LAW, POLICY AND SOCIETY – UNIVERSITY OF HOUSTON

Essays In Honor of Professor Stephen T. Zamora

A LIFE BETWEEN MEXICO AND THE UNITED STATES

Alfonso López de la Osa Escribano

and James W. Skelton Jr.

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Arte Público Press
Houston, Texas

Publication of *Essays in Honor of Professor Stephen T. Zamora: A Life Between Mexico and the United States* is made possible with support from the Center for US and Mexican Law at the University of Houston Law Center and the North American Consortium on Legal Education (NACLE). We are grateful for their support.

Recovering the past, creating the future

Arte Público Press
University of Houston
4902 Gulf Freeway, Bldg 19, Rm 100
Houston, Texas 77204-2004

Cover design by Mora Des¡gn

Cataloging-in-Publication (CIP) Data is available.

The paper used in this publication meets the requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

Printed in the United States of America

22 23 24 3 2 1

TABLE OF CONTENTS

DEDICATION

This book is dedicated to the honor and memory of our dear friend and colleague, Professor Stephen T. Zamora (1944-2016), who was a brilliant lawyer and law professor in the fields of international and comparative law. Steve was deeply respected and admired. He was always upbeat, kind, thoughtful, pleasant and helpful, and that kindness, which took the form of good humor and generosity, came to him so naturally and effortlessly that he made everyone he met feel important and valued. His open character allowed him to create an international academic network of colleagues who quickly became his friends. He was a team player with a strong sense of community, a consummate gentleman, a great professor, and an inspirational leader. Always well prepared for his classes, he shared his knowledge with enthusiasm, and helped his students whenever he could.

We also dedicate this book to Steve's loving wife, Lois, confirming the saying that behind every great man is a great woman, and to their children, Camille and Peter, faithful mirrors of his charisma. Professor Zamora's professional life was very important and fulfilling to him as his numerous achievements showed, but it constituted a small part of what made him such a great man. Steve was primarily a dedicated family man who relished the fulfillment of his principal roles as a loving husband, father, brother and grandfather.

To Steve, thank you for combining academic gravitas and expertise with your unlimited talent for friendship.

PREFACE

It is with a profound feeling of both sorrow and pride that we offer this collection of scholarly essays in memory and honor of our dear friend and colleague, Professor Stephen T. Zamora. We still miss our treasured friend terribly because he was larger than life and one of the greatest and kindest men we have ever known.

The initial goal in putting this anthology together was, of course, to gather a group of substantive articles about international and comparative law matters from among Steve's friends and colleagues. Alfonso began the process on January 27, 2017, when he sent an email message to a list of potential participants inviting them to participate in an anthology that would connect with Professor Zamora's contributions through an essay related to our common legal fields of interest. The idea was to compile articles for a Festschrift honoring Professor Zamora's intellectual and institutional dedication to US-Mexican understanding that would demonstrate the respect, admiration, and affection we had for Steve. Indeed, Festschrifts are excellent ways to commemorate either the retirement or passing of excellent scholars. While we know Steve would have never asked for honors or personal recognition, we believe he would have enjoyed very much celebrating life with fascinating legal topics and his academic and professional colleagues, who quickly became friends. All the articles are an excellent example of Steve's vision, versatility, and talent for friendship. Most of the articles also include a few lines about a situation, a moment, or a remarkable anecdote the authors lived with Steve.

When the project started, Jim responded immediately, saying that he would be extremely honored to contribute an essay or an article to the anthology. In June 2019, during a meeting of the International Law Section of the State Bar of Texas in Austin, Alfonso and Jim spoke about the delays concerning the submission of a few articles for the Festschrift. First, as an author and afterward as an editor, Jim became, during the process, an invaluable ally to this book, being of tremendous help with editing responsibilities and contacting authors who had agreed to write an article, and persuading others. Thanks very much to Jim for his time and dedication.

Although many of Steve's friends and colleagues agreed to participate, many of them were unable to adhere to the timeframe for submitting the first drafts of their articles due to other pressing commitments. *No están todos los que son, pero si son todos los que están*, following the Spanish idiom stating that *Not all the needed are*

here, but the ones here are very much needed, and we would like to express our gratitude to all of them. We keep in our thoughts and prayers, especially Amalia Mena-Mora and her family. Amalia was a young and promising lawyer that Steve mentored, who also left us too early in December 2019. Amalia had the time to submit her article a few months before her passing, and Alfonso and Jim had the privilege of exchanging messages with her several times. We are sure she would have also enjoyed seeing this book published in memory of Steve.

Alfonso and Jim worked closely to coordinate their efforts, and slightly more than a year and a half after forming their editing team, they had most of the articles fully edited and ready for publication. We were even able to gain the agreement of two more participants from among our contacts. By the end of November 2020, we had a total of nineteen chapters ready for the publisher, and assembled the final manuscript for submission to Arte Público Press. Without Jim's thoughtful editing work and the authors' outstanding contributions, this Festschrift in memory of Steve would not have been possible.

We hope readers will enjoy this book remembering Steve, as much as we have enjoyed working closely with his friends.

The Editors, Alfonso López de la Osa Escribano and James W. Skelton, Jr.

December 2020

INTRODUCTION

PROFESSOR STEPHEN T. ZAMORA: A VISIONARY AND GENEROUS SOUL

By Alfonso López de la Osa Escribano[1]

On July 8, 2016, Professor Stephen T. Zamora suddenly passed away in Mexico City. His good health, active life and clear mind never gave the slightest sign of such a terrible event. He died "con las botas puestas"—with his boots on, as the Spanish idiom has it. He was full of energy and had many projects in progress.[2]

Professor Zamora was Leonard B. Rosenberg Professor of Law at the University of Houston Law Center, which he joined in 1978. An international authority in his field, he received the Decoration of the Order of the Aztec Eagle Award from the Mexican Government in 2006—the Mexican government's highest award given to a foreign national in recognition of his dedication to Mexican law, education, and the promotion of U.S. and Mexican cooperation.

