6. Constitutionalism old, new and unbound: the case of Mexico

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I. INTRODUCTION

Mexico shares many of the features that characterize other Latin American contemporary countries, but its pattern of constitutional change is non-standard. In the 1980s and 90s, the countries of the region operated a collective return to democracy that included the summoning of constitutional assemblies and the enactment of new constitutional texts.[1] By contrast, Mexico underwent in the same period a long concatenation of changes – some of them piecemeal, others more robust, yet profoundly altering, taken as a whole, the political and legal scene – while keeping all along its 1917 constitutional text. It is unclear however, how much of the iconic revolutionary document remains after more than 500 constitutional amendments that find new additions every month.[2] Reformism, therefore, is a badge of Mexican constitutional life: it speaks of the deep

[1] For general chartings of Latin American constitutions enacted over the last wave of democratization in the region, *see* Rodrigo Uprimny (2015), "The recent transformations of constitutional law in Latin America: trends and challenges", in César Rodríguez Garavito (ed.), in *Law and Society in Latin America: A New Map* (London: Routledge); Gabriel L. Negretto (2012), "Replacing and amending constitutions: The logic of constitutional change in Latin America", *Law & Soc'Y. Rev.*, **46**, 749; Gabriel L. Negretto (2013), *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (New York: Cambridge University Press).

[2] *See* Jorge Carpizo (2011), *La reforma constitucional en México: Procedimiento y realidad*, *Boletín Mexicano de Derecho Comparado*, **131**, 543 (reporting reforms in 533 constitutional Sections – some of the 136 Sections of the Constitution having been amended several times) and Hector Fix-Fierro (2014), "Engordando la Constitución", *Nexos* (February) (also taking "an amendment" to be a modification to a constitutional Section and counting 573 of them by mid-January 2015). *See also* M. Amparo Casar and Ignacio Marván (2014), *Reformar sin mayorías: La dinámica del cambio constitucional en México*: *1997–2012* (Mexico City: Taurus) (organizing their analysis around "constitutional decrees", each one containing amendments to one or several Sections enacted in a particular moment in time,

bonds the Mexican legal system retains with the past, but it should equally convey the idea of permanent, never-ending adjustment of basic rules and institutions.

In this chapter I will explore Mexican contemporary constitutionalism from both a static and dynamic viewpoint, while emphasizing the salience of the latter and suggesting that a focus on the dynamics of permanent constitutional change is critical to understand core features of the country's constitutional democracy. The analysis will be organized around constitutional text, which is clearly a limitation – there is always more to political and legal life than text. This way of proceeding, however, allows us, in an orderly fashion, to present traits of the Mexican constitutional system that are important under any reading, facilitates comparative analysis, and sets foundations for more comprehensive ulterior evaluations. Moreover, since it has been a distinctive feature of Mexican politics to center on the Constitution, as opposed to statutes or policy, to such a great extent – this being one of the features of Mexican democracy that deserves analysis – this methodological choice delivers in our case more than an average reward.

Section II will start by providing a cursory description of the contents of the Mexican Constitution (as it stands by mid-2014) by substantive area: the separation of powers, federalism, the judiciary, the electoral system, fundamental rights and the "economic constitution". Although occasional references to the distant past will be made to render the narrative meaningful, the focus will be on events over the last 20–25 years – the time span in which the other regional countries operated their return to democratic life. An effort of general mapping – even if a bit cramped, unable to capture all nuances and destined to be adjusted as amendments ensue – can be useful in a context in which, precisely because of the frequency of change, it is rarely attempted, and it may help insert Mexican constitutionalism into regional debates.

In the remainder of the chapter, the analysis will proceed by distinguishing three kinds of evaluations one can undertake regarding a constitution: content-based evaluations, which focus on the sort of institutions, substantive standards and rules it includes; process-based evaluations, which ponder what sort of decision-making process it emerges from; and frequency-based evaluations, which assess the effects of living under profuse and frequent (versus rare) constitutional change – independently of the content of the Constitution that results from change and the quality of the processes by

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and counting 206 decrees between 1920 and 2012, 69 of them passed over the last 15 years).

which change is attained. Sections III, IV and V will respectively examine the Mexican case from each of these dimensions, trying to discern general patterns, and will draw disquieting conclusions from all three.

All in all, the chapter will emphasize traits of the Mexican constitutional scenario that are more troubling than thrilling. It will ponder the advantages but also the significant costs of Mexican gradualism, and it will identify traits that are arguably problematic from the perspective of what a more inclusive democratic scenario would look like in the context of a country currently ridden by dreadful problems. To be sure, as other contributors in this volume compellingly argue, it is critically important not to subscribe and inadvertently help fortify narratives of "constitutional failure" that are often based on asymmetric assumptions about the value of rules and institutions in some parts of the world versus others, reflecting a non-neutral political economy of legal knowledge in whose context the constitutionalism of the South is portrayed as "naturally" defective and poor.[3] An analysis captured by biases of this kind could, moreover, render invisible (or hinder the development of) valuable rules, institutions and practices in our societies.

That granted, I believe that constitutional structures and rules in post-authoritarian Mexico have reached a point where they will probably succeed only to the extent they are finally replaced by something qualitatively different. In a scenario marked by rule-of-law fragility and political and social exclusion, Mexico's dynamics of non-stop, elite-driven constitutional amendment has planted the seeds for a profound transformation while holding up their potential. It may finally occur that the Mexican Constitution, whose contents and patterns of change this chapter will present, will be taken more seriously by both people and public authorities, and more extensively used from now on. If that happens, however, it will probably be along a course of events that could lead to its ultimate replacement – if done peacefully, maybe a story of "constitutional success" after all.

II. THE MEXICAN CONSTITUTION IN THE TWENTY-FIRST CENTURY

Though at the beginning of independent political life Mexico experienced pervasive political instability and the first half of the twenty-first

[3] *See* Bonilla and Esquirol in this volume. *See also* Mauricio García Villegas (2010), "Sociología y crítica del derecho", *Doctrina Jurídica Contemporánea*, **51**, 65.

century saw the rapid succession of several constitutional texts (Cádiz, 1824, 1836, 1843 and 1848), the country then spent several decades under the long-lasting liberal 1857 Constitution. The document was, however, only intermittently in force, and under its umbrella – when not dealing with foreign invasions or interventions and episodes of civil strife – very different political projects were advanced, from social and political liberalization and state secularization under the lead of Benito Juárez to the highly exclusory, "modernizing" policies of Porfirio Díaz, based on foreign investment, oligarchic exploitation of natural resources and control of social unrest within an ever more authoritarian political frame.

At the beginning of the twentieth century the Mexican Revolution – unleashed by extreme land concentration and political repression – led to summoning the Queretaro constitutional assembly and the subsequent approval of the 1917 text, still in force. The political dynamics in the country were afterwards marked by the progressive consolidation in power of the *Partido Revolucionario Institucional* (PRI), which would stay in power for seven decades.[4] The gradual advent of political pluralism from the 1980s onwards – contrary to the natural expectation in a country with a pretty demanding amendment formula – was accompanied by a steady increment in the amount of amendments effectuated on the foundational document. As Fix-Fierro documents, almost two-thirds of the total number of amendments are post-1982 – a fifth of the total having been passed during the Calderon sexennial period;[5] and in only one year of presidency, Peña Nieto propelled six major reforms in the areas of education, telecommunications, energy, anti-trust, transparency and the electoral system which touched, to a smaller or greater degree, around 60 percent of the total number of constitutional sections, besides adding to the Constitution an extremely long and detailed body of transitory provisions. The following sections succinctly survey the main traits of the Constitution that have resulted from such a long process.

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[4] Casar and Marván (n 2), describe constitutional evolution under PRI rule by distinguishing five periods, named after salient changes in the general shape of the political system: factionalism without parliamentarian discipline (1917–28); emergence and consolidation of a single party and of legislative discipline (1928–46); the hegemonic party years (1946–63); dominant party and moderate pluralism (1964–78); and evolution from dominant to majoritarian party (1979–97).

[5] *See* Fix-Fierro (n 2).

The Separation of Powers

Following the rule in America, Mexico set out from the beginning a presidential system that it has retained to date. The long decades of PRI political hegemony gave the impression that the country lived under an all mighty federal president, armed with a panoply of constitutional and meta-constitutional powers.[6] When the advent of political plurality made institutional design relevant, however, it turned out that – on the books and viewed from a comparative perspective – the Mexican presidency was in fact rather weak.[7]

The President is elected for six years with no chance of re-election: after Porfirio Díaz's long decades of power retention, "effective suffrage and no re-election" was a core motto of the 1917 foundational moment.[8] Distinctively in a region characterized by widespread resort to the institution,[9] the Mexican President lacks the power to rule by decree.[10]

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[6] *See* M. Amparo Casar (1996), "Las bases político-institucionales del poder presidencial en México", *Política y Gobierno*, **1**, 61 (emphasizing that Mexican presidentialism did not traditionally exhibit the expected consequences of this form of government and analyzing the factors that operated as political-institutional sources of presidential power in the country); and Fernando Serrano Migallón (2007), "Facultades metaconstitucionales del Poder Ejecutivo en México", in Roberto Saba (ed.), *Poder Ejecutivo: SELA 2006* (Buenos Aires: Editorial Del Puerto) (elaborating on the meta-constitutional powers of the Mexican President).

