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MEXICO – NATIONAL LAW OF EXTINCTION OF OWNERSHIP **(“Ley Nacional de Extinción de Dominio”)**

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On March 14th, 2019, the Mexican Government published in the Federal Official Gazette (“Diario Oficial de la Federación”, hereafter the “FOG”) a decree to reform the Article 22 of the Mexican Constitution regarding matters of expiration of ownership. Afterwards, On August 09th, 2019, the National Law of Extinction of Ownership (the “Law”) was published and thus it came into force on August 12th. The Law has the intention to recover all kinds of assets/goods that have or may have a link and/or are used for illegal acts.

In this regard and after analyzing the Law, it is our opinion that it presents some conflict with basic principles of Mexican Law, and that it not only represents a direct risk to the right of private property, but if improperly exercised it could violate other human rights, such as legal certainty or presumption of innocence, as well as the derivative rights that these guarantees attribute to their holders.

“The Extinction of Ownership is the loss of rights over an asset/good in favor of the State without consideration or compensation, for the owner or for those who act as such.”

- Gerardo Carrasco Chávez¹-

It seems as an “act of irony” from the Law, since the Law establishes in its Article 21 that *“In the application of this Law, the fundamental rights and guarantees recognized in the Mexican Constitution and in international treaties where Mexico is a part of, shall be respected and protected.”* In order to refute said Article, here are the most worrying and possibly unconstitutional aspects of the Law:

Non-existence of the Autonomy between the Procedure and the Criminal Scope: The Law clearly indicates under Article 9 the necessary elements to exercise the execution of the domain extinction, which are (i) the existence of an illegal act; (ii) the existence of any property of illicit origin or destination; (iii)

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the causal link of the two previous elements; and (iv) the knowledge that the owner has or should have had, from the destination of the good/asset to the illegal act (unless it is proved that the holder was prevented from knowing it). Furthermore, Article 22 of the Mexican Constitution and Article 8 of the Law, expressly states that for the exercise of the domain extinction, the Actor (*Public Prosecutors' Office*) through a civil procedure and independent from all criminal nature, must execute such extinction of domain.

This autonomy is fictitious, since only the execution of the domain extinction can be exercise over goods/assets that have a direct link with the illicit acts established under Article 22 of the Mexican Constitutional and Article 1, Section V of the Law. Thus, we can point out that the execution of the domain extinction is directly linked to the investigation(s) that the Public Prosecutors' Office (the "MP"), in relation to presumable illicit acts, and therefore the autonomy is nullified².

Summarizing it is clear that there is NO autonomy between the judicial procedure of the extinction of ownership and the criminal scope, since there is an obligation to prove the relationship of the good/asset with the illicit act and thus having as a result that both procedures need to be develop in a joint manner.

Principle of Presumption of Innocence: Not only does the Mexican Constitution recognizes the principle of presumption of innocence, but also Mexico is part of various international treaties that also recognize such principle. Especially under Article 20 of the Mexican Constitution, section B, sub-section I, established that "*the presumption of innocence shall prevail as long as it is not declared otherwise by means of a judgment issued by the judge of the case*", and said principle is also found under the American Convention on Human Rights³ and the Universal Declaration of Human Rights⁴.

Therefore, the Law clearly violates the principle of presumption of innocence, breaching the individual guarantees recognized execution of the domain extinction in the Mexican Constitution and in international treaties. Nevertheless, as a rhetoric act, Article 14 of the Law established that:

"The action of extinction of ownership will be exercised even if criminal responsibility has not been determined in the cases of the crimes provided in the fourth paragraph, of Article 22 of the Mexican Constitution. Provided the existence of solid and reasonable grounds that allow the presumption of that the owner or destination of the assets/goods are derived from or connected to such the crimes established under the fourth paragraph of the Article 22 of the Mexican Constitution."

The Law clearly states that the execution of the domain extinction could be apply even against the principle of presumption of innocence.

² In accordance with Colombian legislation, the extinction of ownership is much broader and more developed, having a true autonomy of criminal matters.

Political Constitution of Colombia "Article 34. The sentences of exile, life imprisonment and confiscation are prohibit. However, by judicial decision, the domain of the assets acquired through illicit enrichment will be declare extinguished, to the detriment of the public treasury or with serious deterioration of social morals."

³ Article 8 of the American Convention on Human Rights recognizes that "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law."

⁴ Article 11 of the Universal Declaration of Human Rights recognizes that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."