Professor Zamora's paternal family originated from the Spanish Basque in a fishing village known as Lekeitio, which is a province of Biscay in Spain. Emigrating to the United States, the Zamora family settled in Los Angeles, California, where Professor Zamora was born in 1944. He was the second of seven children and always remained close to his family in California. He also constantly maintained his bonds with his cousins in Spain—whom he often visited—feeling proud of his Hispanic-Basque origins; pride that he projected in his beloved Mexico.

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[1] Dean of Law and International Relations and Professor of Law at Nebrija University in Madrid, and former Director of the Center for U.S. and Mexican Law at the University of Houston Law Center. This article was originally published in the *Houston Journal of International Law*, Vol. 40, No. 3 (2018), and is reproduced with the permission of the *Houston Journal of International Law*.

[2] I came to work with Professor Stephen T. Zamora in August 2015, joining the Center for U.S. and Mexican Law as an Affiliate scholar to undertake and develop research projects in comparative law between the US and Mexico in the fields of energy, health, immigration and corporate law, among others. From our first meeting, I was taken by the intellectual capacity, warmth, energy, and good will of Professor Zamora.

Professor Zamora was fascinated by Mexico and its complex history and society—especially by Mexico City, also known as the City of the Palaces, with its rich pre-Hispanic and colonial culture.[3] He particularly loved the *plaza* and *iglesia* of San Jacinto in San Angel, a neighborhood in the southern part of Mexico City where his remains are today, and where for twenty years, Professor Zamora and his wife had an apartment they loved. To walk the area of San Angel, with its ancestral cobblestone streets, and colonial buildings, beautifully preserved in the middle of frantic Mexico City, is like being tele-transported in time to the Mexican past. Just as Professor Zamora was proud of his Spanish roots and an admirer of ancient cultures and popular traditions, he was also immersed in modern Mexico. San Angel was the perfect spot for him, replete with historical echoes and family memories, his beloved Lois, his children, and friends.

Professor Zamora enjoyed spending time with his friends at the Chapel of the Capuchinas near San Angel, a chapel designed by the Mexican architect Luis Barragán that truly is an architectural gem and was designated by the UNESCO as a World Heritage Site. This chapel may also be said to reflect Professor Zamora himself. The set of lights is amazing: light enters the chapel from above and mixes golden and red shadings on the walls, creating an imposing effect in a space of pure light and line.[4] So, too, Professor Zamora's personality was imposing but clear, radiating a charismatic aura that inspired students, colleagues, and friends to share his vision of international understanding and cooperation.

I. Professor Zamora: A Visionary

A visionary is a person with the capacity to project himself or herself into the future, to foresee possibilities with broadmindedness and intelligence.[5] Such a person intuits what *needs* to be done, what *can* be done, and *how* to do it. Professor Zamora was a visionary, and also a realist. He knew what steps had to be taken, day by day, year by year, to realize his vision: "Lo cortés no quita lo valiente" or "Courtesy detracts not from bravery," as we have it in Spanish. Actually, this popular say-

[3] Charles La Trobe, The Rambler in Mexico*: 1834*, Coll. History of Colonial North America, Ed. British Library, 2011. In this very instructive text of manners from La Trobe—an expert in that type of anthropological works—we can appreciate in a very descriptive way the customs and the everyday life habits in Mexico City. Besides these descriptions, La Trobe mentions recurrently in several passages the numerous and outstanding palaces existing in Mexico (*see* § 109, 118, 122 or 127, among many other examples) after which he named the city.

[4] Luis Barragán: Capilla en Tlalpan/México. Fotografías de Armando Salas. Ed. Capilla y Convento de las Capuchinas Sacramentarias. Tipografias editoriales, p. 15.

[5] Adjectives found in the definition of visionary, see https://www.merriam-webster.com/dictionary/visionary.

ing could very well illustrate another of Professor Zamora's character traits: He constantly combined courtesy and bravery, kindness, and expertise. His colleagues at the Law Center and in Houston's legal community remember this characteristic in particular: "He didn't even know how to be unkind;"[6] he was enthusiastic, listened to students and "offered them a helping hand whenever he could;"[7] "he was always natural, genuine, and never pretentious."[8]

Professor Zamora's fields of expertise were international trade and investments, international banking, conflicts of laws, international economic relations, Mexican law, and U.S.-Mexican relations. His book, *Mexican Law,* co-authored with José Ramón Cossío Díaz, Justice of the Mexican Supreme Court, and three other authors, was conceived as an introduction and overview for U.S. lawyers, and was published by Oxford University Press in 2005.[9] Professor Zamora also wrote about Mexican constitutionalism, and peso-dollar economics,[10] NAFTA,[11] and most recently about energy reform legislation initiated in Mexico in 2013.[12] Additionally to cite a few of Professor Zamora's contributions to various areas of international law, there are his articles on international monetary law,[13] liability for damages in international transport,[14] and judicial review in Latin America.[15]

Building international programs at the University of Houston Law Center was central to Professor Zamora's vision. When he was Dean from 1995 to 2000, he

[6] Professor Sandra Guerra Thompson, Alumnae College Professor in Law and Director of the Criminal Justice Institute at the University of Houston Law Center, http://law.uh.edu/news/summer2016/0711Zamora.asp.

[7] Counsel Bradley J. Richards, partner at Haynes and Boone. Prof. Zamora that served as Of Counsel for Haynes and Boone for more than 15 years. *See*: http://law.uh.edu/news/summer2016/0711Zamora.asp.

[8] James W. Skelton Jr., Member of the Advisory Board of the *Houston Journal of International Law*.

[9] Stephen Zamora, S., Cossio, J.R. (*et al*.) *Mexican Law,* Oxford University Press, 2005.

[10] Stephen Zamora, *Peso-Dollar Economics and the Imposition Of Foreign Exchange Controls in Mexico*, Am. J. Comp. L., 32 (1984).