[7] Eric Magar (2014), "Los contados cambios al equilibrio de poderes", in Casar and Marván (n 2), at 281. *See also* Tom Ginsburg, Jose Antonio Cheibub and Zachary Elkins (2012), "Still the land of presidentialism? Executives and the Latin American constitution", in Detlef Nolte and Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Farnham: Ashgate) (charting the powers and attributions of presidents in contemporary Latin American countries).

[8] A distinctive feature of the Mexican model is the absence of a vice-president, and the Constitution sets forth a complex list of instructions – somehow simplified after a 2013 constitutional amendment – clarifying what to do to designate a substitute when one is lacking.

[9] Ginsburg et al. (n 7).

[10] But there was widespread Executive legislation under two figures: "state of emergency" and the "extraordinary delegation of faculties" bestowed often by Congress on presidents in the nineteenth century. Codes and other important pieces of legislation were issued by the Executive. *See* Stephen Zamora et al. (2005), *Mexican Law* (Oxford: Oxford University Press), p. 150, fn 79 (citing Jorge Carpizo (1991), "El Presidencialismo mexicano", at 102, and Jesús Orozco Henríquez (1988), "El sistema presidencial en el constituyente de Querétaro y su evolución posterior", at 49, in *El Sistema Presidencial Mexicano (Algunas Reflexiones)* (Mexico: Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México). The Executive has unilateral ruling powers in an additional narrow

They may present bills (which they do profusely), veto legislation (which they do rarely) and hold emergency powers – extensively used in the past,[11] not resorted to in recent times and set under tight constraints after the 2011 human rights reform.[12]

Presidential powers are articulated with those of Congress through a pretty standard system of checks and balances. The President directs the army and foreign policy, shares treaty-making powers with the Senate and must cooperate with it to make a number of important appointments – the General Prosecutor, the Supreme Court Justices and higher diplomats among them.

The Legislative branch is organized along the lines of a pretty symmetrical bicameral system in which context the Chamber of Deputies and the Senate collaborate as equals in the production of legislation, with slight pre-eminence of the Senate in some matters and slight pre-eminence of the Deputies in others (typically purse-related). The Chamber of Deputies is composed of 500 representatives elected for only three years and the Senate is composed of 128 individuals – elected under rules intending to be sensitive to geographical representation – elected for six.

As commentators have underlined, the Mexican Congress was also designed to be weak.[13] At the 1917 constituent moment, it was thought that one of the reasons Porfirio Díaz had so extensively resorted to exception powers was the strong position of the Legislative branch under the 1857 Constitution: that would have "forced" him to resort to informal, illegal powers.[14] The 1917 Constitution therefore set a Congress sitting only for five months a year and following an internal protocol that forces the two chambers to engage in an endless ping-pong game to issue any

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case: an inter-secretarial commission headed by the President (the *Consejo de Salubridad General*) can issue general regulations when facing a serious health crisis (Section 73-XVI of the Mexican Constitution).

[11] On the massive resort to emergency powers amidst the instability of the second half of the nineteenth century, *see* José A. Aguilar Rivera (2001), *El manto liberal. Los poderes de emergencia en México, 1821–1876* (Mexico City: Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México); Carlos Bravo Regidor (2012), "De la épica de la victoria a la política de la derrota: Juárez, la Constitución y la Convocatoria de 1967", in Adriana Luna, Pablo Mijangos and Rafael Rojas (eds), *De Cádiz al siglo XXI: Dos siglos de constitucionalismo en México e Hispanoamérica 1812–2012* (Mexico City: CIDE), pp. 203–67.

[12] *See* Section 29 of the Constitution, setting a scheme that requires the concurrence of the President, Congress and the Supreme Court.

[13] Zamora et al. (n 10), at 180–86.

[14] The argument along these lines developed by Emilio Rabasa is said to have influenced the choice. *See* Emilio Rabasa (1956 [1912]), *La Constitución y la Dictadura* (Mexico City: Porrua).

piece of legislation. The integration of the legislative chambers by perpetual freshmen (since re-election was forbidden until the 2013 reform), aided by an ever-changing pool of variably skilled "advisors" – not permanent officials – has compounded the situation.

In his survey of amendments in this area, Eric Magar underlines that the horizontal separation of powers has been an area of the Constitution not extensively altered over the last 15–20 years.[15] In view of unending reform along so many other dimensions, this is surprising and could be associated with the Mexican "political class" endorsement of a self-preservationist dynamics of change.[16] Most of the changes that have occurred are associated with the transparency and accountability agenda.[17] But they have not been far-reaching and have not eased, in any case, the Mexican Congress's extremely poor public image. In relation to this, it had been repeatedly suggested that non re-election was among the main causes of generalized non-professionalism among legislators and that it has shielded them from all forms of relevant accountability. The 2013 amendments finally changed the system: starting in 2018, it will be possible to re-elect Senators for one more period (12 years in total) and Deputies for three more (12 years in total).[18]

A feature that sets Mexico apart from the majority of its Latin American neighbors is the weakness of direct or participatory democracy instruments. After total inactivity in this area in recent decades, the 2013 constitutional reform recognized two channels: popular legislative initiative and

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[15] Magar (n 7), at 260–61.

[16] As I will later suggest, the dynamics of permanent constitutional reform in some areas, particularly in the domain of fundamental rights, could be interpreted as a way of gaining short-term legitimacy – while avoiding modifications that could alter the privileges that "to be in politics" continues to represent in Mexico. *See* n 25 below.

[17] Magar counts 37 Sections amended in this domain, but remarks that only 11 of the changes altered in a substantive fashion the pre-existing equilibrium. Among them he stresses the changes on the schedule for the Executive to present the Budget and the Public Account and the creation of a supervision body (*Auditoría Superior de la Federación*) at the service of the Deputies Chamber – all of which increased the power of the Deputies over the Executive in financial matters – and the clarification of the mechanics of the Presidential veto on legislation, which reinforced Congress. In his view, globally seen the amendments left the Executive as relatively weak as it was before, reinforced the Deputies, left the Senate in the same position, and reinforced the Supreme Court over the other two branches (given, for instance, its new powers of appointment in the Judiciary Council and its attributions regarding popular consultation). Magar (n 7), at 266–79.

[18] The reform makes it mandatory for states to allow re-election of state representatives and municipal presidents in state constitutions.

popular consultation. Both are conceived, however, in highly restrictive terms – this is particularly true of consultation, which is barred in a long list of subject matters and must pass previous constitutional muster in the Supreme Court.[19] No possibilities of recall have been allowed. In the same amendment package, also with the idea of heightening the political profile of citizens, the possibility of leading independent candidacies (i.e. candidacies non-sponsored by a political party) to federal elections was approved.[20]

A description of the contours of the separation of powers in contemporary Mexico must finally underline the multiplication of independent agencies in recent times. From the 1980s and 90s, bodies as different as the National Human Rights Commission, the National Institute of Statistics and Geography (INEGI), the Bank of Mexico (Banxico) or the Federal Electoral Institute (IFE) were given the status of "independent constitutional organisms" – and regulated, basically, by the Constitution itself. The 2013 reforms have given independent status to additional bodies that had formally remained under the Executive umbrella: the Federal Institute of Telecommunications (IFETEL), the Federal Economic Competence Commission (COFECE), the National Commission of Evaluation (CONEVAL) and the Federal Institute of Information Accessing (IFAI). Amendments conferred independent status even to the Federal Prosecutor Office (PGR) and to the newly created National Institute for the Evaluation of Education (INEE).[21] These developments evince to what extent the "independent agency kit" has been considered an unquestioned institutional solution, almost automatically resorted to by politicians when seeking to bestow a patina of "efficacy" and "impartiality" on troubled policy areas. The institutional design of these bodies – in terms of appointment rules, jurisdiction (many of them combine management, regulation and adjudication) and mechanisms of external control – are remarkably varied. The fact they now manage huge areas of public policy previously under control of the traditional branches makes their careful analysis mandatory.

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[19] Sections 35.VII and VIII, and 71.4 of the Mexican Constitution.

[20] Section 55.II of the Mexican Constitution.

[21] The Federal Prosecutor's Office is among the least well-regarded institutions in the country; its performance as head of federal criminal investigations has been outrageous. The reform seeks to fortify its independence vis-à-vis the Executive and creates two specialized prosecutors (on electoral matters and corruption). The Institute of Education Evaluation, for its part, was created in 2012 within the "education reform" package, after a long conflict with the teaching unions; inexplicably, the reform focuses exclusively on teachers' evaluation and discipline, instead of tackling the structural determinants of the profound deficiencies remaining in this crucial policy area.

