

The Rule-of-Law Crisis as a Testing Ground for Latin American Constitutionalism

A View from Mexico under López Obrador

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I Introduction

Recent debates on public law have been analyzing developments that were difficult to imagine two decades ago, when democratic constitutionalism was expanding and reigned undisputed at the level of normative ideals. As the literature has underscored, the world has been a pasture for leaders that engage in anti-pluralist, polarizing, illiberal politics in recent years. On the basis of often massive electoral victories, populist politicians deploy policies that are against migration, globalization, environmental sustainability, and equality. They pose a distinctive challenge to democracy because, far from denouncing democratic rule, they claim to represent a more perfect instantiation of it. They pose a distinctive challenge to constitutionalism because, in contrast to the authoritarian leaders of the past, they do not set aside constitutions but rather use – and abuse – them, gradually emptying them of their substance. They pose a distinctive challenge to the rule of law because they extensively draw on legal means to advance their policies. They practice government *per lege* in an effort to mask performances ever more distant from government *sub lege*.

Latin America partakes in these familiar trends challenging the rule of law. We find paradigmatic examples in Brazil, El Salvador, and Mexico. In Brazil, Jair Bolsonaro was elected on an “anti-politics” platform that

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openly advocated hatred against indigenous populations, Afro-Brazilians, and civil society organizations.¹ His government brought together military officers, neoliberal tycoons, and religious activists; despite scarce support for his policies in Congress and significant judicial drawbacks, he partly advanced his agenda.² Mimicking Donald Trump, Bolsonaro spent months aggressively attacking the electoral authorities, proclaiming that he would not accept the results of the November 2022 election (which he lost), and urging the army and his supporters to resist the results – something they actually did, blocking the roads in many parts of the country and mounting a physical assault on Congress and the Supreme Court.³

In El Salvador, Nayib Bukele similarly gained office by portraying himself as the alternative to traditional corrupt political parties, using new styles of political communication and promising to meet effectively the needs of the population.⁴ His administration has been marked by gross abuse of the state of exception, nullification of presidential term limits, destruction of judicial independence, and plain irrationality – including its decision to make Bitcoin legal tender and undertake investments in this cryptocurrency that have been ruinous for the country.⁵

In Mexico, Andrés Manuel López Obrador (popularly known as AMLO) ran on a leftist platform, only to deploy, once in office, policies contrary to progressivism: militarization, anti-migration, efforts to control the judiciary and eliminate independent agencies, defunding of public services, strict fiscal policy, and daily broadcast attacks on all

¹ Pedro Henrique Leal, *Bolsonaro and the Brazilian far right*, OPEN DEMOCRACY (Apr. 24, 2017), www.opendemocracy.net/en/democraciaabierta/bolsonaro-and-brazilian-far-right/.

² Suely Mara Vaz Guimaraes de Araujo, *Environmental Policy in the Bolsonaro Government: The Response of Environmentalists on the Legislative Arena*, 14 BRAZILIAN POL. SCI. REV. (2020); Carolina Moehlecke, *Businessmen Support Amidst the Turmoil: The Second Year of Bolsonaro's Presidency in Brazil*, 41 REV. CIENC. POLÍT. (SANTIAGO) 239 (2021); BERTELSMANN STIFTUNG, BTI 2022 COUNTRY REPORT: BRAZIL (2022), <https://tinyurl.com/446vv3b2>.

³ Diego Werneck Arguelhes, *Weak, but (Very) Dangerous: The Bolsonaro Paradox*, VERFASSUNGSBLOG (July 22, 2022), <https://verfassungsblog.de/weak-but-very-dangerous/>.

⁴ Ricardo Roque Baldovinos, *Nayib Bukele: Populismo e implosión democrática en El Salvador*, 18 ANDAMIOS 233 (2021), www.scielo.org.mx/pdf/anda/v18n46/1870-0063-anda-18-46-233.pdf.