[11] *See* Stephen Zamora, *A Proposed North American Regional Development Fund: The Next Phase of North American Integration Under NAFTA*, 40 Loy. U. Chi. L. J. (Fall 2008); *see also*, Stephen Zamora, *Rethinking North America: Why Nafta Laisser Faire Approach to Integration is Flawed, and What To Do About it*, 631 Vill. L. Rev. 56 (2011).

[12] Tony Payan, Stephen Zamora & J.R. Cossio, *Estado de Derecho y Reforma Energética en México*, Tirant lo Blanch (2016).

[13] Stephen Zamora, *Sir Joseph Gold and the Development of International Monetary Law*, 23 Int'l L. 4 (1989).

[14] Stephen Zamora, *Carrier Liability For Damages or Loss To Cargo In International Transport*, 23 Am. J. Comp. L. 3 (1975).

[15] Stephen Zamora, Judicial *Review in Latin America*, 7 Sw. J. L. & Trade Americas 2 (2000).

promoted a strong international dimension at the Law Center, considering this to be an essential part of today's legal education.

Professor Zamora created the North American Consortium on Legal Education (NACLE) at the time of the establishment of NAFTA in January of 1994. The principal objective of NACLE was (and still is) to promote professional cooperation and comparative legal education in North America. Thirteen law schools in Canada, Mexico and the United States are member institutions of NACLE. This program is more relevant than ever and will continue to be promoted in the Center for U.S. and Mexican Law, which Professor Zamora created in 2012.

The contribution to the internationalization of the University of Houston Law Center began much earlier, in 1979, when Professor Zamora was invited to join the Advisory Board of the *Houston Journal of International Law* (HJIL). He also became, along with Professor Jordan Paust, who had joined HJIL in 1978, a faculty advisor to HJIL. Professor Zamora believed in the relevance of international law in every U.S. lawyer's education, and thus aligned himself with the philosophy of John O. Brentin,[16] as documented by James W. Skelton, Jr.—one of HJIL's most avid supporters and sponsor of HJIL's annual Skelton Lecture Series—in his text celebrating the thirtieth anniversary of the HJIL.[17] Professor Zamora joined this team and helped, among other things, to obtain articles and to receive them on time—not an easy task in the world of academic writing.

Professor Zamora's vision of strong international programs was grounded in experience. After clerking for Justice Raymond Sullivan at the California Supreme Court in 1972-73, he received a postgraduate fellowship in international law and arbitration at the University Consortium of World Order studies in Geneva, Switzerland. He shared wonderful memories from that period, and he pronounced the French he learned and refined during that time with an almost perfect accent. But it was Mexico that was closest to his mind and heart.

Upon arriving at the University of Houston in 1978, then Dean George W. Hardy III asked him to direct the University of Houston Law Center's Mexican Legal Studies Program—a summer program for law students from the University of Houston Law Center and other law schools, which he then organized for fifteen years. This program not only provided hundreds of students an understanding of a different legal system and legal culture, but it also contributed to building a solid reputation for the University of Houston Law Center. Today, under the leadership of Dean Leonard Baynes, the University of Houston Law Center is widely recognized

[16] First Editor in Chief of HJIL.

[17] James W. Skelton, Jr., *The journal at 30: An Insider's view,* 30 HOUS. J. INT'L L. 618 (2008). In the words of John O. Brentin in his Editor's Foreword, "Given the phenomenal pattern of growth Houston has been experiencing in international business and commerce, the Journal will become an important medium of communication for practitioners, students, and scholars within the international community."

in Mexico for its LLM program for Mexican lawyers and diplomats, and for its programs offering internships to University of Houston Law Center students in Mexico, which the Law Center's current administration continues to develop. To this date, both programs have been in operation for more than twenty-five years. Thanks to Professor Zamora's vision and persistence, the University of Houston Law Center is more than a point of reference for American legal education in Mexico today.

Professor Zamora's initiatives over thirty-four years (at that time) have increased "the understanding of Mexican laws and legal institutions in the United States, and of U.S. laws and legal institutions in Mexico,"[18] and in 2012 led to the establishment of the Center for U.S. and Mexican Law (US-MEX LAW). Today, US-MEX LAW is the only center in any U.S. law school dedicated to the independent and critical study of Mexican law and its interactions with U.S. law.[19] The special standing of the University of Houston Law Center on the national scene with respect to diversity is enhanced by US-MEX LAW, as is its standing in the international legal community. I use the term "international" in relation to Mexico and the U.S., though the Center also envisions the integration of North America not only in trade, but also through intergovernmental cooperation in technology, employment, security, and immigration aspects. Supranational cooperation, distant from the international one, is advantageous to neighbors who are naturally inclined to find common solutions to close common issues. In the Center for US-MEX LAW, we are working in this direction, following Professor Zamora's legacy because "*L'union fait la force*."[20]

Professor Zamora appreciated the fact that the University of Houston Law Center believed in the future of U.S.-Mexican relations. The Law Center facilitated his creation of externship programs with institutions in Mexico, including the *Secretaria de Relaciones Exteriores de México* (Mexican Foreign Ministry, Mexico's State Department), Petróleos Mexicanos (PEMEX), and the *Comisión Nacional de Hidrocarburos* (National Hydrocarbons Commission). Professor Zamora arranged summer externships in Mexico City for students at the University of Houston Law Center—an experience that is professional, cultural, and personal. Still today, University of Houston Law Center students spend up to two months during the summer working in Mexico City, learning about legal, political, and economic relations between the U.S. and Mexico. The program with the Mexican Foreign Ministry began in 1991, when Professor Zamora signed an inter-institutional agreement with the Ministry. It is to the credit of the University of Houston Law Center, as well as Professor Zamora, that this externship program has been on-going for twenty-seven years.

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[18] *See* Mission Statement of the Center for U.S. and Mexican Law, https://www.law.uh.edu/mexican-law/mission-statement.asp.

[19] *See*, https://www.law.uh.edu/mexican-law/mission-statement.asp.

[20] Translate "Unity is strength."