Federalism

The Mexican Constitution adopted a federal system following in its origins the "dual" logic found in so many other American texts: the Constitution lists the areas of jurisdiction attributed to the Federation and the rest remains in the state's hands.[22]

Contrary to what this choice of constitutional design suggests, however, Mexican federalism was not built from below. It was not the sort of arrangement necessary to maintain the unity of the country in view of strong regional political identities that we find in Germany, Canada or the United States. In the process of state reconstruction which followed the Revolution after the instability of the nineteenth century, federalism was sacrificed.[23] As Casar remarks, this can be partly explained by the process of building institutions in a country with feudal pockets, poor communications, meager economic development, salience of the army, etc., but it was also a core effect of a political project in whose context the leader of the party acquired, first, the possibility of defining the composition of the federal system – controlling access to the post of governor – and afterwards, its behavior, in the context of a system of a hegemonic party.[24]

In consonance with this, at the constitutional level the original dual logic progressively eroded. Continuous one-by-one amendments have given extensive attributions to the Federation and have organized very important matters as areas of shared jurisdiction, coordinated or managed by the Federation. As scholars underline, many features would now be closer to cooperative federalism than to traditional dualism,[25] if all coated in an unambiguous centralizing fingerprint. To this we must add the use of mechanisms to subordinate states via funding: tax revenues are collected mostly by the Federation, which then manages them in the "system of fiscal coordination" making large use of conditional cash transfers. State

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[22] The Constitution provides the Federation with an "implied powers" clause (Section 73.XXX) that has been rarely resorted to, since direct enlargement of federal powers through constitutional amendment has made it unnecessary.

[23] Casar (n 6), at 89.

[24] Id.

[25] *See* José M. Serna de la Garza (2009), *El sistema federal mexicano: Un análisis jurídico* (Mexico City: UNAM, Instituto de Investigaciones Jurídicas), and Jose Maria Serna de la Garza "Las reformas al federalismo mexicano" (2014), in Casar and Marván (n 2) (analyzing constitutional amendments in the area over the last 15 years). *See also* Martín Díaz Díaz (1996), "México en la vía del federalismo cooperativo. Un análisis de los problemas en torno a la distribución de competencias", in Barra Mexicana-Colegio de Abogados, *Homenaje a Fernando Alejandro Vázquez Pando* (Mexico City: Ed. Themis), 129–73.

constitutions, for their part, offer a most varied collection of scenarios we cannot describe in any detail here. The federal Constitution sets a minimum content they must include, but it is all referred to the structuring of the power branches. Beyond that, we find great heterogeneity: some of them have extensive bills of rights, others skinny ones; some have constitutional review, others don't; some develop federal provisions on the recognition of cultural diversity, others don't. And so on.

The Federal District was long under the Federation's control. In 1993, a process began that gave the city a status close to the states, with an elected Chief of Government, a unicameral Legislative Assembly, a Superior Tribunal of Justice and its own electoral branch. Political life in the city is lively and the fact the leftist party has always won has created an interesting counterpoint to politics at the federal level. Mexico City, however, is still out of the constitutional amending process, and calls for a "political reform" in the Federal District are periodically made.

Municipalities, finally, were for long strongly subordinated to the states – particularly governors – and lacked independent rule-making powers. In 1999, the Constitution granted them exclusive areas of jurisdiction and several Supreme Court rulings reinforced in the years that followed the position of municipal sources of normativity and revenue. Their performance remains, however, mortgaged by excessive political rotation – up to the 2013 reform, municipal presidents' terms have been for three years with no chance of re-election – and – with the exception of a few, highly populated, urban municipalities – municipalities are characterized by precarious infrastructure, poor regulation and insufficient funding. Absent true commitment on the part of national authorities, the development of indigenous local authority – prefigured in Section 2 of the Constitution – remains incipient.

Although successful Supreme Court performance in the area of jurisdictional conflicts has given some oxygen to political decentralization, the legal framework of Mexican federalism is, on the whole, ambiguous and weak. Discussion about the constitutional role of state constitutions, or about how state legal systems are supposed to fit into the new architecture emerging from recent reforms in the human rights and economic areas is still pending. States get regularly mentioned as instances of the sort of corruption and inefficacy the country has failed to eradicate. The reinforcement of federalism seems to be definitely outside the political agenda.

The Judiciary

As in most federal countries, two judicial strands coexist. Criminal and civil matters fall under state jurisdiction (though there have always been federal

crimes and they are being enlarged all the time) and labor and commercial ones under federal jurisdiction. The country combines procedures and codes characteristic of the Civil Law tradition with a judicial structure similar to the one found in the United States, with district judges, circuit courts and a Supreme Court at the top. In Mexico, however, the federal judiciary has operated as general supervisor of state rulings through the writ of *amparo*, which allows citizens to question them before federal judges. This has greatly reinforced, of course, the centralizing flavor that impregnates the country.

Over the last 25 years the most consequential reforms in the area have touched three rubrics: judicial review, judicial governance and the regulation of criminal trials.

As regards judicial review, these last decades have transformed a system based for very long on the exclusive, hegemonic figure of the *amparo* writ into a hybrid, multiple-tiered system that offers many channels of constitutional review, before different judicial authorities, through different procedures and with different effects.

On proclaiming independence, Mexico did not develop a U.S.-like diffuse system of review but a French-like system of political-legislative review, replaced by the mid-nineteenth century with a judicial one grounded exclusively on the writ of *amparo*.[26] The *amparo* is a writ citizens can file to denounce before a federal judge the violation of their constitutional rights at the hands of a public authority. The notion of public authority is unqualified, so the writ protects as much against a police arbitrary seizure, as against a statute, a judicial ruling or an administrative decree. When filed against a norm, *amparo* protection has *inter partes* effects. Powerful as it may seem on paper, over the years the *amparo* transmuted into an exceedingly complex channel, largely denaturalized from its original rights-protecting function. Its centrality within the legal system caused it to progressively acquire more and more functions. At an early state, in the nineteenth century, it became a tool of legality review – and this ended up damaging its edge as a tool of constitutionality review. The extremely baroque quality of its procedural regulation has rendered it usable only with the aid of specialized lawyers, and the perception is that it has largely allowed the most powerful – many of them companies, not citizens – secure exceptions to the application of general rules.[27]

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[26] J. Ramón Cossío (2013), *Sistemas y modelos de control de constitucionalidad en México* (Mexico City: UNAM, Instituto de Investigaciones Jurídicas) (presenting the complete historic evolution of the system).

[27] Francisca Pou Giménez (2014), "El nuevo amparo mexicano y la protección de los derechos: ¿ni tan nuevo ni tan protector?", *Anuario de Derechos Humanos*, **14**, 91, 93.

Recent times have importantly supplemented this panorama. First, in 1994, the system added two review channels designed after the Kelsenian, centralized model: the action of unconstitutionality – allowing for the abstract review of general norms which can produce their *erga omnes* invalidation – and the constitutional controversy – a refurbishing of an institution Mexico had kept dormant from the previous century, now redesigned after the Kelsenian model to channel conflicts of jurisdiction between federation, states and municipalities. This same year, the Supreme Court was reformed, but no Constitutional Court or Chamber was added: it remained the exclusive apex court, though an effort was made to release it from areas of jurisdiction unrelated to constitutional matters. Second, in 2011, the Supreme Court changed the interpretation of a constitutional provision and recognized diffuse powers of review to all Mexican judges. This great architectural change removed from federal judges the privilege of being the sole owners of the Constitution. Mexico now consequently has a hybrid model of review, as most other Latin American countries,[28] though it combines three strands, not two: centralized, semi-centralized (*amparo*) and diffuse. Moreover, after the 2011 human rights reform, the Supreme Court said Mexican judges must effectuate both constitutionality and conventionality review. Lastly, we must mention the *amparo* constitutional and legal reform of 2011–13. It was intended to simplify *amparo* to make it effective for rights protection, but the result was moderate. Although it allows for collective claims and defines more broadly under what conditions a rights violation can be denounced, judges will have to provide via interpretation that extra dose of access to justice that an insufficient statutory streamlining does not assure.[29]

A second strand of evolution that brings Mexico in line with the standard Latin American path was the setting in 1994 of a system of autonomous judicial self-governance with the creation of the *Consejo de la Judicatura Federal* (Federal Judicial Council) and analogous bodies at the state level.[30] Distinctive in Mexico is the strong hold the Supreme Court

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[28] *See* Uprimny (n 1); Justin Frosini and Lucio Pegoraro (2008), "Constitutional courts in Latin America: A testing ground for new parameters of classification?", *J. Comp. Law*, **2**, 39 (underlining the hybrid nature of judicial review systems in Latin America, the latter emphasizing how contemporary developments in the region create ground and demand the crafting of new forms of theoretical classification to adequately describe them).

[29] Pou Giménez (n 27).

