-formally employed population, but there still may be some other more effective ways to improve the welfare of such people.

### **13.4.3 Litigating the RSS with equality and the non-discrimination principle**

Even if the Mexican judiciary has provided little to none welfare relief for those non-formally employed, there are more helpful alternatives to be found elsewhere. One such alternative, similar to the case of Japan, is litigating with arguments of equality and non-discrimination. Even though the RSS is recognized by international treaties signed by Mexico, which now more than ever are important because of the NHRR, judges tend to favor the previously mentioned equality and non-discrimination arguments over the RSS. Just to mention three judgments among many examples of such trend are:

- a) The judgment that recognized a partner of the same sex marriage as a “widowhood” recipient. This recognition was not because of the RSS invoked in court, but due to the necessity of “respecting benefits equally and without discrimination.” <sup>834</sup>
- b) The judgment to recognize alien workers without immigration papers as entitled to social security benefits. In this judgment, it was made clear once

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<sup>810</sup> SEGURIDAD SOCIAL. TIENEN LA CALIDAD DE DERECHOHABIENTES DEL INSTITUTO DE SEGURIDAD Y SERVICIOS SOCIALES DE LOS TRABAJADORES DEL ESTADO EL CÓNYUGE DEL TRABAJADOR O TRABAJADORA ASEGURADOS, AUN CUANDO SE TRATE DE MATRIMONIOS ENTRE PERSONAS DEL MISMO SEXO (INTERPRETACIÓN CONFORME DE LOS ARTÍCULOS 6, 39, 40, 41, 131 Y 135 DE LA LEY DEL ISSSTE) Tesis: I.3o.T.21 L (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo III, Libro 6, Mayo de 2014, pág. 2127. Tribunales Colegiados de Circuito Tipo de Tesis: Aislada (Constitucional, Laboral). ISSSTE) Tesis: I.3o.T.21 L (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo III, Libro 6, Mayo de 2014, pág. 2127. Tribunales Colegiados de Circuito Tipo de Tesis: Aislada (Constitucional, Laboral).



again that formal workers affiliated to IMSS or ISSSTE, and notwithstanding their migratory condition, are entitled to social security benefits due to the “equal treatment for equal work” principle, but not for the RSS by itself.<sup>835</sup>

- c) The judgment that recognized social security benefits for an elderly person on the basis of protecting him against age discrimination. This was an obtuse resolution that would have been much more easily solved by protecting the RSS.<sup>836</sup>

Therefore, rather than technically correct substantiated claims, Mexican courts favor the resolutions that show how they “defend equality” and “protect the people from discrimination”. Since the right to equality is a constitutional right<sup>837</sup> to which the Mexican courts give more importance than the RSS, the role of unions, the NHRIs and civil society as claimants of such rights cannot be understated. Such fact will be explained in the ext subsection.

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<sup>835</sup> SEGURIDAD SOCIAL. LOS EXTRANJEROS TIENEN DERECHO A LOS BENEFICIOS DERIVADOS DE ELLA SI HAN DESEMPEÑADO UN TRABAJO, AUN CUANDO OMITAN CUMPLIR CON LAS DISPOSICIONES ADMINISTRATIVAS DE ÍNDOLE MIGRATORIO Y CAREZCAN DE PERMISO PARA LABORAR. Tesis: XI.1o.A.T.18 L (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo III, Libro 10, Septiembre de 2014, pág. 2595. Tribunales Colegiados de Circuito Tipo de Tesis: Aislada (Constitucional).

<sup>836</sup> LA EDAD NO PUEDE SER UNA CIRCUNSTANCIA PARA EXCLUIR DE LA COBERTURA DE LOS SEGUROS SOCIALES A PERSONA ALGUNA, PUES ELLO OCASIONARÍA LA DESPROTECCIÓN DE ESE DERECHO HUMANO. Tesis: IV.1o.A.24 A (10a.), Gaceta del Semanario Judicial de la Federación, Décima Época, Tomo III, Libro 10, Septiembre de 2014, pág. 2593. Tribunales Colegiados de Circuito Tipo de Tesis: Aislada (Constitucional).

<sup>837</sup> Constitución Política de los Estados Unidos Mexicanos [Consitution of Mexico] [Constitution]. Feb 5, 1917, art. 1, Par. 1 and 5. “In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights... Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.”

### 13.4.4 Non-judicial activism

As in the case of Japan, judicial activism is not necessarily the best option to protect the RSS for the unemployed. Non-judicial activism in Mexico was at first associated with the logic of corporativism, and a strong tradition of unions exerting pressure upon the political establishment. Yet, after the 1970s, such role degenerated into a farce between unions and government<sup>838</sup> which would last until the liberalization of markets when unions were displaced<sup>839</sup> or removed<sup>840</sup> to varying degrees.<sup>841</sup>

By the late 1980s, the NHRI replaced unions as the most successful institutions for non-judicial activism.<sup>842</sup> The most important of such NHRI is the CNDH which has extended various recommendations related to the RSS. In fact, just below the Attorney General Office, the social security institute agencies (IMSS and ISSSTE) have historically received the largest number of complaints and recommendations.<sup>843</sup> The CNDH has issued recommendations on matters such as nonpayment of wages, breach of social security benefits, housing, education, and public health services.<sup>844</sup> The Human Rights Commission of Mexico City, the second

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<sup>838</sup> Javier Aguilar García, "La Seguridad Social y las Reformas a los Sistemas de Pensiones en México" (2006) 8:8 *Estudios Políticos* 148.

<sup>839</sup> The imprisonment in February 26, 2013, of the union leader from the teachers' union (SNTE) Elba Esther Gordillo, was one example of displacing powerful leaders and naming tamer ones.

<sup>840</sup> Such was the case of the complete dismemberment of the Central Electricity Union (LyFC) in a *blitzkrieg* operation taking place in October 11 of 2009.

<sup>841</sup> Although the message of a strong Executive that "doesn't negotiate with terrorists" seems to be the new discourse, the price paid has been high with demonstrations and even deaths in the mobilizations from the teachers, electricians, farmers and PEMEX workers in particular.