This agreement encourages Mexican diplomats and lawyers to take an LLM degree at the Law Center. Their residence in Houston varies from one to two years and results in a comparative understanding of two different legal systems and legal cultures. Similar agreements exist with PEMEX and the Hydrocarbons National Commission. International mobility of law students was for Professor Zamora a must. He wanted students at the University of Houston Law Center to have intercultural and comparative legal experiences in Mexico, knowing that this would lead to enhanced understanding among lawyers in both nations.[21]

II. Professor Zamora: A Generous Soul

Generosity is manifested in different ways. It might be material help, an amount of time dedicated to others, an interest shown in them, or an intellectual generosity of shared ideas without expecting anything in return. A generous person is ready to give "something larger than usual or expected,"[22] and one who is "characterized by a noble or kindly spirit."[23] Professor Zamora conforms to both definitions. He was moved by shared ideas and the desire to do good for others.

Professor Stephen Zamora was married to Lois Parkinson Zamora, a mirror of him in many aspects. She, too, is a professor at the University of Houston. Her field is Latin American literature and art, with a particular interest in Mexico—an obvious complement to Professor Zamora's dedication to Mexican law and culture. Both were Deans at the University of Houston at the same time. As Dean Leonard Baynes points out, Professor Zamora's "tenure as Dean was notable for two reasons: First, he was the University of Houston's and the Law Center's first dean of Hispanic origin; and, second at the same time his wife, Lois, was dean of the then-College of Humanities, Fine Arts and Communication at UH, making them quite unique in academia."[24]

They are the parents of two children, Camille and Peter, and grandparents of Nate and Landon. For Professor Zamora, his family was a high calling and he devoted the scarce time he had outside of his work to them. His family was always on his mind, as anyone knows who spoke to Professor Zamora for more than ten minutes.

Professor Zamora's generosity also took the form of sharing his experience with others and giving useful advice. He spent time with my wife Marie-Sixtine and me after I accepted an affiliate scholar position with US-MEX LAW in February of 2015. After our meeting, we talked about our families, and I mentioned that my wife

[21] *See* Dean Leonard Baynes' words at: http://law.uh.edu/news/summer2016/0711Zamora.asp.

[22] *See*, https://dictionary.cambridge.org/us/dictionary/english/generous.

[23] *See*, https://www.merriam-webster.com/dictionary/generous.

[24] To learn more about Professor Zamora's life and legacy, please read how the University of Houston Law Center colleagues remembered him: http://laaw.uh.edu/news/summer2016/0711Zamora.asp.

was outside waiting for me. He did not even think twice before he took us to a place near the Law Center for a cup of tea, and explained to us Houston's residential areas, using a map of the city. This openness was quintessential to Professor Zamora. He spent time with us, knowing how to make foreigners new to Houston feel at home.

Professor Zamora's global vision led him to build bridges, promote synergies and alliances, and seek ways to solve legal issues and controversies. He was never divisive but rather the opposite; working to get things done for the sake of the community. He was patient, persistent, and devoted to his students. His high academic profile in both research and teaching underpinned the supervision of his students. Far beyond the hours of class, he was always available to encourage them to excel. While he was Dean, Professor Zamora remained personally involved with HJIL, offering advice and direction to student editors and contributors.

From 1967 to 1969, Professor Zamora lived in a village in the coffee-growing area of Colombia with his wife in a Peace Corps program of "acción communal."[25] The communal and generous spirit that I have highlighted in Professor Zamora is reflected in this experience. Even today, the information of the program fits Professor Zamora's personality: "The Peace Corps is a service opportunity for motivated change-makers to immerse themselves in a community abroad, working side by side with local leaders to tackle the most pressing challenges of our generation."[26] Could we find a better description of Professor Zamora?

Professor Zamora worked to fund scholarships for Mexican LLM students through US-MEX LAW. Together with the Advisory Board of US-MEX LAW, he institutionalized financial support for these students. In his will, Professor Zamora designated a certain amount of money to this end. The Stephen T. Zamora Scholarship Fund has been created, and we look forward to raising funds year after year to allow Mexican students to study U.S. law at the University of Houston Law Center.

In US-MEX LAW, we are working to maintain Professor's Zamora's legacy. We are expanding our research projects, applying for multidisciplinary grants, increasing our internships agreements with Mexican institutions, and working toward legal and economic understanding between Mexico and the U.S. through seminars, lectures, and professional training programs. The task is not small and the responsibility is great, but we are sure that the results will be positive. We strive to replicate the effort Professor Zamora so enthusiastically put into everything that he did.

Thank you, Steve, for your example.

[25] Translated as "rural community development."

[26] *See* https://www.peacecorps.gov/about/.

CHAPTER 1

DISCERNMENT IN PUBLIC LAW: A COMPARATIVE LAW PERSPECTIVE BETWEEN SPAIN AND THE UNITED STATES OF AMERICA. FROM GEORGE FLOYD'S DEATH TO THE RIGIDITY OF CERTAIN RULES: WHEN COMMON SENSE IS LACKING

By Alfonso López de la Osa Escribano[1]

Introduction

On May 25, 2020, George Floyd was killed by a police officer who was performing a chokehold that may have lasted eight minutes and forty-six seconds[2] while he was in custody. The brutal action done by the officer had a significant impact worldwide, questioning the protocols police officers had to apply, the action's proportionality, life's threat notion, law enforcement certifications and training, brutal treatment, and police expertise, among others. George Floyd was not representing a life threat, although he received the most brutal treatment possible for someone, who, even if he had committed an infraction, and may have been under the effect of drugs,[3] did not endanger the persons surrounding him. Judgment and discernment lacked in this action.

Discernment is a quality, a capacity that we attribute to human beings that allows us to distinguish rationally between different situations. Latin *Discernere* is a verb composed by the prefix *dis* (to separate through different paths) and the root *cernere*

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[1] Dean of Law and International Relations and Professor of Law at Nebrija University in Madrid, and former Director, Center for U.S. and Mexican Law, University of Houston Law Center, Adjunct Faculty, University of Houston Law Center.