[30] The creation of institutions, controlled by judges or a combination of judges and political appointees to manage access, adscription, promotion and discipline within the judiciary was seen as instrumental to reinforcing (or gaining for the first time) judicial independence. International donors and institutions promoted

retains over the Council – presided over by the president of the Court.[31] The Mexican judiciary has retained most of its old, strongly hierarchical style and the Supreme Court concentrates a wide range of functions that in other countries are performed by two or three different institutions.[32]

To the preservation of traditional hierarchical fingerprints, we must add the retention of very formalistic styles of adjudication that, until recently, have done little in terms of effective rights protection for the majority of the population. While over the last 20 years the Supreme Court did quite well as arbiter of inter-branch conflict, the performance of the whole Mexican judiciary in terms of rights protection has been poor.[33] Things have clearly started to notably change, however; these few last years the Supreme Court has gone public in deliberations, it has issued important rulings that have substantially changed rights and case law in a number of fields, and it has become an active participant in the debate about the relations between national and inter-American law, even if ferocious disagreement between justices leaves undetermined the direction the Court will take in the coming years.[34]

The third strand of changes is presided upon by the turn from an

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them as a part of a rule of law-reinforcing agenda. *See* Linn Hammergren (2007), *Envisioning Reform: Conceptual and Practical Obstacles to Improving Judicial Performance in Latin America* (Pennsylvania: Penn State University Press); Pilar Domingo and Rachel Sieder (2001), *Rule of Law in Latin America: The International Promotion of Judicial Reform* (London: Institute of Latin American Studies).

[31] *See* Andrea Pozas-Loyo and Julio Ríos-Figueroa (2011), "The politics of amendment processes: Supreme Court influence in the design of judicial councils", *Texas Law Rev.*, **89**, 1807, 1807–33.

[32] Julio Ríos-Figueroa (2011), "El sistema de administración de justicia", in Gabriel L. Negretto (ed.), *Debatiendo la reforma política: Claves del cambio institucional en México* (Mexico City: CIDE), 164.

[33] Julio Ríos-Figueroa and Gretchen Helmke (2011), "Introduction", in Julio Ríos-Figueroa and Gretchen Helmke (eds), *Courts in Latin America* (Cambridge: Cambridge University Press), 5. The country did not participate in the wave of new developments in rights adjudication that has singularized the courts of Colombia, Costa Rica or Argentina.

[34] On the system of TV broadcast of deliberations in the Plenary Chamber of the Court, *see* Francisca Pou Giménez (2017), "Changing the channel: Broadcasting deliberations in the Mexican Supreme Court", in Richard Davis and David Taras (eds), *Justices and Journalists: The Global Perspective* (Cambridge: Cambridge University Press); for a quick identification of new Supreme Court doctrines in the domain of rights (and in other constitutional areas), *see* José Ramón Cossío, Jimena Ruiz Cabañas, Julio Martínez Rivas and Santiago Oñate Yáñez (2017), *Constitución Política de los Estados Unidos Mexicanos Comentada* (Valencia: Tirant lo Blanch).

inquisitorial system in criminal trials to an adversarial one – a tendency shared in all Latin America. The reform was designed in 2008 to be gradually implemented at the state level (where most criminal trials proceed) and reinforced in 2013 by the issuance of a code of common procedural rules applying nationally. Improving the performance of the criminal system is one of the major challenges the country faces – it now works poorly in every possible respect.

The consolidation of democracy in Mexico, to sum up, has come hand in hand with a clear reinforcement of the judiciary within the constitutional system. But Mexican judges have started to release only very slowly their bonds with the past, and the system carries a heavy burden in terms of inherited institutions and procedures that match poorly with the recent, far-reaching reforms in the bill of rights. What the judiciary will do with the new constitutional tools in the rights area, will surely be, in any case, among the most dynamic developments in the constitutional system in the years to come.

Electoral Management

The Mexican transition to democracy – not surprisingly after decades of iron-handedly PRI-controlled periodical "elections" – started with an accent on electoral matters. In the 1980s a long series of intermittent amendments that found their last episode in the 2014 "political reform" started.[35] Changes in the electoral system were gradual and led to a country with a system that – besides an Executive elected under majoritarian principles – elects Congresses through a combination of majoritarian and proportional representation – both at the federal and the state level.

A main feature of the model is the existence of a huge and well-funded electoral branch with probably no peer elsewhere. Its first tier is administrative: it was headed from 1990 to 2014 by the *Instituto Federal Electoral* (now replaced by the *Instituto Nacional Electoral*, INE). The IFE/INE not only organizes elections, but also enforces a large body of rules governing the finances and activity of the political parties on a permanent basis (and not only in election time). The second tier is jurisdictional: it is formed by the Electoral Federal Tribunal (TEPJF), with a superior chamber

[35] *See* José Woldenberg et al. (2007), *El cambio político en México* (Mexico City: Cal y Arena) and Lorenzo Córdova Vianello (2014), "Sistema electoral y sistema de partidos. Pluralismo político en las reformas constitucionales en materia electoral", in Casar and Marván (n 2) (mapping the numerous episodes of electoral reform from the 1980s on). On the 2014 reform, *see* the materials available at http://pac.ife.org.mx/reforma2014 (accessed 28 November 2014).

sitting at Mexico City and five regional chambers spread across Mexico. It is formally part of the federal judiciary though has autonomous operation, has both legality and constitutionality review attributions (though abstract review of electoral statutes is retained by the Supreme Court). What's amazing is that these institutions are only for federal electoral law: every state (and Mexico City) has its own two-tiered electoral branch, employing buildings and personnel that work on a permanent basis.

The amount of resources employed by the Mexican electoral branch has been justified as being necessary to set the foundations of democracy in a country with decades of polluted elections. For two decades, the IFE piled up prestige and reliability, until recently the branches in charge of appointing its councilors let the institution decay in some measure. The 2014 reform, in what was interpreted as a questionable "package" negotiation among political parties, unexpectedly replaced the IFE with the INE and packed their *consejeros*. The plan was having the institution absorb the functions of state electoral branches and eliminate the latter – thus saving resources and reinforcing electoral authorities before pressures of state governors. In the end, the elimination did not occur, but the resulting system is clearly more centralized.[36]

Fundamental Rights

The rights' area has experienced deep changes in recent years, but they have come late, compared to those affecting other parts of the Constitution. Three rubrics must be referred to: the catalogue of protected rights, the principles about identification, interpretation and application of rights, and the regulation of rights guarantees.

Although the 1917 Constitution was a world pioneer in its enshrinement of social rights, the catalogue of protected rights was updated only very slowly. Over the last 15 years, there were continuous piecemeal additions: the rights of indigenous peoples – declared to be foundational to the nation and holders of both autonomy and accommodation rights; the right to information and access to governmental data – the basis of the strong transparency agenda advanced in the country; the reinforcement of equality guarantees – though short of including a "material equality" clause; the strengthening of due process and the recognition of victim

[36] State institutes remain, but now organize state elections in coordination (and supervised) by the INE, which appoints their councilors. The INE has lost disciplinary attributions (transferred to the TEPJF) and the latter can now attract jurisdiction to supervise the regularity of state elections in some cases.

rights; the right to health, food, water, healthy environment, culture or the practice of sports; the recognition of special rights for children, a reform of educational rights, among others.[37]

Notwithstanding this large catalogue on paper, the constitution of rights remained dormant these last decades. There was almost total absence of rights-based litigation as late as 2005. There was no use of international human rights law; there was no public interest litigation; on the contrary, it was companies which took advantage of the *amparo* to protect economic claims; there were no collective suits (not even after a 2010 amendment succinctly named them in the Constitution); human rights commissions – created in 1988 – failed to make a difference; abstract review was not used in defense of rights, and so on. The feebly organized and demobilized Mexican civil society was not using the Constitution to vindicate, in or outside courts, decent levels of rights' enjoyment.

A big step forward arrived in 2011, when a Section 1 amendment conferred constitutional status to all human rights enshrined in treaties while prompting all authorities to promote, respect, protect and guarantee rights, properly remedying their violations and having the obligation to interpret them *pro personae*. As has been noted, this amendment signals a "change of paradigm",[38] the evolution from "retail" to "wholesale" change in the domain of rights.[39] The reform was accompanied, as we have mentioned, with a too shy *amparo* amendment that lessens some of the traditional barriers but fails to engage in the sort of radical remodeling capable of assuring a real change in terms of access to justice.[40]

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[37] *See* Pou Giménez (2014), "Las reformas en materia de derechos fundamentals", in Casar and Marván (n 2), for a mapping of all rights-related constitutional amendments in the 1997–2012 period, and Miguel Carbonell, id., for a detailed account of three major ones in the areas of human rights, transparency and criminal procedure.

[38] Miguel Carbonell and Pedro Salazar (2011), *La reforma constitucional en materia de derechos humanos: un nuevo paradigma* (Mexico City: IIJ – UNAM).

[39] Pou Giménez (n 37), at 112.

[40] The reform relaxes standing requirements, allows for collective claims, admits *amparo* against certain private agents displaying public functions, redefines relevant rights affectations and opens the door to *erga omnes* invalidation of unconstitutional statutes under some conditions. But the regulation of procedure and, in general, the language and the structure employed by the *Amparo Act*, continue to be confusing and incomprehensible by an average citizen. *See* Eduardo Ferrer Mac-Gregor and Rubén Sánchez Gil (2014), *El nuevo juicio de amparo. Guía de la reforma constitucional y la nueva Ley de Amparo* (Mexico City: Porrúa-IMDPC-UNAM) (providing an exhaustive general view of the novelties) and Pou Giménez (n 27) (emphasizing the modesty of the changes from the viewpoint of effective rights protection).