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Pre-Constituted Evidence: Article 126 of the Law (third paragraph), indicates the relation of the evidences at the time of the process, which establishes that:

"... In reference to the data/information of the evidence from the investigation folder or evidence provided in mixed criminal procedure, such evidence will be legally pre-constituted, which should not be repeated in court, except for the right of the parties to object to their value and probative scope, to renounce them as false and to offer evidence to the contrary, and will be assessed by the court in a free and logical manner, and their submission, with their incorporation with synthetic explanation at the hearing. The Public Ministry may offer means of proof for its improvement, in particular it may do so when there is objection, challenge or offer of evidence to the contrary, which it will perform at the initial hearing ..."

In reference to the previous cite, we can observed how the pre-constituted evidence by the MP is reincorporated. Therefore, it is important to warned, that all the elements that the MP would incorporate in an investigation, will be automatically considered as evidence, despite having been presented in a process completely independent and autonomy from the domain extinction, which in accordance with the Law must be autonomous from the criminal scope.

Inaccuracy to the Catalog of Crimes: To be precise, the Constitution and the Law only contemplate eleven crimes that may allow the Mexican Government to exercise the domain extinction. Regarding the Mexican Constitution, it is under Article 22 that are stated and delimited the illicit acts on which the execution of the domain extinction must proceed *"will be originating in goods/assets of a patrimonial nature whose legitimate origin of ownership cannot be proof and are related to investigations derived from acts of corruption, cover-up, crimes committed by public servants, organized crime, theft of vehicles, resources of illicit origin, crimes against health, kidnapping, extortion, trafficking in persons and crimes related to hydrocarbons, petroleum and petrochemicals."*.

In the case of *"crimes committed by public servants"* and *"acts of corruption"* each state includes different criminal types within these classifications, thus there will be a difference between each entity regarding what crime may be considered within them and therefore, what will be subject to fall under the Law.

Right to Due Process: In accordance with Article 14 of the Mexican Constitution⁵, everybody has the right to due process, that is, they have the guarantee of having access to the set of essential formalities that must be observed in any legal procedure, to ensure or defend the rights and freedoms of every person. Furthermore, Mexico is part of several international treaties, in which the right to due process is recognized, such as the Universal Declaration of Human Rights, the American Declaration of Rights and Duties of Man, the International Covenant on Civil and Political Rights and the American Convention on Human Rights.

As this article has been describing and developing through, it is our opinion that the Law is unconstitutional, since the Law (i) does not guarantee, nor respect the principle of presumption of

⁵ Article 14 of the Mexican Constitution *"No law shall have retroactive effect to the detriment of any person. No one may be deprived of liberty or of their property, possessions or rights, except by trial followed before the previously established courts, in which the essential formalities of the procedure are fulfilled and in accordance with the Laws issued prior to the fact."*



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innocence; **(ii)** establishes a civil procedure, autonomous from any criminal nature, which does not comply with these characteristics, since there is no autonomy; **(iii)** reinstate the pre-constituted evidence, which violates the audience guarantee in an “autonomous” process to the process where said evidence is constituted; **(iv)** generates an inaccuracy catalog of crimes, since being a National Law, it may be applied by both federal and state authorities, which according to each State Criminal Code, the catalog will be different; and **(v)** consequently all this leads to a direct violation of the right to due process.

Therefore, as a merely remainder, the legal route of protection for an unconstitutional law is through the legal figure of *amparo*, which is regulated in the Amparo Law, Regulatory of the Articles 103 and 107 of the Political Constitution of the United Mexican States (the “Amparo Law”). One of the objects and finality of the Amparo Law is to “*to challenge the acts of authority that violate the rights recognized by the Political Constitution of the United Mexican States to nationals and foreigners and to maintain respect for the law by guaranteeing the exact application of the law*”⁶. Which establishes two options of defense:

(i) *Amparo indirecto*, which will proceed “*against general rules that, due to its sole entry into force or on the occasion of the first act of its application, cause damage to the complainant*”, meaning, that it will proceed when a new law and/or reform is published and enters into force. Thus, proceeding through the *amparo indirecto* within the next 15 (fifteen) business days after the Law is published, therefore, the deadline to file the *amparo indirecto* will be on September 2nd, 2019; or

(ii) *Amparo directo*, which will proceed “*against final sentences, awards and resolutions that put an end to the trial*,” meaning, it will proceed when an authority of Mexico through any sentence or resolution proceeds dictates or goes through the action extinction of ownership. Thus, proceeding through the *amparo directo* within the next 15 (fifteen) business days after notification and/or knowledge of the actions of the authorities.

⁶ DE PINA VAR, Rafael. Diccionario de Derecho, Edit. Porrúa S.A., México, 2000, pag.79