[2] *See* about what the symbol "eight minutes and forty-six seconds" have become, although the exact time of chokehold still is unclear: https://www.nytimes.com/2020/06/18/us/george-floyd-timing.html.

[3] *See* about the controversy on the methamphetamine and fentanyl found in George Floyd's autopsy: https://www.newsweek.com/george-floyd-was-fentanyl-medical-examiner-says-experts-dispute-cause-death-1507982 ; *See also*: https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/04/869278494/medical-examiners-autopsy-reveals-george-floyd-had-positive-test-for-coronavirus.

(which means to sort, to isolate), namely, to sort among several options. The word discernment is, in turn, formed by the Latin verb *discernere* and the Latin suffix, *mentum*, which means medium or instrument. Thus, having a discernment capacity would imply having the means to choose the best option from among the many that would exist. It also means to have the intelligence to understand, a term etymologically coming from the Latin *intellegere*, which would define the capacity to read between the lines, "to read through" the situation that is in front of us. In this sense, discernment and intelligence could be considered as being, in a way, synonymic terms. It means understanding quickly, not delaying too much in the explanations, adapting rapidly to the present situation.[4] One can measure the level of intelligence as being inversely proportional to the time it takes for someone to adapt to a new situation.

As far as public law is concerned, discernment would be the ability of police officers, bodies, and persons belonging to the Administration[5] to adapt to reality with their intuition and training, and by applying relevant legislative or regulatory texts. As well, in the absence of a specific text, they would take a decision that will solve wisely and fairly the problem, without generating friction or alarm, or by creating the least possible. In addition to the content of laws and regulations, it may be necessary to go beyond the regulated authority of the Administration so that public officials make the decision. Those officials, entrusted with the executive power, would decide among the many existing legal options, using their discretionary power in the best interest of society, as persons belonging to the Administration (not as a private person or with a private interest).

Discernment capacity for law enforcement officers is also a necessity, and its absence can also be detected. The recent tragic event of George Floyd's death is an unfortunate example. Mr. Floyd died by asphyxia, caused by a police officer who kneeled on his neck for an unacceptable length of time; Mr. Floyd was not supposedly offering any resistance and had expressed several times during custody that he could not breathe. The result showed an arbitrary abuse of power, a disproportionate action. The police needed to respect law and order in that situation, but in doing so, the action was not at all adapted to reality. It seemed that either no protocol existed, or the existing one was not accurate. Police officers at the scene lacked discernment, especially the one performing the chokehold, and the others helping him.

Public agents represent and personalize the Administration. In doing so, they should always be acting in respect of the principle of legality, choosing the best option (the most intelligent solution) among the various alternatives available to

[4] According to the Merriam Webster dictionary, discernment is "1. the quality of being able to grasp or comprehend what is obscure: skill in discerning; 2. an act of perceiving or discerning something". *See* https://www.merriam-webster.com/dictionary/discernment.

[5] For the purposes of this article, Administration includes the different public bodies, agencies, and civil agents devoted to public service that are part of the Executive branch (at both the federal and state levels). These bodies are not considered from a partisan political point of view as an Administration identified with the federal or a state Government. In Codified legal traditions, Administrative Law analyzes the way public office and service tasks (of general interest or common good) are organized by the Constitution, the law and regulations, and how citizens interact with these bodies, overall considered under the Public Administration. The political dimension of the Executive power, the Government, is studied under Constitutional Law, also called Political Law.

accomplish their duty. This dichotomy between legal authority (or legal competence) and discretion when making the decision is known in Spanish law as *potestad reglada-potestad discrecional*, and in German law, as *Geregelten Befugnisse* (legal competence settled), and *Ermessens Befugnisse* (discretionary competence, situated in the context of *Rechtsfrei Raume* or *room free from the law*). Discretion, as we shall see, justifies the taking of administrative decisions with a certain margin of maneuver. These decisions are, traditionally, beyond the control of the administrative judge, but that must always be taken, obviously, within the framework of the law.

By Administration's discretionary power, we consider the existence of the mentioned margin of maneuver proper to the Administration, when laws and regulations do not specifically define everyday activity. Traditionally in Spain, discretionary decisions were not subject to a complete revision by the administrative court judge, on the pretext that the judiciary could not substitute to the intellectual judgment or rational approach followed by the Administration on this specific discretionary aspect. The judge, when exercising jurisdiction, could only control the procedural legal aspects followed when enacting the decision, the rule of law we may say, but not review the content of a specific decision.

Thus, we saw a double notch of independence of the executive power vis-à-vis two classic powers, the judiciary and the legislative. There is already independence of the executive power *per se* (it is one of the three constitutional powers). There is as well independence in the intellectual process of a decision, taken under the umbrella of discretion, which should, one would like, be taken with discernment and in respect of the rights and freedoms of all citizens. Unfortunately, it is not always the case, and law and justice must be there to remind the Administration about the most appropriate action to take for the common good, as recent tragic events related to George Floyd's death exposed.

In an increasingly global legal world, it is useful to relate the interpretation of discernment to the global phenomenon. From a legal philosophy point of view, the principle of freedom helps us in interpreting discernment. We live in a world that tends to homogenize some of the structural elements that are strongly influenced by the ultra-rational, or integral human rationality. Should it be science, technology, production, markets, or political relations, we tend to situate solutions in an ultra-rationalistic environment. Increasingly, ultra-rationalism reaches different sectors of society, leaving a small place for free, disinterested, and spontaneous solidarity. Even the notion of general interest or common good seems to be eroding and shrinking nowadays due to a desperate race to seek economic profit. The economy should move on and work, of course, to generate jobs and wealth and improve everyone's lives, but other interests are also in play. The construction of fair and humane decisions relies on lower levels of society (civil servants, and first responders, among others) who play a crucial role in this direction, and that are the first levels of the Administration in contact with citizens. These first levels may seek to avoid shocks or collisions,[6] encouraging this dialogue beyond purely private interests. However,

[6] J.C. Scannone, *Discernimiento filosófico de la acción y pasión históricas*, Ed. Anthropos y

these levels are not always provided with the best tools and resources to perform their work. A more humane and close Administration must set itself up as a promoter of this dialogue, but there is a lot of weight and responsibility put on the shoulders of these mentioned first levels, and they need to be trained for that.