⁵ *El Salvador: President Bukele Engulfs the Country in a Human Rights Crisis After Three Years in Government*, AMNESTY INT'L (June 2, 2022), <https://tinyurl.com/mry6cy7f>; *El Salvador: State of Emergency Has Created a Perfect Storm of Human Rights Violations*, AMNESTY INT'L (Apr. 25, 2022), <https://tinyurl.com/365sxn2a>.

sectors of society, including feminists, academics, scientists, the press, and civil society organizations.⁶ His policies are far from not only progressive liberal democratic politics but also left-wing populism as practiced in the past in Latin America by leaders such as Juan Domingo Perón or Getulio Vargas. Although authoritarian, such populism was state-friendly and inclusive of industrial workers and popular masses, unlike the state-shrinking drive and almost exclusive reliance on cash transfers (as opposed to structural redistribution) that marked López Obrador's policies.⁷

A focus on Latin America, however, invites us to unsettle and refine prevailing narratives of constitutional retrogression. In Latin America, many of the current trends are not unprecedented. The region has long dealt with challenges to the “constitutional trinity” of human rights, democracy, and the rule of law,⁸ including problems that derive not from direct violations but from abuse and covert undermining of these goals. Sure, these problems were until recently framed as temporary problems, to be overcome through the process of progressive consolidation of democracy – a linear, happy-ending frame – whereas now, in parallel to challenges elsewhere, they are portrayed as chapters in a narrative of retrogression running in the opposite direction. Nonetheless, as a result of Latin America's long-standing familiarity with these challenges, regional constitutions include a wealth of innovations intended to counter them. While countries that perceive themselves as mature democracies are wondering what sort of reforms could help contain or reverse current developments, in Latin America those reforms have already been attempted, and the relevant contemporary agenda is therefore to inquire what has worked, and what has not, and why.

⁶ CARLOS ELIZONDO MAYER-SERRA, *Y MI PALABRA ES LA LEY: AMLO EN PALACIO NACIONAL* [And my word is the law: AMLO at National Palace] 87–169 (2021).

⁷ On Latin American left-wing populism, see Alejandro Rodiles, *Is There a Populist International Law (in Latin America)?*, 49 NETH. Y.B. INT'L L. 69 (2018); CARLOS DE LA TORRE & CYNTHIA ARNSEN, *LATIN AMERICAN POPULISM IN THE TWENTY-FIRST CENTURY* (2013); Juan F. González Bertomeu & María Paula Saffon, *The Mix of Latin American Populist Constitutionalism*, 16 L. ETHICS HUM. RTS. 137 (2022). On López Obrador's neoliberalism, see Rosa Albina Garavito Elías, *El continuismo neoliberal de AMLO* [AMLO's neoliberal continuity], PROCESO (Mar. 5, 2022), <https://tinyurl.com/yc3c3bsc>; Roger Bartra, *López Obrador es un populista de derecha de manual* [López Obrador is a textbook right-wing populist], EL PAÍS (Mar. 28, 2021), <https://tinyurl.com/mrw645nt>.

⁸ Mattias Kumm, Anthony Lang, James Tully & Antje Wiener, *How Large Is the World of Global Constitutionalism?* 3 GLOB. CONST. 1 (2014).

This chapter's aim is to introduce and further invite assessments of whether the institutional solutions typically embraced by contemporary Latin American constitutions make a difference in fighting contemporary patterns of rule-of-law violations and what sort of difference they make.

The chapter advances the preliminary hypothesis that Latin American last-wave constitutions make a positive difference. Many features of constitutional design are arguably helping to sustain democracy and the rule of law in the region in times of authoritarian, neopopulist onslaught, setting the ground for the middle-term reinvigoration of democracies and rule-of-law guarantees. The analysis suggests, however, that these features help fight erosion in a relatively ineffective way because most of them are reactive, *ex post* defenses, and overcharge the judiciary. A more effective, systemic prevention of rule-of-law erosion would require the design or reinforcement of preemptive solutions, both in the domain of rights and in the domain of the organization of powers.⁹

There are grounds for confirming this hypothesis in various countries – such as Brazil, Ecuador, Colombia, or Bolivia – where periods of hyper-presidential rule have been reversed. The focus of this chapter, however, will be exclusively on Mexico, in order to more fully ground the analysis. Among the many patterns of rule-of-law undermining currently underway, this chapter concentrates on two episodes and the reactions to them on the basis of Mexico's Constitution—the onslaught against the National Electoral Institute as the arbiter of electoral fairness and the enhancement of the military's role in society, particularly in relation to public security and the economy.