Together with the concurrent admission of diffuse control on the part of all Mexican judges and the Supreme Court criteria on the relations between national and international human rights law – recently redefined, however, to curtail the *pro personae* principle[41] – no doubt the Mexican Constitution of rights will start to move differently. Today, the Constitution includes leading-edge argumentation tools – including acknowledgment of international human rights categories more explicitly than the average regional text. Events these past two or three years evince the dynamizing potential of the new provisions. We should, however, not overlook the fact that, as I will refer to below, the Constitution retains provisions in complete tension with the new features.

The Economic Constitution

At the beginnings of 2013, during the first year of the Peña Nieto presidency, a group of amendments importantly changed, after being unaltered for many years, the Mexican economic constitution. The reform affected three main areas: energy, telecommunications and anti-trust.

As is known, the original 1917 text was characterized by a strong statist imprint in the conception of economic activity and the treatment of property rights. Section 27 stated in its original terms that all property was originally held by the nation and recognized peasant communities' (*ejidos*) collective title to land – the Mexican Revolution having been fought to a great extent after land redistribution. The strong prevalence of the state over the market was confirmed by two crucial episodes: the petroleum expropriation decreed in the 1940s and the nationalization of the banking sector in 1981.[42]

The first alterations to this state of affairs came with the presidency of Miguel de la Madrid and, far more consequentially, that Carlos Salinas de Gortari. De la Madrid sought to give predictability and definition to the boundaries of state involvement in the economy and amended Sections 25, 26, 27, 28 and 73 to that effect, though the idea of "state guidance of the economy" remained firmly in the books. Salinas's changes were more radical and affected core tenets of the original constitutional pact. His reforms withdrew the banking sector from those reserved to the state, conferred autonomy on the Bank of Mexico and, more consequentially,

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[41] *See* Supreme Court, CT 293/2011.

[42] *See* Carlos Elizondo Mayer-Serra (2014), "¿Una nueva constitución en el 2013? El capítulo económico", *Cuestiones constitucionales*, **31**, X. In this section I broadly follow this author's narrative of the evolution of market-state relations in the Mexican Constitution.

created agrarian courts, stopped land distribution and recognized property title to *ejido* peasants, who could now alienate land, exploit it with others or transfer it as corporate capital. He also championed free trade and signed the North American Free Trade Agreement (NAFTA – but without touching the Constitution).

After this, even during the years that followed the 1994 financial crisis (the "tequila effect" crisis) – except for a small Zedillo reform eliminating state exclusivity over railway and satellite sectors – the economic constitution remained unaltered. There was much talk, however, about the need to tackle "structural reforms" to secure competitiveness in the global scenario. For all the constitutional modifications politicians had been eager to agree on, they were resistant to face others that clearly affected deep vested economic interests. Peña Nieto seemingly assumed office with that priority in mind and sought an elite negotiation with the main political party leaders, in the context of the so-called *Pacto por México*, and produced an extremely long list of scheduled reforms. Passed in only one year, the 2013–14 reforms are far-reaching, but it is not entirely clear what message they give concerning state–market relationships. The energy reform, by far the most controversial because it concerns the exploitation of Mexico's petroleum resources – which provide a gigantic percentage of the budget – allows the participation of private capital in exploration and exploitation tasks, through contracts that are intended to assure the state a fair rent. The telecommunications and anti-trust reforms, by contrast, are directed to contain, at least in part, the excessive standing of private economic power. As Elizondo underlines, the fact these reforms were the product of deep transactions in the context of the *Pacto por México* (discussed in a package with the electoral, transparency and political reforms) have rendered their contours exceedingly fuzzy. Tricky provisions and notions were left to be pinned down in the developing statutes, now under hasty discussion in Congress.

III. A CONTENT-BASED APPRAISAL

The overview in the previous section, though quick and necessarily cursory, gives preliminary ground to address some of the content-related questions that frequently articulate collective discussions on Latin American constitutionalism. After its long, reformist path, how does Mexican constitutionalism look? Does it share the traits that scholars have identified as common features of contemporary Latin American constitutionalism? Where does Mexico stand if we distinguish liberal and radical strands?

What are the most salient traits of the current Mexican Constitution as a framework for common political and social life?

On a preliminary analysis, Mexico proves to share most Latin American constitutionalism's core common traits.[43] Thus, the country now enjoys an extensive rights catalogue, including last-generation rights, and an explicit acknowledgment of bonds with international human rights law. The substantive part of the Constitution includes the recognition of cultural diversity as a core definitional element of the polis. There are specific channels for the guarantee of rights, both extrajudicial (human rights commissions) and judicial, including an *amparo* writ – not sufficiently redesigned, however, to ensure effective protection. On the top of a federal scheme, the country has a particularly well-assorted, three-tiered system of judicial review – another Latin American staple – and a system of judiciary self-governance under the lead of a Judiciary Council, as do most of its neighbors. It also participates in the regional trend towards "judicial reform", which has led to the adoption of an adversarial system in the criminal domain. A presidential system has been retained, as in all Latin America, in whose context the Executive interacts with a bi-cameral federal parliament through a U.S.-style system of checks and balances. The Executive is not particularly powerful, but neither is Congress, designed to act with parsimony – though it has had enough incentives to quickly and continuously amend the Constitution.

Mechanisms of direct democracy are, however, distinctively timid: a very restrictive version of popular consultation and legislative initiation has been recently established. There is also an emphasis on electoral matters we do not find elsewhere, with a huge and expensive administrative and judicial structure devoted to give reliability to elections and control political parties. In the economic chapter, the fingerprint of the Mexican Revolution is still textually detectable, but the message of the 2013–14 reforms is that of a country centrally concerned with assuring the conditions for fluid capitalist market transactions. The multiplication of constitutionally independent agencies has detracted from majoritarian politics extensive policy areas, touching not only on the economic domain but also on areas associated with fundamental rights – education, freedom of speech and right to information – and even to more atypical state functions such as criminal investigation.

In view of this, Mexican contemporary constitutionalism seems therefore to be clearly associated with what we call the liberal model, in contrast

[43] I rely on Uprimny's proposed catalogue of shared regional constitutional features (n 1).

with the novel experiences in Bolivia or Ecuador: there are no innovations in the design of the division of powers to respond to more diverse sources of political legitimacy; there exists an explicit, strong recognition of the nation's cultural plurality but development is left to lower norms and does not reshape the design of national institutions; instruments of participatory democracy are particularly weak; transparency has an important place in the bill of rights and has led to the establishment of a specialized institution, which is innovative. But overall, the Mexican Constitution contains simply a recognizable evolution of what Gargarella calls the traditional "liberal-conservative" Latin American model[44] in whose context, in the balance between majoritarian components and anti-majoritarian ones, there is an undisputable emphasis on the latter – given the reinforcement of the judiciary, the enlargement of the bill of rights, the integration of the country into the inter-American system, the multiplication of independent agencies, or the application of tight schemes of checks and balances in extensive areas (popular consultation, state of emergency, etc.).

We could deepen this preliminary appraisal in a number of directions, refining the description of certain constitutional junctures or evaluating them from one or another normative stance.[45] Much of the singularity of the Mexican Constitution is not captured, however, by a preliminary inventory of content: it is largely independent of the regulation it makes of particular institutions because it is associated with the style, structure, textual organization, language and substantive import of the text when examined as a whole. The Mexican Constitution is at this point a pretty untidy collection of provisions: it is a long and extremely detailed text, it is not well structured, it is very heterogeneous – sometimes contradictory – and it is exceedingly complex on a number of counts. These features have, in my view, prominent effects on the sort of normative framework for social and political life it provides – they are the most salient edges in terms

[44] Roberto Gargarella (2005), "Una maquinaria exhausta. Constitucionalismo y alienación legal en América", *Isonomía*, **33**, 7, 19; Roberto Gargarella (2008), *Los fundamentos legales de la desigualdad. El constitucionalismo en América: 1776–1870* (Madrid: Siglo XXI Editores).

[45] In his contribution to this volume, for instance, Gargarella evaluates American constitutionalism using criteria of two main sorts: functional and substantive. The functional dimension of his analysis assesses the degree of constitutional congruence of American constitutions – both internal congruence (the degree to which their internal sections, elements or parts work coherently, reinforcing and not undermining their mutual efficacy) and external congruence (the extent to which these constitutions take responsibility for the problems and realities that are really salient in the society in point). The substantive dimension of his analysis assesses how egalitarian these constitutions arguably are.

of "constitutional content". I will therefore devote the remaining section to identify and briefly discuss them.