<sup>842</sup> Francisco Zapata, "Movimientos Sociales y Conflicto Laboral en el Siglo XX" in *Los Grandes Problemas de México*, II SOCIEDAD (Mexico City: El Colegio de México, 2012) at 83.

<sup>843</sup> Víctor Chávez, "IMSS y Segob Lideran Quejas por Violaciones a Derechos: CNDH" (Mexico City: El financiero, January, 27, 2016), available at: <http://www.elfinanciero.com.mx/nacional/imss-pf-issste-inm-y-cfe-con-mas-quejas-por-violaciones-cndh.html>.

<sup>844</sup> Jorge Carpizo, "Los Derechos De La Justicia Social: Su Protección Procesal en México" (2012) 45:135 *Boletín Mexicano de Derecho Comparado* 1079.

largest in the country, has also made important recommendations in these fields, especially with regard to various aspects of public health services.<sup>845</sup>

Finally also since the late 1980s, and due to the government's mishandling of rescue efforts during the Mexico City earthquake,<sup>846</sup> there was an upsurge of grassroots activism. Civil-society groups gained further prominence by fighting voter fraud during the 1990s elections until the PRI finally lost its 72-year-old grip on power in 2000.<sup>847</sup> By 2004 civil society was recognized and ordered by the Law to Foster the Participation and Activities of the Civil Society,<sup>848</sup> albeit with a similar objective of control as in the case of Japan.

It is true that there is a relatively small number of NPOs in Mexico, (27 thousand as of 2014)<sup>849</sup> when compared to other countries (Japan, for example, has two times as much).<sup>850</sup> It is also true that there is a lack of developed procedures for NPO lobbying.<sup>851</sup> Nevertheless, on one hand, there have been recent important victories of NPOs which are placing effective pressure on the government regarding transparency and governability.<sup>852</sup> And on the other, many NPO campaigns have provided the template for anti-poverty strategies that the government came to embrace as its own (such as "Crusade against Hunger" and "Reading against Analphabetism"<sup>853</sup>).

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<sup>845</sup> Sergio García Ramírez, "Protección Jurisdiccional Internacional de Los Derechos Económicos, Sociales y Culturales" (2003) 9 *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional* 127, at 135.

<sup>846</sup> The Mexican NPOs involvement in this earthquake of 1985 is similar to what happened with NPOs with the Tohoku Earthquake in Japan.

<sup>847</sup> *Mexico and its NGOs: The New Movers and Shakers*, The Economist, Mexico City, May 2nd, 2015.

<sup>848</sup> LEY FEDERAL DE FOMENTO A LAS ACTIVIDADES REALIZADAS POR ORGANIZACIONES DE LA SOCIEDAD CIVIL. Published in the DOF on February 9, 2004. Last amended: DOF 25-04-2012.

<sup>849</sup> Registro Federal de Organizaciones de la Sociedad Civil (Mexico City: INEGI, 2015).

<sup>850</sup> There were 50,273 NPOs in Japan as of July 2015. Nonprofits in Japan, *Size and Scope of NPOs Numbers of Different Nonprofits in Japan*, available at: <http://www.jnpoc.ne.jp/en/nonprofits-in-japan/size-and-scope/>.

<sup>851</sup> See Ileri Ablanado Terrazas, *Las Organizaciones De La Sociedad Civil En La Legislación Mexicana* (Washington: USAID/ICNL, 2009).

<sup>852</sup> See for example "Yo soy 132", "Ni una más", "Todos somos Ayotzinapa", "No + Violencia" etc.

<sup>853</sup> <http://sinhambre.gob.mx/>.

### 13.4.5 The RSS in Mexico today

Since Mexico has not acknowledged a constitutional RSS independent of labor, it is relevant to analyze the proposed equivalent of the so-called “non-contributory social security”. This is a euphemism for new social assistance programs, with shared responsibilities between the state and the taxpayers. Non-contributory social security doesn’t generate a justiciable right, and as of now still depends on the will and discretion of each administration, (and thus is highly susceptible to political manipulation). Nonetheless, and unlike the role of the courts, non-contributory social security has generated a small but tangible relief for the most impoverished Mexican society.<sup>854</sup>

#### a) *Seguro popular*

In 2003 a reform to the National Health Law<sup>855</sup> established *Seguro Popular*, an assistential program that offers health services to those people without public or private insurance. With *Seguro Popular*, a limited number of services are provided using the facilities and staff of the IMSS, ISSSTE or even some private hospitals that are part of their network. In return, either the local, state or federal government assigns resources to those institutions according to the number of persons served.<sup>856</sup> This is presented as a win-win formula since it helps to finance hospitals and clinics that serve few formally employed persons, but many unemployed or underemployed persons which are covered by *Seguro Popular*.

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<sup>854</sup> See C102 and SPF which were analyzed in Chapter 5.

<sup>855</sup> Decree that reforms Article 73 of the National Health Law. Published in Diario Oficial de la Federación in November 13, 2003.

<sup>856</sup> Reyes Aterido, Mary Hallward-Driemeier & Carmen Pages, *Does Expanding Health Insurance beyond Formal-Sector Workers Encourage Informality? Measuring the Impact of Mexico’s Seguro Popular*. Research working paper; no. WPS 5785. (World Bank, 2011).

As of 2016, there were 57 million people affiliated with *Seguro Popular*, which received the praise of both the ILO and the WHO for extending health coverage to low-income and unemployed populations.<sup>857</sup> However, it is important to remember that this system depends on the efficiency and infrastructure from the original institutions which it “rents” and, as such, shares its original deficiencies and inequalities. In this regard, one study done by specialists from El Colegio de México has shown that infant mortality rates can almost double within *Seguro Popular* depending on each local state.<sup>858</sup>

Another problem has to do with the varied arrangements between the three levels of government involved (federal, local and municipal). When these levels are led by distinct political parties or have particular relationships with other legal or illegal actors, their agency is compromised. When multiplying this network of 32 states with its sub-complex levels, there are very different and unequal outcomes.

Finally, Mexico still allocates only 6.3% of their GNP to health.<sup>859</sup> This means that most of the health costs are still financed by private expenditure, which can easily take whole families into poverty if a non-covered illness or accident occurs to one of their members. Since *Seguro Popular* spends fewer resources than either IMSS or ISSSTE but serves more people than both of them together, the immediate problem will be having higher co-payments, fewer illnesses covered, or both.