In pursuing this analysis, the chapter first recalls historic trends with regard to democracy and the rule of law in Latin America. Second, it provides an overview of the standard institutional tools contained in Latin American constitutions that can be put at the service of the rule of law and other normative ideals. Third, it describes rule-of-law undermining patterns that illustrate the current situation in Mexico and explores how the Constitution is used to resist them. Throughout, the chapter draws inspiration from Shaffer and Sandholtz's five-dimensional conception of the rule of law, which assesses whether (1) power is *ex ante*

⁹ For an interesting survey of different mechanisms (including elections, separation of powers, constitutional rights, and administrative law) for the control of executive policymaking in Latin America, and an argument about their insufficiency, see Susan Rose-Ackerman & Edgar Andrés Melgar, *Hyper-Presidential Administration: Executive Policymaking in Latin America*, 64 ARIZ. L. REV. 1097 (2022).

subject to limits and accountability mechanisms; (2) individuals have a degree of predictability as to how power is exercised; (3) individuals can question and respond to the exercise of power; (4) authorities engage in reason-giving; and (5) there is proportionality in a set of distinct state responses.¹⁰ These dimensions provide a background grammar for assessing current challenges and the strengths and weaknesses of available constitutional responses.

II The Long Quest for the Rule of Law in Latin America

In the countries that experienced the “third wave of democratization” – those in Latin America and Central and Eastern Europe – constitutional democracy has a contorted history. The first Latin American constitutions were passed in the early years of the nineteenth century, after independence revolutions similar to those that had taken place shortly before in the United States and France. As Roberto Gargarella has observed, these first regional constitutions alternate or combine designs that embody three distinct understandings of individual autonomy and collective self-rule – liberal, conservative, and radical.¹¹ The second half of the nineteenth century saw the stabilization of a “constitutionalism of fusion” based on a long-lasting liberal-conservative pact. This pact supported checks and balances, but it tilted in favor of executive power; federal states with very strong centers; religious tolerance, though without depriving the Catholic Church of its privileges; and bills of individual rights, without any social precommitments, at a time of increasing social unrest.¹²

While for some time constitutions embraced French-inspired systems of political review of legislation, in the second half of the nineteenth century most countries established systems of decentralized judicial review allowing for the nonapplication of statutes in individual cases – with additions, like the *amparo* writ in Mexico or certain modalities of abstract review in Colombia and Venezuela. The hybrid legal traditions

¹⁰ See Chapter 1.

¹¹ ROBERTO GARGARELLA, *THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS, 1770–1860* (2010); ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM 1810–2010: THE ENGINE ROOM OF THE CONSTITUTION 1–20* (2014) [hereinafter GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM*].

¹² GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM*, *supra* note 11, at 20–43. Constitutions representative of this period include those of Argentina (1853), México (1857), Peru (1860), Uruguay (1830), Colombia (1886), and Paraguay (1870).

of Latin America thus progressively developed, with bodies of civil, criminal, commercial, and procedural law codified and applied within structures typical of the civil law tradition, and constitutions featuring presidentialism, federalism, and decentralized review, much in the style of the United States.¹³

However, as in other countries, constitutions had long been operating more as political documents than as legally enforceable ones. The historical dockets of Latin American supreme courts contained some important constitutional cases, but law enforcement consisted for the most part in enforcing codified legislation. Constitutional rule was seriously compromised in most countries through abuse in the form of emergency states, civil wars, and military coups.¹⁴ As reflected in popular sayings, academic literature, and literary works, overt or covert noncompliance with the law has been widespread and often normalized in Latin America.¹⁵ As García Villegas remarks, for some, these attitudes can be ultimately traced back to colonial times, during which the formula *se acata pero no se cumple* (complied with but not fulfilled) served as a means to adapt the law that came from the Iberian peninsula to the very different conditions of the colonies; others associate it with the influence of iusnaturalism, which makes the validity of the law conditional on its moral weight – an attitude similar to the perspective of those who find no reason to obey the law under conditions of gross socioeconomic injustice, where the state is authoritarian or itself disobeys the law.¹⁶ Constitutions and laws were, therefore, not irrelevant, but existed in a medium where flexibility and negotiation were common, in constant interaction with rules of other sorts.

In the twentieth century, a diversified political and constitutional setting coexisted with widespread ambivalence about the cause of liberal democracy.¹⁷ As Javier Couso has explained, until the decades of the

¹³ Francisca Pou Giménez, *Hybridity and Constitutional Taxonomy in Latin America*, 16 L. & ETHICS HUM. RTS. 245 (2022).