First, the Mexican Constitution is very long and regulates many aspects with all possible detail, in the style of a legal code, shaping in profuse detail the contours of many domains of public policy and the institutions it regulates.[46] This creates a structural necessity to keep on amending – because rules become more easily outmoded – and burdens interpretive tasks. It is true that many contemporary constitutions are long – Latin American ones among them – and not everything in a Constitution of detail is a problem, since detail can be instrumental to enforcement and can make control of judicial decisions easier. The combination of length, detail, and other traits we will immediately identify, however, render the Mexican Constitution overweight and a bit oppressive as a directly enforceable charter, and makes it difficult for citizens to "appropriate" it.

The effects of detail are compounded by the fact that the structural organization of the text has been severely eroded and the provisions one would expect to find grouped – rights, federalism, the separation of powers – are spread out and mixed all along the text. Moreover, the 2013–14 amendments came accompanied with an assortment of lengthy transitory provisions that regulate in every detail how things are to proceed regarding institutions and policy plans in the areas of energy, telecommunications, electoral administration, education supervision, transparency and competition. The normative status of this extensive, codified, transitory constitution is elusive and reinforces the impression that we are left with a document that is puzzling in many respects.

The Mexican Constitution is also stylistically very heterogeneous: it evinces the fingerprint of several layers of constitutional script coming from very different moments in time, reflecting different constitutional logics and different ideas about how to write a constitution. In the rights area, for instance, some provisions are exceedingly detailed, as we noted, while others are abstract; some rights are enshrined in negative terms (i.e. the Constitution specifies what public authorities cannot do) and others positively (by means of a direct reference to the underlying value that justifies the enshrinement of a specially protected claim); some rights find a counterpart in the federalist division of power (i.e. they are treated as areas of jurisdiction and the Constitution specifies who may regulate the right) and others don't. This creates difficulties to reconstruct constitutional

[46] The Constitution has grown from around 22 000 words in 1917 to almost 70 000 in February 2014 – not counting the transitory clauses. *See* Elizondo (n 42), and Fix-Fierro (n 2).

meaning and to articulate sound theories of constitutional interpretation – especially in the domain of rights.

More importantly, the Mexican Constitution is also very heterogeneous at the level of content, because amendments have not been done in view of their impact on the pre-existing constitutional body. For sure, substantive heterogeneity obtains always to some extent in constitutions, which are typically the result of political transaction, negotiation. As has been noted, producing a constitution *ex novo* does not ensure coherence either.[47] Fundamental rights and values, moreover, are by their intrinsic nature prone to enter into conflict with one another in the context of specific cases: to a certain extent, as we know, the Constitution of a pluralistic society is designed to include a wide range of values and principles whose ultimate reconduction to unity remains to be seen. But in Mexico, the pattern of unending, fragmentary change, stirred by political conjuncture, and led by politicians who ostensibly see gains only in what they add to the text – not in struggles to synthesize additions, suppressions and extant clauses – in the context of a constitution of detail that decides many things by itself, has produced a set of blatant contradictions within the Constitution that cause a lot of trouble.

Thus, the Mexican Constitution contains at the moment several anti-conventional provisions, such as the one denying political rights to persons under criminal proceedings – contrary to Section 23 of the American Convention on Human Rights (ACHR) and the right to the presumption of innocence enshrined in Section 20.B.I of the Constitution[48] – the ones allowing prosecutorial detention for as much as 80 days in some cases,[49] the imposition of liberty-restraining penalties by administrative authorities,[50]

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[47] *See* Tom Ginsburg (2012), *Comparative Constitutional Design* (Cambridge: Cambridge University Press), 2 and Justin Blount, Zachary Elkins and Tom Ginsburg, "Does the process of constitution-making matter?", in that volume, at 50 (stressing that, for all contemporary emphasis on constitutional design, quite a few factors remain operative in actual constitution making, propitiating heterogeneity).

[48] Section 23 of the ACHR refers to the limitation (not denial) of the right to vote (not the range of political rights referred to in Section 38.II of the Mexican Constitution) and only for persons convicted (not those simply charged with certain counts, which may well have been charged with no merit or even with the direct intention of eliminating them from an electoral race (for instance).

[49] *See* the regulation of the so-called *arraigo* (house arrest) in Section 16 of the Mexican Constitution.

[50] *See* Section 21 of the Mexican Constitution, contrary to Sections 1 and 2 of the ILO Covenant 29, Section 8 of the ACHR and Section 8.3 of the International Covenant on Civil and Political Rights (exempting community work from being "forced labor" wherever it is dictated by a *judge* after due proceedings).

or the regulation of the rights of foreign people.[51] As the Supreme Court's internal battles illustrate,[52] these pathologies have greatly complicated the task of clarifying the articulation between internal and external sources of law – declared to be of the same hierarchy in the domain of rights by Section 1 of the Constitution – and have obstructed the progression towards more substantive constitutional reasoning – one of the core goals of the 2011 human rights reform. The first years of life of the Mexican new "rights constitution" have been mortgaged by the amount of technical talk produced to try to make sense of the problems caused by internal inconsistency.[53]

A too complex, frequently obscure and sometimes incoherent constitution is a constitution that sets obstacles to its own enforcement. If constitutions are to operate to some extent as coordinating devices capable of generating a fair degree of self-enforcement,[54] the Mexican document is then problematic. A bona fide reader, including those familiar with legal terminology, is soon puzzled when trying to sort out what the Constitution is about. In the case of politicians and public officials genuinely interested in its enforcement, the same difficulties will arise. It is true that the endurance of the 1917 Constitution, in its changing versions, cannot be explained without presupposing a loyalty to a set of identifiable agreements – in this sense the Constitution has been "self-enforcing", from the perspective of the range of political and social groups that could have forced its replacement. But this was so, I believe, because the Constitution that was enforced in this sense was not the Constitution in

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[51] *See* Sections 8, 9, 11, 31, 32 and 33 of the Mexican Constitution. It is difficult to articulate many of these provisions – and the provisions on naturalized citizens, who have some rights severely limited in comparison to natural-born citizens – with the relevant treaty provisions and even with the apparent "spirit" of other provisions of the Constitution.

[52] *See* Fernando Silva García (2014), "Derechos humanos y restricciones constitucionales: ¿reforma constitucional del futuro vs. interpretación constitucional del pasado? (Comentario a la CT 293/2011del pleno de la SCJN)", *Cuestiones Constitucionales*, **30**, 251; Rubén Sánchez Gil (2014), "Notas sobre la Contradicción de tesis 293/2011", *Revista Iberoamericana de Derecho procesal constitucional*, **21**, 333.

[53] The Mexican Constitution would then be inconsistent in Gargarella's sense (*see* his contribution in this volume) since there are open problems of practical articulation between the substantive part of the Constitution and the way it regulates the "engine room", and in the stronger sense of containing internal contradictions within each structural part of the Constitution.

[54] *See*, for instance, Russell Hardin (1989), "Why a constitution?", in Bernard Groffman and Donald Wittman (eds), *The Federalist Papers and the New Institutionalism* (New York: Agathon Press).

all its actual detail. Once a passage is made from a political conception of the Constitution to a normative conception destined to be daily enforced and to discipline the relations between citizens and authorities – not only the relations among the latter – content matters, and the complexity of content matters increasingly.

A further consequence of these content features concerns the role of judges in the daily administration of the Constitution. The judiciary, particularly the Supreme Court, will be the single actor repeatedly summoned to try to confer some coherence to the complex constitutional "whole". It will then be particularly important to assure that constitutional adjudication proceeds within an institutional and procedural architecture that properly equilibrates the role of the constitutional judge within the system.[55] At any rate, it is important to see that the internal complexity of the Constitution makes it more difficult to meaningfully supervise the exercises of adjudication advanced within such wide margins. The Constitution now provides citizens with new tools to argue almost all that they could wish and, as I mentioned, they can trigger promising dynamics that had been, indeed, unduly weak in Mexico over the last decades. By the same token, however, it may be difficult to sustain that the response citizens receive from judges is arbitrary or unfounded: the variety and disparity of constitutional provisions allows for a good measure of comfy judicial cherry-picking.

IV. A PROCESS-BASED APPRAISAL

A second source of evaluation focuses on the genesis of constitutions, i.e., on the sort of process (composition of the deciding body, deliberation dynamics, voting rules, etcetera) they derive from, in terms of political and social inclusion and procedural adequacy. Some scholars have suggested that the actual content of a constitutional text is less relevant for middle and long-term constitutional "success" than it being the product of a constituent moment allowing citizens and salient political and social groups perceive the Constitution as "their own": as a collective venture they feel participants of, delivering a set of foundational rules they can meaningfully feel co-authors of.[56] In the Mexican case, we would have to evaluate

[55] *See* Roberto Gargarella (2014), *Por una justicia dialógica: el poder judicial como promotor de la deliberación democrática* (Madrid: Siglo XXI Editores).

[56] *See* Oscar Vilhena Vieira et al., *Resiliência Constitucional. Compromisso maximizador, consensualismo político e desenvolvimento gradual* (on file with author) (arguing that the negotiated and inclusive genesis of the Brazilian

therefore what kind of constitutional moment the Constitution emerges from and the sort of process through which amendments have come to life.

