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Briefing, analysis, opinion and insight of legal affairs in Mexico. Digital publication by Abogados Sierra



“DILIGITE JUSTITIAM QUI JUDICATIS TERRAM.” “Ye who judge the earth, give diligent love to justice”



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## National Law of Domain Extinction. by Vera García\*

# Abogados Sierra 25th Anniversary



Abogados Sierra is very proud to share with all of our clients and friends our pride and joy to have reached the young age of 25 years during this month of September. Throughout these years we have proudly built the most respected, consolidated and recognized aviation practice in Mexico and are proud to be one of the most recognized aviation boutique firms in the world.

We hope to continue strengthening our abilities and always finding ways to improve our service and professionalism for the benefit of our clients and of the Mexican aviation industry. We look forward to continuing servicing your needs for the next 25 years and for many more to come.

On behalf of every member of our team we reiterate our appreciation for the continuing favor, support and confidence of each and every one of our clients.

THANK YOU!

A handwritten signature in black ink, appearing to be the initials "JS" or similar, written in a cursive style.

# Construyendo México



For a second consecutive year our firm and its members proudly engaged in our now traditional homebuilding project for families living in underdeveloped and impoverished communities in Mexico. Through the unmeasurable economic, physical and moral support of our friends, relatives and the Abogados Sierra family, we were able to help yet another family build a dignified place to live. As mentioned in our September 2018 edition, the goal of our project is to provide families with a place they can call “home”, and for “home” we do not only mean a set of walls but rather a new start, a place which provides stable foundations and security to restore the dignity and hope for the future to the families we work with.

This year’s project took us back to the community of Mexicapa, in the State of Mexico where our team had the opportunity to work side by side with the Mendoza family in the construction of their new house. It is important to mention that this homebuilding model promotes self-sufficiency principles as the construction requires the close collaboration of the benefited family and the surrounding community.

Abogados Sierra would like to thank Constuyendo for their leadership in this venture and again extend an invitation to all members of society, both in Mexico and abroad that wish to contribute in any way, to please contact Radina de la Peña at [rdelapena@asyv.com](mailto:rdelapena@asyv.com) should wish to come on-board this project.

# National Law of Domain Extinction.

by Vera García\*.

**W**ith the main purpose of combating the patrimonial and financial structure of organized crime, the Congress has approved by unanimity of votes the amendment of articles 22 and 73 of the Political Constitution of the Mexican United States ("The Constitution") in terms of Domain Extinction. Published on August 9, 2019 on the Federal Official Gazette, the National Law of Extinction is regulatory of article 22 of the Constitution (the "Law"). According to Article 4 of the Law, the Domain Extinction is defined as *"the loss of the rights that a person has in relation to an asset declared by judgment of the judicial authority, without consideration, or compensation to the owner or for those who hold or behave as such, nor for those who, under any circumstance, own or hold the aforementioned asset."*

**"Public Prosecutor will be the authority in charge of exercising the Domain Extinction action through an oral judicial process of civil and patrimonial nature, through a special procedure over the assets."**

The Modification to article 22 of the constitution was as follows:

*(...) It shall not be considered confiscation to the application of a person's property when it is ruled for payment of fines or taxes, or when is ruled by the judicial authority for the payment of civil liability derived from the commission of a crime. Neither shall be considered confiscation to the order from a judicial authority of the property in case of illicit enrichment under the terms of article 109, the application in favor of the State of detained assets that cause abandonment in the terms of the applicable provisions, nor to those goods whose domain is declared extinct in judgment. The domain extinction action will be exercised by the Public Prosecutor through a civil jurisdictional procedure and autonomous of criminal nature. The competent authorities from the different government levels will assist with fulfilling this function. The law will establish the mechanisms for the authorities to administer the goods subject to the process of domain extinction, including their products, fruits and accessories, so that the authority carries out its disposition, use, usufruct, alienation and monetization, according to the public interest, and define with destiny criteria the destination and, where appropriate, the destruction of these. It will be related to assets of a heritage nature whose legitimate origin cannot be credited and are related to investigations derived from acts of corruption, cover-up, crimes committed by public servants, organized crime, vehicles theft, resources of illicit origin, crimes against health, kidnapping, extortion, trafficking of persons and crimes involving hydrocarbons, oil and petrochemicals. Any person deemed affected must be guaranteed access to the means of defense adequate to demonstrate the legitimate origin of the good subject to the procedure."*

A significant modification was that the Public Prosecutor will be the authority in charge of exercising the Domain Extinction action through an oral judicial process of civil and patrimonial nature, through a special procedure over the assets. Besides, the list of the crimes subject to this action were extended and some of the specifications of this action, were removed from the previous version of the article to include them in more detail in the National Law of Domain Extinction.