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<sup>857</sup> Secretaría de Salud, “Se presentó Informe Estudios de la OCDE sobre los Sistemas de Salud: México 2016”. (Mexico City: SSA, 6 de enero de 2016).

<sup>858</sup> Laura Flamand & Carlos Moreno, *Seguro Popular y Federalismo en México. Un análisis de política pública* (Mexico City: El Colegio de México, 2016).

<sup>859</sup> World Health Organization, *Global Health Expenditure database*, available at: <http://datos.bancomundial.org/indicador/SH.XPD.TOTL.ZS>.

## **b) Programs 70+ and 65+**

Another innovative non-contributory social service has been the elderly income protection program (originally named 70+, and since 2016 reduced to 65+). The program began in 2004 with the leftist governor of Mexico City, Andrés Manuel López Obrador (who as previously mentioned competed to become President both in 2006 and 2012), assigning a “universal” monthly pension of 700 pesos (about 40 USD) to the city’s elderly population of more than 70 years of age.<sup>860</sup> The program’s success was both social and political since it was the first program that did not require a poverty test to assign the pension. Nonetheless, it did require affiliation to the “Mexico City Network of Welfare”, a propaganda service for the governor and his party for the next elections.<sup>861</sup>

The program’s success was reflected in the 2006 presidential elections when López Obrador was ahead in the polls (particularly within Mexico City’s elderly population), but lost by a small margin at the end. The winner of that election, Felipe Calderón, decided to copy the strategy of his foe but with a more modest budget. More recently, Peña Nieto has tried to take advantage of the strategy and brand it as his own “Elderly Pension System,” by reducing the affiliation age to 65 years and linking it with both *Seguro Popular* and *Prospera* programs.

As innovative as the Elderly Pension System may look, and covering over 4.9 million Mexicans,<sup>862</sup> Jesús Gastelum has thoroughly analyzed this program and has some

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<sup>860</sup> See the official report in: “Programa General de Desarrollo del Distrito Federal 2000-2006” (Mexico City: Official Bulletin of Mexico City, December 4, 2001), at 28, available at: [http://www.infodf.org.mx/escuela/curso\\_capacitadores/PGD/PGD-AMLO.pdf](http://www.infodf.org.mx/escuela/curso_capacitadores/PGD/PGD-AMLO.pdf).

<sup>861</sup> Jorge Basurto, *El populismo del Poder* (Mexico City: Repositorio del Instituto de Investigaciones Sociales/UNAM, 2006) at 17.

<sup>862</sup> Consejo Nacional de Evaluación de la Política de Desarrollo Social (CONEVAL), *Informe de Evaluación de Políticas de Desarrollo Social 2010-2014* (Mexico City: CONEVAL: 2015) at 32.

interesting criticisms.<sup>863</sup> The most obvious of such criticisms is that the policy wasn't based either on development, population studies or the diagnosis of social needs of the elderly. This is reflected in CONEVAL's report of 2008 indicating that just "71% of the programs in Mexico have identified the social problem they are addressing, 67% have objectives which correspond to the solution of the problem they address, 58% have an adequate design to reach their purpose, but just 47% have defined their target population which represents the social problem."<sup>864</sup>

As in the case of Japan, the elderly population is more susceptible to electoral manipulation. Thus, it is commendable that to this day this program remains the only "universal" social policy with the only requirement of having 65 or more years of age. It is even more commendable that the program is effectively introducing the elderly to other social programs to which they may be eligible. But it would be even better for the program to exist independently to the results of the subsequent elections or the whim of the next president. To achieve such goal, it would be desirable that a permanent budget earmark was assigned due to the expected increase of the Mexican elderly population.

### **c) Unemployment insurance**

Following one of his campaign promises, President Peña presented by late 2013 his project for Unemployment Insurance (UI). The objective stated in the original project was to "mitigate the negative impact of unemployment on the welfare of workers and their families due to loss of earnings, promote the reintegration of the unemployed in the formal labor market and strengthen the social safety net."<sup>865</sup> But both in the original project and in the most recently revised version of the program, as of July

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<sup>863</sup> Jesus Gastelum Lage, "To What Extent Does Social Policy Design Address Social Problems? Evidence from the "70 y más" programme in Mexico" *Development in Practice* (2012) 22:7 *Taylor Francis Online* 1052.

<sup>864</sup> CONEVAL, *supra* note 862, at 82.

<sup>865</sup> *Iniciativa del Ejecutivo sobre Seguro para el Desempleo* (Mexico City: Presidencia de la República, 2013).

2016, the results are more political propaganda than an actual income insurance program.

The reasons for this are varied: first, the eligible population is limited to formal full-time workers from the private sector (which are eligible for IMSS coverage)<sup>866</sup> that had worked steadily for more than 2 years.<sup>867</sup> Secondly, the income insurance can only be used after having more than 2 months of unemployment which may be too late to prevent entering the informal labor market. Thirdly, and perhaps most importantly, the financing of the program is based on a charge made to the workers housing account with only a 0.5%<sup>868</sup> extra contribution by the federation “to cover administrative costs”. Put in other words, workers would have to use their own money for their “unemployment insurance”.<sup>869</sup>

Another type of risk arises from the fact that the covered population is not necessarily the most vulnerable. Since the project doesn’t require the unemployment to come from involuntary causes, it is possible, and probable, that many workers may mix the unemployment insurance income, with a full-time informal work.<sup>870</sup> Moreover, if the project isn’t efficiently linked to work reinsertion programs it will be yet another gateway to informality.

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<sup>866</sup> This phenomenon creates institutional inequality even within the formal labor sector.

<sup>867</sup> Argentina and Chile require just one year, half the time of the Mexican Project whereas Brazil and Uruguay require just 6 months. Moreover, according to official data in urban records, of every 100 weeks an average worker has only been affiliated to IMSS or ISSSTE for 38 weeks (INEGI-CONSAR, ENOA, 2012).

<sup>868</sup> Dictamen sobre Iniciativa de Decreto para la Creación del Seguro de Desempleo (Mexico City: Cámara de Diputados, 2016).