The process of making a decision based on discernment must be associated with the respective culture of a specific country, and to its principles or values. For instance, in Europe and America, culture is based on the conditions peculiar to Judeo-Christian values, which have legally and socially shaped the legal systems of these continents.[7] Besides, to act with discernment in each case is to bring solutions following the existential, historical, and pragmatic conditions that give birth to a customary action. Beyond purely philosophical perspectives (such as the epistemological break that would reject previous knowledge in favor of new knowledge, free from the past and common sense, and in the benefice of new science to appear), the solutions to the problems will be brought by a critical and educated mind, in relation with the existing assumptions and conditioning situation in a specific culture: what we are.

The purpose of this essay is to analyze discernment in Spanish public law, which one will attempt to enrich with some notes of comparative law from a United States of America perspective. Several questions come to our mind when defining the subject: can a public Administration have the capacity to discern? How does this kind of intelligence, initially considered a human trait of character, manifest itself in institutional areas of public and administrative law in Spain or the United States, for instance? How can citizens know the intellectual reasoning followed by their Administration? Is it possible for an administrative judge to control today the judgment or criteria used by the Administration? How would that be done? What examples can we cite in Spanish and US law, and what elements do they bring to our discussion?

After analyzing the capacity of discernment perceived as the intelligence of the Administration (I), I will expose some examples of administrative actions showing the ability of autonomous discernment (II).

I. Discernment Capacity Seen as the Intelligence of Public Administration

Before taking a decision and discerning from various options which one to choose, the Administration's agents must understand the situation to determine the action that will be decisive, always supported by the rule. The human action and the law and regulation will then meet. In this same line, Ricœur was studying the existing connections between the theory of the text, the theory of action, and the theory

Universidad Iberoamericana, Barcelona 2009, p. 10.

[7] On this matter related to principles and values, the French philosopher Maurice Blondel, who prone the idea "to live as Christian, think as a philosopher," had reflected about the importance of roots and values in order to find adapted solutions to social needs. *See* P. Archaumbault, *Vers un réalisme integral. L'Oeuvre philosophique de Maurice Blondel*, Paris 1928, note 40.

of history,[8] which are theories that must be present at the moment of taking with discernment a decision fully adapted to its context.

Also, one would add a necessary condition to discernment, the imagination,[9] which is a quality that can be put in place when finding the best solution.[10] Imagination is also a capacity that should not be foreign, not only to the jurists but also to public officials who have to adapt with discernment to everyday situations, without becoming mere automatons. Such as when a law enforcement officer has to apply a protocol to someone who is not offering much resistance like in George Floyd's case.

In deciding with discernment, the words and their meaning have considerable importance. It is a question of doing things with words, of explaining actions with words.[11] Mastery of speech or verb is, in our view, also essential when making a clear decision taken with discernment, giving quality to the whole process.

In discernment, the normative text will become autonomous from its author, from its intention, to be interpreted by the person in his action, endowing it a specific content that initially does not exist. The author will know the initial meaning, although the decision will be detached from the text to be applied, having a specific reading, revisited by the author. The normative texts to which we refer are multisemantic and can have different meanings when no interpretation excludes the other.

This factice adaptation by the public official will have to be appropriate with the evolution of society. The "world of the text," as Ricœur calls it,[12] the world of the rule that defines all the different possibilities of being and acting. In summary, it is a question of choosing or discerning among different possible options.

In discernment processes, the explanation is critical. The administrative act becomes legal in its justification, in its motivation. It is a question of its legality and its legitimacy (when the motivation is also consistent). The act needs to be justified, explained, in order not to violate the principle of legality to which the Administration is bound. When lacking, the administrative decision falls under the scope of arbitrariness, of illegality. To avoid arbitrariness, we must justify the administrative act, explain it intellectually, deeply, and substantially. Moreover, the lack of motivation condemns, or should condemn, the administrative act to disappear from the legal order. It should become null.

Understanding the meaning of words referenced in the legal text, the education, and even the experience accumulated by the public agent, will allow enriching the given explanation. An explanation that will help to understand the choice among the existing valid interpretations. Among these options, there will be some more valid or more legitimate than others, thus the explanation of any applied choice becomes

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[8] P. Ricœur, *Du texte a l' action. Essais d'hermeneutique II,* Paris 1986, at 161-182.

[9] *Id.* P. Ricoeur, *"Imagination dans le discours et dans l'action" (Imagination in speech and in action)*, (1976), at 213-236.

[10] According to the Merriam Webster Dictionary, imagination is the "Act or power of forming a mental image of something not present to senses or never before wholly perceived in reality; 2. Creative ability; ability to confront and deal with a problem," *see* https://www.merriam-webster.com/dictionary/imagination.

[11] J. Austin, *How to do things with words,* Cambridge, Massachusetts 1962, at 7.

[12] *Id.* at note 6.

critical. Applying by analogy Ricœur's thought to the legal argumentation, the convergence of indicators or counter-indicators can show us the importance or the greater probability of a valid interpretation, which allows us to reach a high degree of certainty.[13] It is also a matter of anticipating possible outcomes, which is as well a sign of intelligence and, consequently, of discernment.

Indeed, discernment for a lawyer practicing public law will allow greater anticipation of the probable legal outcome chosen by the Administration or by the administrative judge. The lawyer will be well-versed on the mentioned theory of the rule or text, the theory of action, and the theory of history. Therefore, this lawyer will seek the coincidence of judgments and bits of intelligence to give the best legal advice to his client, whether to continue or not the procedure, for instance.