¹⁴ Between 1949 and 1991, Colombia was under a state of exception for more than thirty years. Between 1970 and 1991, it lasted for 206 months (equivalent to 17 years, or 82 percent of the time). MAURICIO GARCÍA VILLEGAS, *NORMAS DE PAPEL: LA CULTURA DEL INCUMPLIMIENTO DE REGLAS* [Paper rules: The culture of normative non-compliance] 227–28 (2009). On the abuse of emergency powers in Mexico, see JOSÉ ANTONIO AGUILAR RIVERA, *EL MANTO LIBERAL: LOS PODERES DE EMERGENCIA EN MÉXICO, 1821–1876* (2001).

¹⁵ VILLEGAS, *supra* note 14, at 15–35.

¹⁶ *Id.* at 283–302.

¹⁷ GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM*, *supra* note 11, at 105–31, posits that between 1930 and 1980 Latin American countries explored five different “exit doors” to the social question that dominated the zeitgeist: the authoritarian,

1970s and 1980s, both the Right and the Left in Latin America held constitutional democracy in considerable disdain.¹⁸ For the Left, highly influenced by Marxism and the Cuban Revolution, little was to be gained from the establishment of liberal constitutions and political democracy unaccompanied by economic transformation:¹⁹ constitutional limits on democratically elected governments – such as the right to property – were benefits for the conservatives.²⁰ For the latter, in turn, “order and progress,” and a concern for the preservation of public and national security, were always paramount, which often translated into support for military coups and strong presidents.²¹

III Contemporary Latin American Constitutionalism and the Exercise of Power

Everything changed in the 1980s and 1990s. Couso remarks that, at that time, both the Left and the Right changed their views on liberal democracy and the rule of law. In the case of the Left, the atrocities suffered at the hands of the military dictatorships led to an appreciation of legal institutions such as habeas corpus and due process guarantees.²² In the case of the Right, free-market ideology was important; from the 1980s onward, the idea that the rule of law, well-defined property rights, judicial independence, and effective state apparatuses were indispensable for economic growth became central to Latin American conservatism.²³

In this environment, emerging from different circumstances but all in need of relegitimation, the countries of the region underwent a wave of

endorsed by “order and progress” regimes, military and civil dictatorships, and hegemonic party regimes; the reformist, based on the introduction of social rights in the constitution and the moderation of presidentialism (formulas that can be found in the constitutions of Bolivia (1938), Cuba (1940), Guatemala (1945), Costa Rica (1949), Uruguay (1942), and Brazil (1946)); the populist, practiced by Perón and Vargas (combining anti-communism, anti-liberalism, and authoritarianism with social commitment); the exclusionary democratic pact exit, practiced in Colombia and Venezuela when the Left and the Right accorded alternations in power; and the socialist, assayed in Cuba, Nicaragua, and, briefly, in Chile.

¹⁸ Javier Couso, *Los desafíos de la democracia constitucional en América Latina: Entre la tentación populista y la utopía neoconstitucional* [The challenges of constitutional democracy in Latin America: Between the populist temptation and the neoconstitutional utopia], 6 ANUARIO DE DERECHOS HUMANOS 33 (2010).

¹⁹ *Id.*

²⁰ *Id.* at 35.

²¹ *Id.*

²² *Id.* at 38.

²³ *Id.* at 39.

political transformation, regularly accompanied by the making of new constitutions (Brazil in 1988, Colombia in 1991, Paraguay in 1992, Peru in 1993, Argentina in 1994, Venezuela in 1999, Bolivia in 1994 and 2009, Ecuador in 1998 and 2008) or the reform of existing ones (Costa Rica in 1989, and Mexico on many occasions over the last three decades).

The new and reformed Latin American constitutions have a significant collection of common traits and generally evince a commitment to organize the exercise of power within new parameters. While commentators have pointed out that the degree of innovation in the domain of power structures is smaller than what we find in declarations of rights – to the detriment of the underlying transformative project – historical designs have not survived untouched.²⁴

A first area of (modest) innovation implicating power structures is the regulation of the relations between the executive and legislative branches: all countries retain a presidential system of government, but adjustments have been made to reinforce the legislative branch, and many executive attributions have been transferred to independent agencies and fourth-branch institutions.²⁵ Moreover, constitutions introduce mechanisms of direct or participatory democracy (popular consultation, presidential recall, popular legislative initiative, and sometimes participatory budgeting).²⁶ A second area where more robust changes have occurred is the design of the judiciary, which now enjoys a system of self-government under Judiciary Councils; a broad menu of responsibilities that diversifies citizens' channels for accessing justice; and, in some countries, an architecture that features several apex courts, including electoral courts.²⁷ The granting of constitutional status to international human rights, moreover, gives the doctrines of the Inter-American Court

²⁴ See GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM*, *supra* note 11, 148–71; see also Roberto Gargarella, *Una maquinaria exhausta: Constitucionalismo y alienación legal en América Latina* [Exhausted Machinery: Constitutionalism and legal alienation in Latin America], 33 *ISONOMÍA* 7 (2010).