<sup>869</sup> Jesuswaldo Martínez Soria, “El Debate sobre la Creación del Seguro de Desempleo” in Jesuswaldo Martínez Soria (coord.), *Situación Actual y Reforma de la Seguridad Social en México* (Mexico City: Senado de la República, 2015) at 130.

<sup>870</sup> Norma Samaniego Breach, “Análisis y Perspectivas de la Iniciativa de Ley en Materia del Seguro de Desempleo” in Jesuswaldo Martínez Soria (coord.), *Situación Actual y Reforma de la Seguridad Social en México* (Mexico City: Senado de la República, 2015) at 153.



Some authors<sup>871</sup> consider that there are yet other types of problems arising from the contradictions of the old labor principle of job protection (similar to that analyzed in Japan), with the new ILO principle of family and individual protection (since the acceptance of the ILO's SPF).

Furthermore, Mexico has a long tradition of compensation for unjustified job dismissals, precisely to prevent poverty for the period in which the worker finds another job.<sup>872</sup> Thus, there would be two institutions covering the same function and elevating the cost-benefit of formal employment. Even worse, this has already been happening in many modes of sub-contracting and outsourcing where workers neither have the benefits of a constitutional compensation, or those of unemployment insurance, having to settle for an unevenly negotiated compensation (if at all).

Due to all these considerations, it is imperative for the Mexican government to choose one model of protection over the other. If the unemployment insurance is chosen over job protections, then it is necessary to universalize it, finance it with general consumption taxes,<sup>873</sup> and maintain the funds from privately employed workers for their housing credits (as it was before the reform). The advantage of this option is that employment would be less costly for the employers since the eventual dismissal would be covered in a tripartite form: worker, employer, and the state.<sup>874</sup> The disadvantage is that employees would have to cede their right to the

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<sup>871</sup> John Scott Andretta, "Seguridad social: fragmentación, desigualdad y oportunidades de reforma, and Ángel Calderón Madrid "¿Por qué la Creación de un Seguro de Desempleo para los Trabajadores del Sector Formal requiere Complementarse con Adecuaciones a las Normas de Despido Vigentes?" both in Jesuswaldo Martínez Soria (coord.), *Situación Actual y Reforma de la Seguridad Social en México* (Mexico City: Senado de la República, 2015).

<sup>872</sup> The severance package in Mexico includes 3 months of salary + 20 days of salary for each year labored + 12 days for pending vacations in the case the worker didn't used them in that year.

<sup>873</sup> John Scott Andretta, *supra* note 871, at 81.

<sup>874</sup> Ángel Calderón Madrid, *supra* note 871, at 189.

constitutional compensation or job reappointment in the case of unjustified dismissal<sup>875</sup> (in a manner similar to more liberal job markets such as the USA).

In sum, unemployment insurance remains to this day as a controversial project with more than 3 years of discussion in the congress. If approved as the last version establishes, the insurance would be a ploy to use the IMSS beneficiaries' own money with the objective of maintaining formal employment and getting electoral credit with very low federal investment.<sup>876</sup> More importantly, the insurance would establish institutional differences even between formal workers that, without a doubt, would generate demonstrations from other sectors of the organized labor.

*Mexico was the first country to constitutionalize social rights, but for the case of the RSS, such right has been strictly linked to labor. This phenomenon has impeded the RSS, as existing in international human rights treaties, to be adequately justiciable and enforced by Mexican courts. In this reasoning, Article 123 Par. XXIX of the Mexican constitution has served as a mere placeholder for interpretations derived from secondary legislation which to this day still subordinate justiciability of the RSS to a pre-existing and formal labor relationship. Even if the Mexican population is not so averse to litigation and there are many more lawyers and judges as compared to Japan, the RSS has not been enforced by the courts without a work contract, which implies that its basis is not a constitutional but a private right. Also as in the Japanese case, litigating with arguments of equality and using non-judicial alternatives have proven to be more efficient for those non-employed. Lastly, while non-contributory social security is not justiciable, it has generated a tangible relief to society's needs, regardless of its constitutional and justiciable status.*

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<sup>875</sup> Constitución Política de los Estados Unidos Mexicanos [Constitution of Mexico] [Constitution]. Feb 5, 1917, art. 123 par. 22 and Article 50, III (Federal Labor Law).

<sup>876</sup> Viridiana Mendoza Escamilla, "10 Respuestas Sobre el Seguro de Desempleo" (Mexico City: Forbes, Economía y Finanzas, January 5, 2014).

**PART IV ARE CONSTITUTIONALIZATION AND JUSTICIABILITY REALLY THE  
BEST WAYS TO FULFILL THE RSS?**

## **Chapter 14. The lack of fulfillment of the RSS in the countries herein analyzed**

This dissertation was dedicated to the evaluation of three commonly defended hypotheses regarding social rights (the constitutionalization, justiciability and welfare hypotheses) in a comparative scenario. Since social rights imply a very ample catalog, a first delimitation consisted in the selection of the RSS among other rights for a more precise analysis.

A second delimitation was made regarding the countries to be analyzed. Japan and Mexico were selected among other countries due to the fact that even though they both have various differences, they share enough similarities regarding constitutionalization, the RSS' justiciability, and welfare betterment without the judiciary. Moreover, they both differ from classic examples of western countries, and have very different economies, elements all the above which provide a wide range for comparison.

Having delimited the object and cases for comparison, the next step in this inquiry implied selecting an adequate methodology. After having weighted its merits and criticisms, functionalism was chosen albeit with considerations to avoid the eurocentrist cannon, to include an adequate cultural contextualization, to balance similarities with differences, and to consider (as much as possible) not only the formal authorities and institutions but also the plaintiffs, courts, civil society and general population of the two countries compared.

With the previous considerations taken into account, the role of functionalism in this dissertation was: 1) To determine if the constitutions of Japan and Mexico

(institutions) protected the RSS (function); 2) To evaluate if the constitutions (institutions) enabled courts and plaintiffs to protect the RSS (function) by making it justiciable and enforcing it and; 3) To determine if there were ways to improve the performance of the constitutions studied herein (institutions) for protecting the RSS (function), or if there were other institutions that would be more adequate to perform the required function within the two countries compared.