Although article 22 of the Constitution, establishes that the action of Domain Extinction will be exercised through a judicial procedure of a civil and autonomous nature, this autonomy in the operation is fictitious since it can only be applied over property that has an affiliation with the illegal activities previously listed in article 22 of the Constitution. Thus, it remains directly linked to the investigations derived from specific criminal acts, therefore nullifying its emancipation of criminal matters and linking a small number of crimes.

On the contrary, on other countries such as Colombia, there is a true autonomy between criminal matters and the Domain Extinction:

*Article 34 of the Colombian Constitution establishes on its second paragraph that "The action of extinction of ownership will be appropriate on the assets acquired through illicit enrichment, to the detriment of the public treasury or with serious deterioration of social morals."*

\* IN COLABORATION WITH ASTRID DE LA FUENTE.

Besides, in the case of “acts of corruption” and “crimes committed by public servants” are categories of crimes, not criminal types; so, on that basis, for certain Federal entities it will not be clear as to which crimes the action proceeds. The foregoing, given that the criminal types classified as acts of corruption or committed by public servants in the various entities do not always coincide.

Furthermore, Article 73, paragraph XXX as amended as follows:

*“Article 73: The Congress has the faculty to:*

*(...) XXX To issue the single legislation on civil and family procedural matters, as well as on Domain Extinction under the terms of article 22 of this Constitution, and (...)”*

Consequently, the Congress of the Union was empowered to establish a single National Law on matters of Domain Extinction, which will be applicable in all Federal entities. The fact that this law will be effective and mandatory for the entire country is perceived as a being a positive thing. However, the establishment of this legal figure has not been well accepted since, it alters and infringes with what is the cornerstone of the Accusatory Criminal Process, the principle of *Presumption of innocence*. Since it should proceed even if no judgment has been issued that determines the criminal responsibility of the defendant causing to strip away people who have not been previously sentenced.

Therefore, we will proceed to analyze the most noteworthy aspects of this Law:

**What assets are subject to this action?** According to Article 8 of the Law, those related with crimes in the following cases: I. instrument, object or product of the crime; II. that have been used or destined to hide assets resulting from crime; III. being used to commit crimes by a third party, if their owner was aware of it and did not notify the authority by any means or did anything to prevent it and IV. those who are entitled in the name of third parties and it is proven that the assets are the product of the commission of the crimes referred to in section II of article 22 of the Constitution where the defendant for these crimes, holds or behave as the owner.

**Action of the Public Prosecutor:** According to Article 7 of the Law, the exercise of the action will be founded on the information collected by the Public Prosecutor when the preliminary investigation has been initiated, or in the proceedings leading to the respective criminal procedure, or both, when the wrongful act happened and the assets fit in the hypothesis of article 8 above. The Law establishes that the action proceeds even if no criminal responsibility has been determined if there are solid and reasonable grounds that allow inferring the existence of the assets. Thus rising, the functions of the Public Prosecutor because, within the criminal process, he will not only have to prove the existence of a crime but simultaneously the existence and nexus of the crime in the civil procedure regarding Domain Extinction to accredit the elements of the action.

**Pre- constituted Test:** According to Article 6 of the Law, for the preparation of the Domain Extinction action, the Public Prosecutor may use the information generated in the previous inquiries that it has initiated in terms of the Federal Code of Criminal Procedures

**Imprescriptible:** According to article 5 of the Law, the Domain Extinction action is imprescriptible in the case of goods that proceed of crime.