²⁵ See, e.g., Eric Magar, *Los contados cambios al equilibrio de poderes* [The few changes to the equilibrium of powers], in *REFORMAR SIN MAYORÍAS* [Amending without majorities] (M.A. Casar & Ignacio Marván eds., 2012); Ana María Bejarano & Renata Segura, *The Difference Power Diffusion Makes: Explaining Divergent Outcomes in Colombia (1990–1991) and Venezuela (1998–1999)*, in *REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES* (Gabriel Negretto ed., 2020).

²⁶ For a mostly skeptical view, see Tom Ginsburg, “The Economy, Stupid”: Notes on a Continuing Conversation, 49 *REVISTA DERECHO DEL ESTADO* 15 (2021).

²⁷ Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 *COMP. POL. STUD.* 189 (2005); Francisca Pou Giménez, *Supreme and Constitutional Courts: Directions in Constitutional Justice*, in *HANDBOOK OF LAW AND*

of Human Rights (IACtHR) a permanent role in day-to-day constitutional dynamics within Latin American countries, implicating rule-of-law practices.

Innovation is even greater when it comes to fundamental rights. In his portrayal of last-wave regional constitutions, Rodrigo Uprimny identifies ten major changes: redefinition of national unity, replacing traditional homogenization drives with recognition of diversity and the foundational status of indigenous peoples; elimination of the residues of religious establishment and guarantee of religious freedom; protection of disadvantaged and discriminated groups, including indigenous and black communities, which are often granted special rights or jurisdiction; generous recognition of rights, including social rights, and new categories of rights-holders, like nature, groups, or communities; great openness to international human rights law, which often operates as a block in conjunction with the constitution; transformation of the system of legal sources, resulting in statutory law now coexisting with other sources of normativity; strong commitment to equality, including affirmative action; introduction of umbrella clauses that synthesize the foundations of the constitutional project, like the “Social and Democratic State” clause or varieties that go beyond European postwar models; inclusion of principles and tools that evince deep concern for the efficacy of rights; and references to the economy, even if heterogenous and irreducible to a single message.²⁸

IV Undermining of the Rule of Law in Contemporary Mexico

The fact that democracy has for three decades remained the only road to political and legal authority in Latin America is in itself an immense, historic watershed.²⁹ In general, civil society has been revitalized, there is widespread public recognition of social and cultural pluralism, and the constitutionalism of rights has given the law a centrality it had never enjoyed before in the region.³⁰ There has been an abundance of developments around new vindications (social rights, equality, environmental,

SOCIETY IN LATIN AMERICA (Rachel Sieder, Karina Ansolabehere & Tatiana Alfonso eds., 2019).

²⁸ Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, in *LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP* 111–17 (César Rodríguez Garavito ed., 2015).

²⁹ Couso, *supra* note 18.

³⁰ See *HANDBOOK OF LAW AND SOCIETY IN LATIN AMERICA*, *supra* note 27.

and indigenous rights), which have supported new forms of adjudication, including structural rulings, innovative remedial practices, and continuous interaction between national courts and the IACtHR.³¹ Political dynamics have embraced a wider assortment of legitimate social claims, often outside the frame of traditional party politics.³²

However, numerous problems remain. In recent times, the persistence of unacceptable levels of inequality,³³ public and private violence,³⁴ inappropriate coverage of basic needs,³⁵ and the ineffectiveness and corruption of many institutions have eroded the status that constitutional democracy and the rule of law had gained in the region.³⁶ New political trends have developed in response. The political projects of presidents Rafael Correa in Ecuador (2007–17) and Evo Morales in Bolivia (2006–19) had an egalitarian thrust along with the strong personalism that dominated their administrations. The political projects of presidents Bolsonaro in Brazil and Nayib Bukele in El Salvador, by contrast, cater to the worst instincts of electorates that are now prepared to support an anti-politics style and policies that sacrifice liberties and the rule of law for the benefit of security as an act of revenge against the so-called traditional political class.