Each country was introduced according to its development as a welfare state since it would be relevant for the specific form of emergence of social rights. Then, a description of how social rights were understood and how international human rights were incorporated, allowed to identify particularities that would later prove relevant for such right's justiciability and enforcement. In order to provide a complete analysis of social rights enforcement, a detailed account of each country's judiciary, including its structure, judicial review and patterns of litigation, along with a qualitative assessment of the courts' independence was provided, which revealed a common pattern that obstructs social rights.

With all the previous background, the object of inquiry was finally presented. In both countries an assessment of the RSS, as provided by the constitution and its judicial interpretation, revealed a stark difference between the RSS in the constitution, and the RSS in practice. In both countries, the institutions dedicated to protect the RSS (constitutional provisions) were interpreted by the institutions able to make such rights justiciable (courts) in a manner that rendered such right as: a mere aspiration, severely limited or, in the most extreme cases, non-justiciable at all.

In both countries similar patterns for the RSS justiciability and enforcement were found. Such patterns included: a) a civil law legal tradition, according to which, statutes are more important than judicial decisions and judges consider themselves as applicators instead of creators of the law; b) strong interventionism of the judicial branch by the executive branch and, more specifically, the hegemonic party (LDP in

Japan and PRI in Mexico) which has ruled uncontested for several decades; c) an exclusionist attitude towards international law and a practical subordination to domestic law, even though both countries formally accept the former as obligatory and valid; d) a conservative judiciary that interprets social rights in a programmatic, abstract, limited or even non-justiciable fashion; and e) social attitudes that were contrary to litigation and to the role of law as a tool for solving problems.

The previous patterns resulted, for all practical purposes, in an exception regarding the applicability of the three aforecited hypotheses and in turn, supported the three main arguments of this dissertation which were:

- a) Constitutionalization of the RSS does not necessarily lead to improved justiciability.

Along with the general arguments against constitutionalization, as discussed in Chapter 4, the analysis of the evidence presented in Parts II and III supports this dissertation's main argument that constitutionalization of the RSS does not necessarily lead to improved justiciability as can be seen in the case of:

- i) Japan

Bearing in mind the relevant cases, methods, and doctrines regarding the constitutional RSS studied in Chapter 9, it seems clear that, in Japan, constitutionalization of such right has not led to more adjudication by the courts. On the contrary, although in theory including social rights in the constitution makes them justiciable, the SCJ has consistently ruled against such interpretation. The evidence for such claim are the cases, in more than 60 years of judicial review, where the justiciability of Article 25 has been consistently denied. *Due to the foregoing, the constitutionalization hypothesis in Japan is false.*

## ii) Mexico

Although Mexico supposedly has a much longer tradition with judicial review and the RSS, its limited provision in Article 123 Par. XXIX has enabled the courts to deny or condition the justiciability of such right should there exist no employment relationship. The relevant cases and the judicial doctrine discussed in Chapter 13 are clear proof that the constitutionalization of the RSS has not made it justiciable. Instead, according to the courts, it is the existence of a previous, formal labor relationship that determines the justiciability of the RSS. Such interpretation is not only contrary to the international human rights treaties (which according with Mexico's NHRR are considered as constitutional law) but also contrary to a *pro personae* interpretation of the Mexican Constitution's Article 123 XXIX itself. *Due to the foregoing, the constitutionalization hypothesis in Mexico is false.*

- b) Making the RSS justiciable does not necessarily lead to more or better judicial enforcement.

Along with the general arguments against justiciability of social rights, as discussed in Chapter 5, the analysis of the evidence presented in Parts II and III supports this dissertation's main argument regarding the fact that making the RSS justiciable does not necessarily lead to more or better judicial enforcement as can be seen in the case of:

## i) Japan

In the rare cases in which the RSS was considered justiciable by the Japanese courts, there was no increase in the enforcement or better protection of such right. On the contrary, the four cases analyzed in Chapter 9.2 show a conservative, restrictive and limited interpretation of the Japanese Constitution's Article 25. In all four cases an implicit limitation by the duty to work as a condition for entitlement can be found, and such duty was even more obvious in the Hayashi case discussed in

Chapter 9.4.1. In all four cases, the courts were also deferential to bureaucrats and lawmakers instead of assuming a more active role of enforcement as discussed in Chapter 9.4.2. *Due to the foregoing, the justiciability hypothesis in Japan is false.*

ii) Mexico

The analysis of the principal cases of *Jurisprudencia* in Chapter 13.2, shows that when the RSS was somewhat justiciable based on grounds other than labor entitlement, such justiciability did not generate an increase in enforcement of such right. Evidence was found for this claim, among others, in the cases invoking international standards for calculating old age pensions, and in the case which established that an explicit restriction in the Mexican constitution, as seen in Chapter 13.4.2, renders the protection of international treaties unenforceable. *Due to the foregoing, the justiciability hypothesis in Mexico is false.*

- c) Making the constitutional RSS justiciable does not improve welfare conditions for the population it intends to protect

Being the welfare hypothesis conditional in nature, and since both the constitutionalization and justiciability hypotheses were proven false, the welfare hypothesis would logically have to be false as well.

While the previous reasoning is valid enough by itself to answer the question regarding the applicability of the welfare hypothesis, it is relevant to explain why such hypothesis can't be applied to the specific cases of Japan and Mexico, and whether the RSS could be improved by means of legislative processes, judicial resolution, or action by the executive.

In such regard, the next section will explain why making the constitutional RSS justiciable does not improve welfare conditions for the population it intends to protect.

### i) Japan

The few and restrictive resolutions of the Japanese courts, along with a population averse to both law and litigation, evidences that the judiciary is not the best instance to look for welfare redress in Japan.

It has also been established that should any improvement in welfare related to Article 25 of the Japanese constitution be found, such improvement would be completely independent of its justiciability and judicial enforcement (examples of this can be seen in litigation based in equality and the principle of non-discrimination as well as the active role of NPOs and non-judicial activism described in Chapter 9.4.3 and Chapter 9.4.4).

Regarding the possibility of welfare improvement, the pressure exerted from social movements upon the legislative, and particularly the executive branches, have proven more fruitful than litigation as described in Chapter 6.3 and Chapter 6.4.