Things look from this stance, again, sub-optimal. On the one hand, the original constituent assembly is now far back in the past. There is little in common between the political community represented in Querétaro in 1917 and Mexican contemporary society. Although the 1917 assembly – initially convened to reform the 1857 Constitution – was articulated around most important social claims, many others that are now central were obviously unaddressed, and the representative texture of the constituent body – which consisted of 219 males[57] – is of course utterly defective when viewed from current standards. And although school curricula ensure the tireless socialization of Mexican children into the national myths, the sense of political continuity that might remain is not grounded on what the Constitution actually says – among other things because it has changed too much and people are not aware of its content; at a maximum it invokes a text that, as I have mentioned, has been historically important in a sense different from the one in which we would say today a constitution matters – as a *binding* and directly enforceable document.

On the other hand, as implied by the fact so great an amount of amendments have been passed, constitutional reform in Mexico is just another incidence of ordinary politics. This may come as a surprise in view of the amendment formula, which requires support of two-thirds of attending members in each Chamber of Congress and ratification by half of the 31 state legislatures.[58] As noted by scholars, however, to account for actual

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Constitution has been key to its success as a general framework capable of containing a succession of pretty different political projects); Blount, Elkins and Ginsburg (n 47), at 31–59 (recommending caution, noting that many hypotheses on the relations between processes and outcomes remain to be authoritatively tested and reviewing existing literature on – among other factors – the alleged effects of popular participation in constitution-making). For further exploration, *see* Stefan Voigt (2003), "The consequences of popular participation in constitutional choice: Towards a comparative analysis", in Anne van Aaken et al. (eds), *Deliberation and Decision* (Aldershot: Ashgate) and Justin Blount (2011), "Participation in constitutional design", in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar), 112–14.

[57] Salomón Díaz Alfaro (1998), "La composición del congreso constituyente de Querétaro de 1917", in *El constitucionalismo en las postrimerías del siglo XX. La constitución mexicana 70 años después*, 219.

[58] Section 135 of the Mexican Constitution. The Mexican formula is "one-size-fits-all" (it does not set forth different procedures for core versus more routine alterations) and it is laconic, leaving unregulated questions such as who can present amendment bills, which sort of parliamentary discussion must be held before the 2/3 vote, or what lies in state legislatures. As we have noted, Mexico City – not

rigidity one must take into account not only the number of institutional players involved and the size of the majorities required, but an assortment of additional elements: the temporal organization of the process (e.g. whether intervening institutions must act at specific points in time or not, or whether voting rounds must be multiple); the need to call for a popular referendum or not; the shape of the party system. To this we can add the range of structural incentives to engage in change.[59] In Mexico, even if the size of the requisite majorities is not trivial, amendments need not obtain approval in consecutive terms, there are neither players outside ordinary political actors nor a need to call directly upon the people. The formula therefore makes constitutional law-making extremely close to ordinary law-making – all the more so because Section 135 leaves internal procedural steps unregulated and the practice has been to analogically apply what is done in the ordinary legislative process.

The pattern of amendment is very distant, in short, from "higher law-making" in an Ackermanian sense – a distinctive process singled out in terms of inclusion, participation, deliberation and high-spiritedness.[60] Amending the Constitution is legislating by (barely) other means. Constitutional reforms, for instance, are as easily lobbied for as ordinary legislation; sometimes public opinion finds out about an amendment after it has already been passed; occasionally, certain changes gain higher profile – but just in the way some statutory bills generate more debate from time to time. To be sure, we could see it all as a democratic advantage: present generations in Mexico would have the Constitution in their hands far more than usual and there would be, therefore, less tyranny of the past over the present. By the same token, however, the present whose decisions constrain (to some degree) the future does not do so on the basis

being technically "a state" – does not participate in the ratification process. The Constitution does not contain unamendable provisions.

[59] *See* Donald Lutz (1995), "Toward a theory of constitutional amendment", in Sanford Levinson (ed.), *Responding to Imperfection* (Princeton: Princeton University Press) (charting possible variations in amendment design and crafts an "index of rigidity" and giving Mexico a score of 2.55 – the highest being 5.6 for the ex-Yugoslavia and the lowest 0.80 for Austria). *See also* Víctor Ferreres Comella (2000), "Una defensa de la rigidez constitucional", *Doxa*, **23**, 29 (noting that actual rigidity emerges from the combination of six factors: federalism, the kind of majority or supermajority that is called for, the presence or absence of referendum, the system of political parties (and the degree of party discipline), the presence or absence of historical factors that can make the alteration of certain constitutional decisions a "taboo", and the degree of conservatism of prevailing political culture).

[60] *See* Bruce Ackerman (1993), *We the People* (Cambridge, MA: Harvard University Press).

of particularly valuable reasons or procedures. There seem to be weak grounds, in short, to recognize special democratic credentials to amendments on the basis of their pedigree. There is perhaps nothing intrinsically wrong in having constitution-making by ordinary means, but if the ordinary political system operates less than acceptably – as it arguably occurs in Mexico – then one must abandon of course any special hopes about the democratic texture of the Constitution.

Fast-track dynamics in the domain of constitutional change is further reinforced by the fact the judicial review of constitutional amendments has been progressively foreclosed by the Supreme Court. Perhaps paradoxically in a country that lives under hectic constitutional change, the Supreme Court has closed the door both to substantive and to procedural analysis of regularity in all channels of review.[61] Again, it is not that judicial review of constitutional amendments is unproblematic from a democratic viewpoint – particularly where the Constitution does not contain clauses written in stone and does not explicitly grant this power to the corresponding most powerful Court. The point is simply to note that the absence of the more complex interaction between courts and legislators this review would probably produce, reinforces a dynamics of unbounded constitutionalism.

V. A FREQUENCY-BASED APPRAISAL

As Elkins, Melton and Ginsburg emphasize in their work on constitutional endurance, a fruitful way of analyzing constitutionalism focuses on whether the constitution has changed a lot, very little, insufficiently, excessively or – could it ever be assessed – just in the optimal degree. From this perspective, one ponders the effects of change or non-change per se,

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[61] In a 2002 case (CC 82/2001, filed by an Oaxaca municipality) the Court said that in resolving *constitutional controversies* it could review neither the substantive nor the procedural regularity of constitutional amendments. As regards *actions of unconstitutionality* (abstract review) the Court said in AAII 168/2007 and 169/2007 (resolved in 2008) that the procedural regularity of constitutional amendments could not be reviewed in that channel. As regards *amparo*, the Court had said in the "Camacho" cases (AARR 2996/96 and 1334/98) that the procedural regularity could be checked, even if it detected no procedural flaws in the instant case. But in addressing the so-called "Intellectuals" saga (where a group of opinion formers were arguing that constitutional provisions on campaign financing violated free speech) changed the law: while at first (AARR 186/2008, 552/2008) the Court said denunciations of procedural and substantive flaws were not "evidently" inadmissible in *amparo*, it eventually held they cannot be examined (AR 488/2010).

beyond what is to be said of the merits of the resulting text in terms of content or in terms of the procedure used to enact it.

As these authors remark, constitutional endurance, stability or permanence – i.e. constitutional actual rigidity – can be associated with positive elements such as the development of habits of obedience to the constitution; the reinforcement of the effects of pre-commitment on public authorities (who come to be effectively constrained by the rules set to bind them); the possibility of more orderly managing of the times and processes of legal-political life; the development of auxiliary institutions which help fulfill constitutional mandates (something impossible if the constitution is changing all the time); the progressive development of a sense of political *demos* around the constitutional text; an increase in predictability which may boost economic development; or the benefits associated with having a "division of labor" scheme that empowers current political majorities in liberating them from the need to address certain matters.[62] Constitutional stability, however, can also be associated with drawbacks such as a weaker representation of present-day citizens' concerns, fewer possibilities for intense political participation, or fewer possibilities of getting rid of sub-optimal institutions which may remain in the system only because of inertia.

What are we to say, from this analytical stance, about Mexican constitutional *reformismo*? Should we emphasize the passive, conservationist side of a Constitution that has been massively amended but not disappeared, and the benefits of constitutional stability and permanence? Should we praise a text that has given some ground to political life for a century and has accompanied/conducted for 25 years a process of increasing democratization? Or should we rather emphasize the innovative dimension of amending and note that the Mexican text has only survived through permanent amendment, stressing therefore the drawbacks associated with instability? Does the Mexican scenario suggest an optimum combination of change and permanence? What relation is there between *reformismo* and Mexican political and social realities?

In my view, and setting aside a core problematic effect of permanent change I have already referred to – i.e., that it has resulted in a complex and often incoherent text in terms of content – the Mexican pattern of gradual, fragmentary and ceaseless constitutional change does not provide

[62] *See* Zachary Elkins, Tom Ginsburg and James Melton (2009), *The Endurance of National Constitutions* (Cambridge: Cambridge University Press), 12–35; Tom Ginsburg, "Constitutional endurance", in Ginsburg and Dixon (n 56), 112–14.

many grounds for praise. To be sure, we cannot rely on counterfactuals – perhaps things would have been worse had the country undergone frequent replacements instead of frequent amendments – and nothing in this chapter could methodologically provide something close to a set of causal explanations. Within the limits of that disclaimer, there are several features in today's Mexican scenario whose degree of connection with patterns of constitutional instability should be, in my view, further explored.