Discernment always expresses a dialectic between mental comprehension and its oral or written explanation, something those of us dedicated to teaching and writing know well. The decision resulting from the discernment's process highlights the convergence of signs (rejecting radical extremes or opposites), or the importance of tools, such as when an investigative magistrate leaves aside specific accusations to follow other clues leading to the solution. Therefore, discernment gives us greater freedom and greater justice, and also greater law enforcement actions. Discernment gives the option of attaining a higher common good, preceded by a reflection made with the necessary knowledge, appropriate baggage, or background. Discernment allows, therefore, greater human freedom, the perfect legal world.

The Administration's discernment capacity must be at the service of the common good, of the general interest, of the well-being of citizens, imposing public burdens equal to all, protecting persons' life and human dignity. Public Administration is obliged to guarantee in its actions this general interest while respecting the principle of legality.

The discernment capacity of a private person, his intelligence, will serve him to put forward his person, his professional ambitions, and his life objectives. On the other hand, the Administration's discernment capacity must seek to protect and guarantee the common good. Misuse of powers will, therefore, exist when the public Administration would use this interpretative margin of discretion for the private interest of its public officials. It would be an arbitrary act of the Administration, prevarication, with the absence of intelligence or discernment from the Administration. It would indeed be an inept and corrupt Administration.

In some situations, the law may leave no room for the discretion of the Administration, the use of its discernment; the Administration must apply the rule without reflection. It is an entitlement binding the Administration to respect it. These rules will have to be adapted to the social reality, even if we can sometimes find excessively rigid texts. In any case, these standards serve as a basis for making decisions according to the law.

We may also witness the existence of an Administration's regulations, enacted but lacking discernment and common sense. Also, we may witness regulations leaving a margin of discretion to the Administration to decide, but the latter not making it intelligently or skillfully. For example, the use of excessive force by public officials to dissolve a peaceful demonstration, or when in custody to control a person

[13] *Id.*

not presenting a life threat, or the confiscation of property related to a person's professional activity, due to a procedure of seizure for existing tax debt. The Administration must certainly advocate protection of the general interest over private interests, but it must not go beyond the protection of private interests for whatever reason. Citizens must feel confident that the Administration, in the exercise of its prerogatives, will provide guarantees to citizens on their interests too. To act with balance here is also to act with discernment.

We must distinguish clearly between the binding authority of the Administration and its discretionary power.

A. Binding Authority and Discretionary Power: the Prohibition of Arbitrary Action of the Administration

Binding authority and discretionary power are both at the origin of regulated and discretionary acts.

1. Regulated Acts and Their Power of Exercise

The existence of the rule of law provides for a series of specific hypotheses and their direct consequences that the Public Administration enforces through actions. These actions are generally administrative acts that are previously regulated. Actions in these cases are confined to strictly apply the law, materializing what a regulation forecast. In these circumstances where the Administration executes a binding authority, there is no margin left to interpretative freedom. The Administration's action only verifies that the case satisfies the legal or regulatory conditions necessary to enact the administrative act. We then witness the correspondent consequence: the eventual benefit or burden applied to the citizen's estate or environment (his patrimony, material or immaterial), or the interested party. For instance, when they are issuing licenses or regulated administrative authorizations, such as a driving license or building permits. Citizens expect a precise and specific action when all conditions are objectively fulfilled.

Regulated powers (or binding authority), therefore, determine the prior existence of regulation, including scenarios and resulting legal consequences. In these acts, the Administration will limit itself to applying the provision contained in the regulation without interpretation. Theoretically, as we can appreciate, the procedure is quite simple from an Administrative law perspective. These regulated powers are part of the legal regime of Administrative acts. We find them in Codified legal system such as Spain, and also in Anglo-Saxon countries such as the United States. The problem arises when these regulated powers are too strict and do not match exceptions that somehow should be considered by the law.

In the United States, there has been strong criticism, sometimes of existing excessive regulation that may render procedures burdensome. An American author, Howard, analyzes and condemns this excess of legislation, which would be killing law.[14] The famous adage which dictates "Too many laws kill the Law" turns up in

[14] Ph. K. Howard, *The death of Common Sense. How Law Is Suffocating America,* Ed. Random House Paperback- New York, New York 2011, p. 10 and following.

corollaries of the incapacity of the Administration to know how to manage exceptions that become very relevant. Let us see an example of it:

During the winter of 1988, the Sisters of Mother Teresa that managed the religious order of the Missionaries of Charity had agreed with New York City's mayor at the time, Mr. Ed Koch, that two buildings that were burned and abandoned in the Bronx would be used by the religious order to accommodate homeless people.[15] The transaction seemed to be easy: New York City would sell both buildings for a value of $1, and the Missionaries of the Charity would put $500,000 on their side, for renovation and reconstruction. The Sisters were looking to give shelter to sixty-four homeless people in a community context, which included constructing a refectory and a kitchen on the first floor, a large space in the second, and small rooms or cells with beds in the third and fourth floors.

Notably, the Missionaries of the Charity, following their wishes of poverty, had deliberately avoided providing the building elements of comfort in its reconstruction. They had not planned a laundry washing machine or a dishwasher; all its tasks would be done by hand by the good sisters. New York City saw the possibility of housing the homeless, managed by this religious order, for sure a Providential fact. In Howard's words it was, "a godsend."

Because it was a city-owned building, the transfer of the property was not easy due to lengthy bureaucratic procedures. For a year and a half, the Sisters of Charity, with their joyful and ascetic spirit, were touring the administrative instances of New York State at the two existing levels (at local and county level: in the Bronx and New York). In September 1989, the City of New York approved the project, and the Missionaries of the Charity began the repair work of the property.

One of Howard's criticisms in his book (and we referred above when talking about ultra-rationalism) is that solidarity does not always connect with the law. After two years of bureaucratic procedures, the Sisters learned that according to New York's building code, the buildings having several floors had to include an elevator. The Missionaries of the Charity explained that they did not want to use an elevator because it was a comfort contrary to their principles and that it would save them an additional cost of $100,000. Besides, they considered it entirely proper to climb stairs, moreover in four floors building. However, the law could not avoid overriding the existence of an elevator in these buildings. Therefore, by a too rigid law, without the installation of an elevator, the project could not prosper. Mother Theresa surrendered. The Missionaries of Charity stopped the project because they did not want to dedicate such amount of much money to something they thought was superfluous and did not help people without resources. It was a matter of principle for them considering the elevator unnecessary and not related to safety, but simply comfort. As Howard mentions, ironically, the Sisters of the Charity preferred to use this money to make soups and sandwiches for the underprivileged rather than to build an elevator.