Although it is not within the scope of this dissertation, it can be argued that lobbying, demonstrations and political accountability during elections, even without referencing the constitutional RSS, have produced tangible results for general welfare redress. Some examples of such phenomenon include the recent discussions in the Diet and corresponding changes in policy over national pension plans and childcare services mentioned in Chapter 9.4.5. *Due to the foregoing, the welfare hypothesis in Japan is false.*

### ii) Mexico

The strict dependency of the RSS to labor, and the explicit lack of justiciability for the non-employed, imply that the RSS has definitely not seen improvements in its



enforcement and protection based on Article 123 Par. XXIX of the Mexican constitution.

Moreover, although there are far better chances for successful litigation in Mexico when compared to Japan, and even though the Mexican population is not so averse to litigation, inequality, the high costs of claiming a right, and the vast number of cases in which the RSS has been denied for the unemployed, make justiciability unattractive at best and useless at worst. The only option regarding the litigation of welfare in Mexico would be to approach it based in equality and the principle of non-discrimination, (as described in Chapter 11.2, Chapter 13.4.3 and Chapter 13.4.4 respectively), situation which, while not as effective as in the Japanese case, represents the best chance for betterment.

As in the case of Japan, any welfare improvement related to Article 123 Par. XXIX has been completely independent of the judiciary (exempting work-based claims), and is usually a result of the social programs coordinated by the executive branch at the Federal, Local and Municipal levels as explained in Chapter 11.2.

Therefore, as up until this point, all recent welfare progress has been due to actions taken by the executive powers in search for votes, in contrast to judicial actions. In sum, the best chance for the Mexican population in order to improve their welfare would be to negotiate social assistance programs and policy by suffrage (as mentioned in Chapter 13.4.5.). *Due to the foregoing, the welfare hypothesis in Mexico is false.*

After the previous individualized evaluations, it has been proved that neither justiciability of Article 25 of the Japanese constitution, nor that of Article 123 Par. XXIX of the Mexican constitution, are adequate ways to fulfill the RSS. In both countries, and notwithstanding their apparent differences, the similar patterns regarding the relationship between constitutional provisions, justiciability, judicial

review as well as attitudes towards law and litigation result in an exception to the three multicited hypotheses.

It is especially relevant to mention that such similarities were more powerful to explain the lack of judicial enforcement than the usually argued economic or cultural considerations. Due to the foregoing, the findings of this dissertation offer alternative and more nuanced explanations regarding the lack of enforcement for social rights.

Finally, this dissertation acknowledged that there may be other non-justiciable ways by which both Articles may be beneficial for welfare purposes, however, the analysis of such aspects were not covered substantially since they exceed the scope of this dissertation. Notwithstanding the previous, in the next and last chapter, a brief referral to some of such alternatives will be made.

## Chapter 15 There might be better options to fulfill social rights than justiciability

Justiciability of constitutional provisions doesn't have to be the only or even the best way to fulfill social rights. Pereira Menaut argues that: a) Not every social good, value, or goal is a right; b) Courts are not the only means to have social rights protected; c) There are other protective devices such as political accountability and social movements; and d) Things which are basically political or social in nature should rather enjoy the protection of like nature.<sup>877</sup>

For instance, evidence regarding the thesis that justiciability may not be the best way to fulfill the goal of social rights can be found all over the world. Rosevear and Hirsch have done an extensive analysis which has shown that although some countries (e.g. South Africa) have qualified and specific provisions on social rights (progressive realization, subject to available resources, etc.), others (e.g. India) have more generic provisions (such as those of human dignity and security of the person). However and despite these differences, measurements of human development are roughly similar for both countries.<sup>878</sup>

In contrast, evidence appears to show that “on balance, Congress and the Executive Branch have been more favorable to the interests of disadvantaged groups than have the courts.”<sup>879</sup> This can be consulted and verified in the national programs,

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<sup>877</sup> Menaut considers that social rights should be placed in the infra-constitutional level of ordinary statutory law with two main advantages. The first advantage is turning social rights into a matter of social policy that is therefore subject to accountability. The second advantage is that it would allow them to be written down in more specific laws and therefore, enable more specific terms. As will be argued, in both of the compared countries, political accountability is more important than justiciability. See Antonio Carlos Pereira-Menaut, *supra* note 20, at 359.

<sup>878</sup> Japan and Mexico rank 115 and 130 respectively as of 2015 (HDI). Furthermore, these measurements are not substantially different from those in other developing world countries such as Mexico, where subsistence rights are not granted constitutional status.

<sup>879</sup> Frank B. Cross, “The Relevance of law to Human Rights Protection” (1999) 20:1 *International Review of Law and Economics* 87.

budgets, expenditures and reports which have also been verified and evaluated by international agencies such as the UN, ILO and the World Bank.

Finally, it is important to remember that constitutionalized rights can be interpreted and applied by other branches than the judiciary. Various authors consider that the ICESCR itself can be interpreted as allowing other procedures to defend social rights. As an example, Article 2 refers to “legislative measures” which may also include administrative measures that can be adequate in many cases. Additionally, the use of other articles and principles not limited to ESCR can be more useful in practice. Such is the case, for example, of litigation by invoking the principles of equality, non-discrimination or procedural fairness.

Thus, judicial protection can be one small element, among various others, of any plan to promote and protect the RSS. Strategies to achieve higher protection of the RSS should be multidimensional and include a range of legal, administrative, financial, budgetary, educational and social measures.<sup>880</sup>

*Complementing the general arguments posited in Chapters 4 and 5 in the general discussion, and Chapters 9 and 13 in the specific cases of Japan and Mexico, in this chapter a recount of the specific reasons against making the RSS justiciable in the two countries herein analyzed was advanced. Common ground in both countries was found, among which are the problems of a) restricting the RSS by the duty to work, b) courts’ attitude against justiciability, c) courts’ preference for equality and non-discrimination arguments over the citing of the RSS by the plaintiffs, and d) limited non-judicial activism.*

*All of the aforementioned problems support this dissertation’s arguments that, 1) in Japan and Mexico, including the RSS in the Constitution doesn’t automatically make*

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<sup>880</sup> Kristen Boon, “The Role of Courts in Enforcing Economic and Social Rights” (2007) 39:2 *George Washington International Law Review* 539, at 452.