First, endless change could be not unrelated to the widespread unfamiliarity with the content of the Constitution that now prevails among citizens and even specialized audiences. I find it impossible to count today the Constitution among the elements that bind Mexicans together, but if any sense of identification remains, it is certainly not with its actual contents. And the impossibility of keeping track of what is under way at any moment, in terms of constitutional law-making, prevents deliberation and public criticism both before amendments are passed and after them – since by that time, professors, media and people are already distracted by the new amendments already under consideration. The non-interruption of the reform dynamics thus effectively contributes to shield political action from criticism. It also weakens, in my view, the effectiveness and quality of judicial review, since judges have little incentive or energy to develop strong doctrines on the meaning of one or another particular provision if they assume it will not remain in the books for long – or if they know the "whole" they should make it cohere with will suffer continuous alteration. For the same reasons, academic analysis gets thinner or lighter than usual: there is no point in focusing on particular points of the law if one believes they will soon be replaced by other rules and institutions, rendering less attractive the publication and discussion of research done on their basis.

Second, the constitutional pattern has weakened, in my view, the logic of pre-commitment and has done little to help install the rule of law and the logic of constitutionalism, understood as a system of limited government. In Mexico, it has been just too easy for authorities to avoid the application of the normative framework designed to constrain their political action. The vast amount of reforms in the area of fundamental rights accomplished in recent times illustrates, I believe, to what extent politicians have operated on the assumption of a toothless, unfrightening constitution. Thus, in a period that will be sadly remembered by the appalling amount of people killed or who have disappeared at the hands of private and state agents, politicians have added a large amount of human rights to the Constitution, seemingly to proclaim that they were doing "something nice" for the people. This way of proceeding has provided them immediate legitimacy gains, while the costs – in terms of having those rights enforced by judges against them – have been (rightly) calculated as being low and

transferred to future incumbents. Whenever one or another constitutional provision has episodically proved actually menacing – as happened when the Supreme Court declared long-term unsupervised home detentions unconstitutional in 2008 – party cupules have found ways to gather the majorities necessary to amend the Constitution and preventively get rid of them.

The Mexican amendment dynamic seems to illustrate, in this regard, a phenomenon that sociologists consider distinctive of Latin American legal fields, associating patterns of legal production with patterns of inefficacy. García Villegas and Rodríguez Garavito argue that the precarious social embeddedness of the political system and its lack of hegemony over others (the space of production, the domestic sphere, etc.) complicates the management of social problems through ordinary political channels and favors the over-production of norms: "The deficit of legitimacy derived and caused by the instrumental inefficacy of the state", they remark, "is sought to be compensated by the production of legal discourse and norms in response to the social demands of security, social justice and participation".[63] The legal system gets overburdened with tasks that the political system cannot handle, and reforms are designed to legitimate state action in areas ridden by deep social claims: the efficacy of the norms that get produced is less important than its communicative and symbolic function.[64]

Third, Mexico has seemingly forgone the advantages of the division of labor ingrained in the logic of rigid constitutionalism. Because at every point everything is up for grabs, legislators have not attempted the careful and detailed legal craft necessary to make constitutional mandates permeate to the levels of statutes and regulations. The heavy readjustments among upper and lower norms necessary in a country undergoing massive redesign has not been done, in part because the process has not been advanced by politicians with a view of the global architecture they were trying to build.

Lastly, in the last decades *reformismo* has constrained, in my view, the opportunities of Mexicans to express themselves as a political com-

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[63] García Villegas (n 3), at 284–85 (with internal citation to José Eduardo Faria (1988), *Eficacia juridica e violencia simbólica: O direito como instrumento de transformacao social* (São Paulo: Editora da Universidade de São Paulo)).

[64] Id., at 287. As these authors remark, this does not mean that legal reform produced for symbolic motivations will be always instrumentally ineffective: it means it is unlikely that they will produce the material effects that are contemplated in the norms and that were mentioned by politicians as the reason justifying their enactment. Id., at 288.

munity. The distance from the foundational moment hinders people's identification with the constitutional project and their self-perception as citizens living under a common frame of values and rules. People have not been involved for long in the sort of more intense republican exercise necessary to give oneself a new constitution and have thus forgone the benefits that come from a "spirited return to the basics". This state of affairs may be illustrated by the first fissures that occurred at the end of 2014, as people reacted massively in the streets to outrageous killings and disappearances in the state of Guerrero under the joint action of state agents and drug cartels. President Peña's response – a ten-point plan to "restore the rule of law", eight points of which consisted of enacting legal and constitutional amendments[65] – confirms, in any case, the aim or direction of traditional automatisms: politicians using amendment proposals to (try to) prevent citizens from engaging in (much-feared) high-voltage political action.

VI. CONCLUDING THOUGHTS: MEXICAN CONSTITUTIONALISM AND THE SHAPE OF DEMOCRATIC LIFE

The scenario I have pictured in this chapter is not heartening. The function of the analysis is not, however, to make a contribution to a hypercritical global narrative of (customarily biased) "Latin American miseries" but to present a view of the law at a time in which Mexico is undergoing a particularly acute crisis on a number of fronts. The magnitude of the challenges currently faced by the country – in terms of eradicating public and private violence, diminishing dramatic levels of inequality, improving education and health, eradicating corruption or making political life more inclusive – seem to be mirrored in the challenges raised by its constitutional system. The problems we have identified along the way could well be therefore epiphenomenal: the features of Mexican constitutionalism we have pictured could be not causes, but reflections or effects of troubled social and political dynamics. In this regard, a merciless description of the Constitution can be considered part of a merciless self-critical description of social and political realities that seems apposite to create conditions instrumental to their transformation.

Viewed from the regional stance, the Mexican Constitution evinces a

[65] *See* www.animalpolitico.com/2014/11/pena-nieto-acuerdo-seguridad-comision-anuncio-mensaje-palacio-nacional (accessed 2 December 2014).

clear inclination for the solutions characteristic of the liberal model of constitutionalism, not to the post-liberal, radical experiences that are under way in some parts of the Americas.[66] But as I have sought to emphasize, the Mexican Constitution stands out by being a text that contains at this point "a bit of everything", embodying a "whole" largely produced by superimposition: adding elements of new constitutionalism without getting rid of many of the old structures and norms.

Mexico's constitutional updating has been extremely gradual, but also hectic and unremitting. This has bestowed a sensation of volatility to the Constitution and our analysis has suggested how this could be linked to difficulties in developing habits of obedience – installing in the mind of politicians the idea they can change at any moment the framework rules intending to limit their behavior – and patterns of political identification. Judicial enforcement of basic rules is further compounded by the fact the resulting text is often incoherent and invariably complex to make sense of.

Mexican constitutionalism embodies, in addition, and in a pattern of unquestionably top-down change, a context in which it is political elites who have determined what to do in response to urgent political issues. While changes in the last 25 years have created a frame for democracy, day-to-day Mexican democratic life remains low-voltage when viewed substantively, from the perspective of the citizen. The frenzy of politicians to keep on amending the basic law – even if partially explained by the need to update an old system – seems to have given them for a long time a comfortable pretext to avoid the costs of to start enforcing it. Hyper-reformism has prevented the development of a national-wide political debate based on shared values, while seriously encumbering the development of the sort of accountability dynamics that are peculiar to democracy.

Unquestionably, Mexican constitutionalism now includes tools that may empower the citizenry to an extent hard to imagine a decade ago. The new rights' Constitution can trigger new forms of interaction – of citizens among themselves and among citizens and judges or other authorities – that could unleash collective social and political energies. As of today, however, whether the Mexican Constitution will finally become the vessel of a more fulfilling democratic life in the decades to come – or whether

[66] *See* Javier Couso Salas (2014), "Las democracias radicales y el 'nuevo constitucionalismo latinoamericano'", in Marisa Iglesias et al., *Derechos humanos: posibilidades teóricas y desafíos prácticos: SELA 2013* (Buenos Aires: Libraria Ediciones) (reconstructing and critically appraising their main features).

citizens, as in the Jeffersonian image, will conclude that they have outgrown their constitutional coat[67] – is something that remains to be seen.

[67] Thomas Jefferson (1930), "Letter to Samuel Kercheval [1816]", in Lester J. Cappon (ed.) (1988), *The Adams–Jefferson Letters: The Complete Correspondence between Thomas Jefferson and Abigail and John Adams* (Chapel Hill, NC: University of North Carolina Press), cited in Elkins, Ginsburg and Melton (n 62), at 16, 25 ("When a society has grown out of sync with its constitutional arrangements, pressure to renegotiate may become severe. Jefferson's metaphor of a grown man wearing his boyhood coat is apt here: when a constitution no longer fits its polity, it is altogether appropriate that the constitution be shed, lest it stunt the growth of the nation inside it.").