**Precatory Measures:** According to article 12, the Judge, at the well-founded request of the Public Prosecutor, may impose the necessary precautionary measures such as the seizure of property or asset insurance to guarantee the conservation of the assets. The defendant cannot offer guarantee to obtain the lifting of the precautionary measures.

**Affected Party:** According to Article 24, any affected person who considers having a legal interest in the assets subject to the Domain Extinction action must appear before court. *The incident of good faith*, which is the only incident contemplated within the process of Domain Extinction, will have the purpose of excluding the assets subject to the Domain Extinction action from the process provided that their ownership and legitimate origin is proven. Therefore, the affected party should prove the ownership and legitimate origin of the assets and in order for the incident to be inadmissible, the Public Prosecutor should demonstrate that the affected party was aware of the illegal events that gave rise to the trial and, despite of this, did not report it to the authority or did anything to prevent it.

**When does the action proceed?** According to Article 45 of the Law, the action proceeds when: *I. the elements (cuerpo del delito)<sup>1</sup> of the crime for which the action was exercised are fully accredited; II. fully prove the act of bad faith of the third party if applicable and III. it has proven the illegal origin of said assets if applicable.*

**Relation with criminal Law:** A couple of articles establish that if the (*cuerpo del delito*) is not accredited, then the assets will not be subject to the action of Domain Extinction. However, this concept was regulated by the predecessor Criminal Proceeding Code, but not by the National Code of Criminal Proceedings that now regulates evidence with which the possible commission of the crime is established<sup>2</sup>.

*Article 10: "(...) In cases where there is a judgment in the criminal procedure in which the absence of elements to prove the existence of the (cuerpo del delito) will be determined, those affected by a process of Domain Extinction will have the right to claim compensation for the damage under the Fund referred to in article 61 of this Law. (...)"*

*Article 50. "When the judge of the criminal case determines the absence of any of the elements of the (cuerpo del delito) in the cases provided for in article 7 of this Law, the domain extinction judge shall order the return of the assets subject to the controversy if possible or its value to its rightful owner or holder, together with the interests, yields and accessories that, where appropriate, have occurred during the time they have been administered by the Property Administration and Disposal Service."*

**“...according to article 7 and 44 of the Law, the Domain Extinction of an asset is no longer subject to the criminal responsibility of a person but rather to the relation of an asset to the commitment of a crime.”**

Finally, according to article 7 and 44 of the Law, the Domain Extinction of an asset is no longer subject to the criminal responsibility of a person but rather to the relation of an asset to the commitment of a crime.

*Article 7: "The action of Domain Extinction will be exercised, with respect to the assets referred to in article 8 of the Law, even if the criminal responsibility has not been determined in the cases of the crimes provided for in section II of article 22 of the Constitution (...)"*

*Article 44. "The acquittal of the affected party in the criminal process for not having established his responsibility, or the non-application of the penalty of confiscation of property, does not prejudice the legitimacy of any Asset."*

Lastly, it can be said that unlike the previous legislation where the *Domain Extinction* was a limited action, now the State is fully empowered to carry out this action without the need of a criminal and enforceable judgment. Creating uncertainty among the population in respect to the possible unjustified loss of private property.

Without neglecting the constitution of a violation of the principle of presumption of innocence as a constitutional guarantee enshrined in article 20, which establishes the rights of every person charged and that precisely in its section I. *"To presume its innocence while not declared its responsibility by means of a judgment issued by the judge, of the case"*. Principle that derives from the jurisdiction or due process and for that reason, recognized by the legislator, elevated to the category of a Fundamental Human Right. That as we have seen, will be violated with the implementation of the aforementioned Law.

Likewise, if we refer ourselves to the Right of Private Property, we can see that the implementation of this Law, violates the correct and strict application that has to be carried out during the legal processes that take place on people that will be deprived of their legal interests like freedom, property and possession rights. Since they must be judged in accordance with the laws previously issued, mediated by a court trial previously established. Therefore, giving the opportunity to defend themselves against a judge and, be heard before the corresponding authorities.

1.- According to article 168 of the Federal Code of Criminal Proceedings, *cuerpo del delito* means the set of objective or external elements that constitute the materiality of the fact that the law indicates as a crime.

2.- Article 323 National Code of Criminal Proceedings.