*it justiciable, 2) a justiciable right doesn't automatically mean more judicial enforcement or more progressive interpretations and, 3) the courts and the judiciary in general are not the best option to increase general welfare of their populations. This chapter concluded with a positive note by mentioning other (better) ways to secure an adequate level of welfare for the citizens of Japan and Mexico that don't require a justiciable RSS.*

## **Chapter 16. Recapitulation, conclusions and final remarks**

### **16.1 Recapitulation**

**Part I** of this dissertation was used for establishing the framework in which this research would take place.

In **Chapter 1** the objective, focus, case selection, methodology and relevance of this dissertation were addressed. After evaluating the related literature, it was argued that the relevance of this dissertation is that it covers a gap in both comparative analyses of constitutional law in Japan and Mexico, and in the contextualized comparative analysis of social security; covering this gap was both possible and meaningful. Finally, it was advanced that both Japan and Mexico might be exceptions to the constitutionalization, justiciability and welfare hypotheses.

**Chapter 2** contained an analysis of the general framework of the welfare state and social rights. After studying the rise of the welfare state, social rights and the problems for incorporating them from their international regulation to domestic law were described. Also, a reference to the so-called “problem with social rights” was made in order to further study it in the next chapter.

**Chapter 3** described the process of social rights constitutionalization and provided arguments for and against such constitutionalization, largely revolving around the previously mentioned “problem with social rights”.

**Chapter 4** analyzed justiciability of social rights and distinguished it from enforceability. Moreover, arguments for and against making social rights justiciable were advanced.

**Chapter 5** delved into the RSS as a specific example of social rights. Special emphasis was placed on the lack of a common definition of such right in international law, lack which facilitates non-compliance from domestic authorities. After the pertinent analyses an overview of the international status for the RSS was provided, along with the contemporary distinctions between social security, social insurance and social assistance.

**Part II** of this dissertation was dedicated to the case of Japan.

**Chapter 6** presented a panoramic view of the Japanese Welfare State. A pattern of residualism, which assigns the primary role of welfare protection to the family, community, company and nowadays, civil society, was scrutinized. The problems of a declining population and an aging society aggravate such residualism making it a primary concern for the coming years.

**Chapter 7** analyzed social rights along with their recent and limited impact in Japan. In this chapter, it was posited that international law has been curtailed due to the role of the Japanese courts.

**Chapter 8** analyzed the judiciary, judicial review, and litigation in Japan. A sum of structural, procedural, ideological, political and social conditions was described to explain the lack of judicial activism. Such lack has in turn affected social rights in general, and the RSS in particular.

**Chapter 9** analyzed the RSS in Japan. Along with the definition contained in Article 25 of the Japanese constitution, it is argued that, in practice, the passive judiciary as

described in the previous chapter, has led to a narrow, programmatic and regressive interpretation of such right rendering it judicially unimportant.

**Part III** of this dissertation was dedicated to the case of Mexico.

In **Chapter 10**, and in parallel to the recounting of Japan, the Mexican Welfare State was discussed, from its revolutionary origins to its neo-liberal present. Although a certain extent of residualism was identified, inequality, corruption, and populism were established as more pressing problems affecting the Mexican welfare.

**Chapter 11** discussed how Mexico's promising origins of social rights were affected by the manipulation and political subordination enacted by the PRI's "Social Constitutionalism". Mexico has a pervasive pattern of signing international treaties without incorporating them into her domestic law, leading to a lack of compliance. This pattern persists even after the NHRR of recent times.

**Chapter 12** was dedicated to the discussion of the judiciary, judicial review, and litigation in Mexico. Continuing with the findings of the previous chapter, the Mexican courts have been under the control of the executive and the President himself. Moreover, inequality and corruption have generated an excess of lawyers without an improvement to justice provision for the population, and in contrast generated a general distrust for the judiciary and rule of law.

**Chapter 13** analyzed the constitutional RSS in Mexico. Such right has been succinctly worded, labor-dependent, deferential to the other branches of power regarding its definition and scope, and insufficient for the most impoverished population. Although it was concluded that the judicial claim of the RSS as contained in Article 123 Par. XXIX of the Mexican constitution was not a good choice for deprived citizens, at the end of this chapter various feasible and non-judicial alternatives which have produced better results were also mentioned.



**Part IV** answered the question: Are constitutionalization and justiciability really the best ways to fulfill the RSS?

**Chapter 14** advanced a conclusion against justiciability of Article 25 in Japan, and against justiciability of Article 123 Par. XXIX in Mexico, based on the findings of this dissertation, which show that in practically all the cases, the court's judgments were opposed to the RSS's adjudication and enforcement. Moreover, both in Japan and Mexico the RSS has been consistently interpreted in a manner that tends to be contrary to the interests of the general population.

Because of all these shared reasons, and despite all the different experiences in Japan and Mexico, both countries prove that the three hypotheses posited at the beginning of this dissertation are false.

Notwithstanding the previous, **Chapter 15** proposes alternative institutions to the judiciary in both countries that could better improve welfare protection of the needy. In such regard, as an alternative to both constitutionalization and making the RSS justiciable, this dissertation briefly referred to invoking the protection of other rights (e.g. equality and non-discrimination), non-judicial activism, and NPOs participation.

## 16.2 Conclusions

This dissertation departed from its original hypothesis (that the inclusion of the RSS in the constitution automatically makes it justiciable, and in turn, enforceable by the courts, thus increasing general welfare), to cover a more complex and interesting reality.

After approaching the relevant literature in both Japan and Mexico, an area of opportunity was identified in the lack of comprehensive comparative studies between

the two countries. Although their economies, and cultures may appear different, Japan and Mexico share a common problem regarding the practical implementation of social rights in general, and the RSS in particular.

After the corresponding analysis and comparison, in Chapter 9, Chapter 13, and Chapter 14 as a whole, this dissertation concluded that, **both in the case of Japan, and of Mexico, neither the inclusion of the RSS in the constitution, nor making the RSS justiciable improved the fulfillment of such right. Therefore, both of the countries herein analyzed constitute exceptions to the “constitutionalization hypothesis”, the “justiciability hypothesis”, and in some cases herein analyzed, even constitute an exception to the “welfare-hypothesis”**. Among other factors, some of the reasons for such results may be found in a civil law tradition, a strong executive power, a lack of judicial independence, and a still immature civil society in both countries compared.