In a correct letter written by Mother Theresa to the City of New York, she expressed her regret that the project could not be accomplished, and expressed with Holy resignation, that this case "served to educate us about the law and its many complexities." As Howard states, there are undoubtedly many buildings in New

[15] *Id.* at 11.

York without elevators, but the current middle-class standard in the United States requires a model of home and comfort that may not be adaptable to everyone, as it was the case here. However, the law did not allow that. Rigidly normed, with automatisms that did not consider the particularities of the situation, we witnessed a sort of lack of discernment from the New York Administration and the law, that did not allow housing for the homeless, moreover in a project that would not have been financed by it. One can only see benefits from this happening.

The Administration may also adopt discretionary acts.

2. *Discretionary Acts and their Exercise Authority*

The Administration dictates discretionary acts when it uses its ability to assess the utility and opportunity of taking a particular decision. When the law acknowledges the Administration possesses this discretionary power, the action falls into an existing margin of maneuver, which we expect will be used with discernment. Discretionary power is, in fact, also associated to a discernment capacity, because when we speak of this Administration's characteristic, we refer to its capacity of reflection, of adaptation, its intelligence, concerning the regulated authority (what is content in the law). There is a double lever of discernment, as it belongs to the legislator, or to the authority creating the norm (Administration in its executive orders, for instance), to exercise discernment, besides those cases in which the Administration will confine itself to applying the regulated disposition.

The Administration, when making use of its discretionary power, will adopt, with some degree of discernment, among several alternatives, the decision considered adapted to the specific case. Traditionally, an important sector of the Spanish doctrine has considered these acts as necessary and indispensable to the activities of the Administration as they may fit better the specific needs of society.

In a rather graphic way, in Administrative Law in Spain, the use of the expression "could" (*podrá*) or "must" (*deberá*) in the articles from the law or regulations is an indicator of the degree of existing margin of appreciation. A provision in which the law indicates that the Administration "could" take a concrete decision or take action opens the door to the mentioned margin of appreciation, discretionary, and with discernment. Besides, it entails a probability of the enactment of the decision. There is indeed a potentiality of this decision; it may happen or not. On the other hand, where the law indicates that the Administration "must" adopt a particular measure, the Administration has no discretion or option; it is a standard regulated act, mandatory in all its elements, and in such a way it has to be enacted.

Regulated acts are, however, always related to discretionary acts. They are both associated. Discretionary power adds to the regulated administrative power a subjective, rational, and intellectual element, but any discretionary act has inherent regulated elements that must be respected. Moreover, as we will see later, this margin of appreciation cannot be considered as being arbitrary because it exists under a law that frames it. As we know, public Administration, even when taking its discretionary decisions, is bound to respect the principle of legality, the rule of law.

Therefore, we confirm that the Administration's discernment is governed by the law, which limits its deployment in order to create several guarantees for citizens in the use of public authority prerogatives. The existence of law conditions the Admin-

istration's discernment, foreseeing the elements (formal and subject-matter based) that the act needs to respect: the public body that may exercise jurisdiction; the extension and purpose of the creation of this power; time-based limits to its exercise; the procedure set for such purpose and the legal authority of the agent, that is, his technical training or his political experience (where needed) as a public official.

By using its power legitimately, the Administration can choose the solution that best suits and complies with the interests and needs of the moment, which must always protect the general interest. The Administration may act as it deems appropriate, but, in advance, legal standards must always give authority to the administering body, while not imposing on the latter any specific conditions of action. The fact that authority is given beforehand gives a plus legally in terms of accountability and transparency of the Administration's actions.

Here again, we can cite an example of discretionary power in United States law in matters of school education, more specifically English language learners (ELLs) or teaching English as a second language (ESL) in American schools. Even as American citizens, the English language would not be for some children, their mother tongue. The educational system can detect a deficiency at this level. Teachers and students' parents should manifest it in order to allow schools to cope with this lack of knowledge.

Synthetically, ELL regulation exists at three levels: federal, state, and local levels. President Johnson's Administration passed the federal Bill that regulates the matter, the 1965 *Elementary and Secondary Education Act* (ESEA). This Bill has been amended on two occasions during its more than fifty years in effect, in 2001 and in 2011. The 2001 ESEA reform under President Bush's Administration was the *No Child Left Behind Act* (NCLB). In 2011, given the rigidity with which American public elementary school teachers applied the law using their discretionary authority, President Obama asked the US Department of Education to invite each State Educational Agency to request Local Education Agencies and school instructors to act with flexibility while applying the ESEA Standard.[16] The amended law was known as *ESEA Flexibility*.

The US Supreme Court promoted further reforms condemning the deficiencies of the American school system. In *Lau v. Nichols* from 1974,[17] a local school was sued by the parents of a Chinese child because ELL students did not receive sufficient education to learn and understand enough English in order to take courses with the possibility of success. The Supreme Court decided that these schools were to adopt the necessary measures to provide students with a learning program that would provide access to education in a manner consistent with the principle of equality.[18]

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[16] For further information, *see* https://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html.

[17] *See* https://www2.ed.gov/about/offices/list/ocr/ell/lau.html.

[18] *See also Keyes v. Denver,* 1973, dealing with a case of segregation of African-American and Latino groups students from other Caucasian students groups. The Supreme Court forced desegregation, on the basis that ELL students could not be separated from other students speaking the language in a fluent manner. *See also Castaneda v. Pickard,* 1978, where the Court of Appeal of the Fifth Circuit declared that the district was separating the students by race and ethnicity, and that in bilingual programs students were failing school.