## Why was the protest of women against gender violence in Mexico City out of control?

In the Mexican capital, a demonstration of women against gender-based violence, triggered by alleged cases of rape in which the accused are police officers, ended in the destruction of public transport and police stations as well as graffiti in monuments and other government buildings. Several capitalists wonder why the violence escalated during the protests, while the head of government Claudia Sheinbaum stated she will not commence investigations against the protesters but against those responsible for the attacks against journalists. During the first six months of 2019, complaints were filed in Mexico for 448 femicides, 1,364 malicious homicides against women, 206 kidnappings, and more than 30,000 malicious injuries against women. <https://cnnespanol.cnn.com/video/protesta-mujeres-feministas-amlo-sheinbaum-violencia-violan-pkg-krupskaia-alis-perspectivas-mexico/> 19/08/2019.

## BMV and Biva fall after the entry into force of tariffs between the EU and China.

The Mexican Stock Exchange (BMV) operates with losses in the first hours of the day. The local shareholding falls after the entry into force of new tariffs between the United States and China, in its commercial war, and is emerging to break a streak of five days of profits that gave it its best week in 10 years on Friday. The benchmark S & P / BMV IPC index, composed of the 35 most liquid shares in the local market, registers a -0.77% decline and is located at a level of 42,295 units. Of the values of index 11, they register gains, 23 operate with losses and one does not present movements. The telecommunications sector has the worst performance. <https://www.economista.com.mx/mercados/BMV-y-Biva-caen-tras-entrada-en-vigor-de-aranceles-entre-EU-y-China-20190902-0040.html> 30/08/2019.

## Experts cut growth estimates and predict more expensive dollar: Banxico survey.

Specialists in private sector economics reduced their growth estimates for Mexico, while anticipating that the peso will depreciate more; in contrast, they estimate lower levels of inflation, in a context where governance issues remain the main obstacle to the country's dynamism. According to the result of the survey of the Bank of Mexico (Banxico) corresponding to August, the specialists adjusted, on average, from 0.79 to 0.50 percent their projections for the growth of the country in 2019, while by 2020 they did it from 1.47 to 1.39 percent. Analysts consulted by the central bank believe that the factors that could hinder the economic growth of the country in the next six months are associated with governance and internal economic conditions. <https://www.milenio.com/negocios/expertos-recortan-estimados-crecimiento-preven-dolar-caro-encuesta-banxico> 30/08/2019.

## Companies from Canada, China and Saudi Arabia, interested in investing in Mexico.

According to the First Government Report of President Andrés Manuel López Obrador, there are companies from Canada, China and Saudi Arabia that are interested in investing in Mexican territory. In March 2019, the Mexican consulate in Vancouver, Canada, reported on the opening of a subsidiary of the Yuandong Electric Motor company in Mexico City, with the aim of manufacturing electric water pumps to supply the Mexican market. In that sense, for the same month, the Mexican consulate in Guangzhou, China, reported that Automobile Group Co., Ltd. Motor, expressed interest in exploring the possibility of producing and / or assembling its vehicles in national territory. <https://www.milenio.com/negocios/empresas-canada-china-arabia-saudita-interesadas-invertir-mexico> 31/08/2019.

## The Mexican State under President López Obrador.

Mexican President Andrés Manuel López Obrador delivers his first annual report on the state of the union Sunday, less than a year after he took office Dec. 1. The president sets the agenda most days with a morning press conference, delivered with a smile and often followed by visits to small towns where he is received by jubilant supporters. Approval ratings remain sky-high for López Obrador, who won office in a landslide July 2018 election. However, brutal violence and a flagging economy threaten to chip away at his popularity. [https://www.washingtonpost.com/world/the\\_americas/ap-explains-state-of-mexico-under-president-lopez-obrador/2019/08/31/a52cb916-cc24-11e9-9615-8f1a32962e04\\_story.html?noredirect=on](https://www.washingtonpost.com/world/the_americas/ap-explains-state-of-mexico-under-president-lopez-obrador/2019/08/31/a52cb916-cc24-11e9-9615-8f1a32962e04_story.html?noredirect=on) 31/08/2019.

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