The findings of this dissertation go against a large majority of academics who consider that constitutionalizing or making social rights justiciable by any other means automatically leads to better welfare conditions. In such regard, this dissertation is more relevant for demonstrating the limitations of the “transformative powers of the constitution and the courts”, rather than for confirming widely held beliefs on such matter. More importantly, such findings open new avenues for other methods and studies that might better protect the welfare and even the RSS in both of the countries compared.

## **16.3 Limitations and lessons learned**

After doing the literature review, no comparative constitutional studies between Japan and Mexico that could provide guidance could be found. Although the previous gap constitutes a problem common to any researcher entering into

uncharted territory, at the same time it is precisely such gap what makes this dissertation relevant.

In this regard, a first problem faced was finding a methodology suited for such specific comparison. Despite a preference for functionalism, its pernicious tendency to force similarities when defining functions could not be ignored. Thus, one limitation of this analysis was establishing variables that were both, as objective and comparable as possible, while discarding other ones that might be interesting and possibly relevant. In this manner, a more thorough comparison of gender, social status, non-judicial activism, and rights as transformative elements, had to be left for future analysis.

A second problem faced was deciding upon a useful concept of justiciability. Being raised in a country (Mexico), and having studied another one (Japan), both of which have civil law traditions, implied deciding if justiciability, which has a particular connotation for common law countries, would be applicable for this dissertation. Notwithstanding all the criticism that this decision may ensue, and although accepting that its use may be limited to a comparative analysis, it was considered that justiciability still offered enough insight as to remain useful for this research.

A third problem faced was the absence of a common definition regarding social rights in international and domestic law. Such absence complicated not only the literature review (particularly in domestic contexts), but also made it more difficult to do a comparison at all. To bridge the gap, a decision to focus in the RSS as a specific unity of comparison was made, leaving out other social rights that deserve to be considered in further studies.

The fourth and final problem faced had to do with the amount of knowledge on each of the two countries herein compared. The language was an obvious limitation in this research, and not having the same academic formation, or professional experience

proved a disadvantage as well. Even after trying to overcome such limitations (by studying the Japanese language since college, doing an M.A. in Japanese Studies, and a research stay in Tokyo), the fact remains that since Japan is not the undersigned's native culture, most probably there would be cultural limitations in this dissertation.

Beyond the implications for the academic discussions that will be mentioned in the next section, this dissertation also provided personal lessons.

One such lesson was the humility needed when approaching both cultures in order to further understand their circumstances. Not only did this humility attain to the foreign Japan, but also to the supposedly familiar Mexico. In this regard, a constant exercise of self-criticism was required in order to distance (as much as possible), from stereotypes and misconceptions of *Japaneseness* and *Mexicanity*.

Another lesson learned had to do with the responsibility of presenting a given culture. Such responsibility is even greater when the culture represented is different to one's own. It is important in this way to avert thinking that these are just references to legal concepts, and fail to understand that one is actually writing about real people, histories, and unique problems which provide them with an identity of their own.

In this same line of reasoning, it became evident that the more knowledge possessed about a foreign country, the more balanced an analysis and opinion will turn out to be. This applies not just to knowledge about a particular field of specialty, but also about other areas that most probably will affect and be affected by the topics studied. Acknowledging the complexity and interdependence of different elements is key for avoiding biased or incomplete analyses.

## 16.4 Implications

This dissertation ascertained particular relevance to historical, social and judicial contexts contrasting with traditionally dogmatic legal comparisons. In this regard, the opportunity to experience the law of both countries *in situ*, not only had a lasting impact on the researcher, but also on the analysis and scope of this dissertation. More than before, it became certain that in order for the law to be more than mere words on paper, it is essential to have as much knowledge as possible regarding the society it governs.

With the aforementioned in mind, this dissertation proposed and implemented a research model which, while based on the methodology of functionalism, added the analysis between legislation, judicial review, and social attitudes towards law and litigation. A balance between strictly legal and extra-legal variables was made and included a qualitative evaluation of the judiciary in order to determine the impact of social rights.

In this dissertation, the aforementioned research model was tested in two countries with very different economies and cultures, and such difference allowed to avoid simplistic explanations based only on such type of variables. Instead, this dissertation engaged on the rich interdependence between social rights and courts, both in theory and practice.

To have an objective point of reference, both constitutions were evaluated using justiciability and enforcement as key concepts to gauge performance. The results of such evaluation suggest, that it is better to reconsider the hypothesis of constitutionalization and making the RSS justiciable as the main way for the realization of such right. It would be convenient for future research to begin with alternatives to justiciability such as political accountability, the participation of civil society, and a more thorough control of social programs. Although this dissertation

briefly referred to such alternatives, future research into these areas will probably render more useful results for the RSS than those which rely mainly on the constitution or the judiciary.

This dissertation demonstrates that both of the countries compared have feasible non-justiciable solutions for their welfare problems in general, and the RSS in particular. However, the decisive factor will be if the political, social and economic elements, both international and domestic, coincide to allow such solutions to be implemented. The apparently contrasting cases of Japan and Mexico raise the possibility that their circumstances may be similar in other countries where social rights, especially the RSS, are lacking protection. The patterns herein described may therefore encourage future research that expands and enriches the groundwork that was intended to be provided in this dissertation.

Given that Japan and Mexico may not be unique exceptions, the problems presented for the three hypotheses herein analyzed may occur in other countries as well. After all, if a country already has a good welfare system, there is probably no need for constitutionalization. However, if a country does not have an adequate welfare system, including a RSS in the constitution is more likely to render it merely aspirationally, devoid of any effective protection, and probably unenforced by the judiciary.

Nonetheless, a generalization of the exceptions of Japan and Mexico cannot be done in automatic, and neither would it be acceptable to negate the validity of the three aforementioned hypotheses without further scrutiny. To do that, more analyses of other countries' constitutions, and more importantly, their particular contexts would be necessary. Such analyses are definitively important and might prove useful in the immediate future.

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