What these projects all have in common is the expansion of presidential powers, and the consequent distaste for constitutionalism understood as the ideal of limited government and protection of the rule of law.

³¹ See *HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA* (Conrado Hübner-Mendes, Roberto Gargarella & Sebastián Guidi eds. 2022).

³² See generally DIANA KAPISZEWSKI, STEVEN LEVITSKY & DEBORAH YASHAR, *THE INCLUSIONARY TURN IN LATIN AMERICAN DEMOCRACIES* (2021).

³³ See MATÍAS BUSO & JULIÁN MESSINA, *THE INEQUALITY CRISIS: LATIN AMERICA AND THE CARIBBEAN AT THE CROSSROADS* (2020).

³⁴ Press Release, CEPAL, Al menos 4.473 mujeres fueron víctimas de feminicidio en América Latina y el Caribe en 2021 [At least 4,473 women were victims of femicide in Latin America and the Caribbean in 2021] (Nov. 24, 2020), <https://tinyurl.com/2tdxxmdj>; Editorial, *Violencia en Latinoamérica*, EL PAÍS (Apr. 9, 2023), <https://elpais.com/opinion/2023-04-10/violencia-en-latinoamerica.html>.

³⁵ Press Release, CEPAL, CEPAL insta a fomentar las inversiones en servicios hídricos para mejorar el bienestar, la calidad de vida y reactivar la economía de la región [CEPAL invites investment in hydric services to improve well-being and quality of life, and to reactivate regional economy] (Feb. 1, 2023), <https://tinyurl.com/h2h8ej89>; CEPAL, *Panorama Social de América Latina y el Caribe* (2022), <https://tinyurl.com/4cnxy882>.

³⁶ Javier Couso, *Las democracias liberales y el nuevo constitucionalismo latinoamericano* [Liberal democracies and new radical Latin American constitutionalism], in *DERECHOS HUMANOS: POSIBILIDADES TEÓRICAS Y DESAFÍOS PRÁCTICOS* 196, 197 (2014); see also Javier Couso, *A Tale of Two Cities*, in *HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA*, *supra* note 31.

While they do not reject the constitution *per se*, since upholding a permanent electoral style is crucial to them, they relativize the division of powers, the idea that the rulers must strictly abide by the rules that define the contours of their powers, and the idea that government must give appropriate reasons for actions – all of which are central to the rule of law. Because of their style of governance, which pits groups of people against each other, these administrations erode respect for pluralism and civil liberties. Because of their personalistic quest for concentrating power, they undermine the rule of law.

In what follows, this chapter focuses on some of the developments underway in Mexico, which provide a paradigmatic illustration of such neo-authoritarian dynamics. Mexico has traced a singular path of constitutional evolution. It transitioned to democracy while maintaining its 1917 Constitution, which has nonetheless undergone more than 800 amendments, especially from the 1990s onward. While the Mexican patterns of accelerated reform pose important problems, they have also brought the country in line with the common features of contemporary constitutionalism in the region.³⁷ Thus, Mexico has a generous declaration of rights, which includes international human rights and enforceable social rights; a sophisticated model of division of powers, with an assortment of fourth-branch institutions; emphatic constitutional recognition of indigenous nations and a model of moderate legal pluralism; channels of participatory democracy; and a reinforced judicial branch, even if the traditional *amparo* complaint procedure is hardly sufficient in ensuring equal access to justice for all.

Within this framework, Mexico has held indisputably reliable elections.³⁸ Yet, important wider problems persist. They include massive deadly violence, which, following state responses to drug trafficking, has increased dramatically since the presidency of Felipe Calderón, who launched a “war against drugs” at incalculable human, political, and legal cost – a policy that has been continued, with less energy, by his successors.³⁹ Other problems include a problematic Gini coefficient; a vitiated political class; very weak provision of public services; and

³⁷ See Francisca Pou Giménez, *The Constitution of Mexico*, in *HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA*, *supra* note 31.

³⁸ JOSÉ WOLDENBERG, *HISTORIA MÍNIMA DE LA TRANSICIÓN DEMOCRÁTICA EN MÉXICO* [Minimal history of the democratic transition in Mexico] (2012).

³⁹ Nina Lakhani & Erubiel Tirado, *Mexico's war on drugs. What has it achieved and how is the US involved?*, *THE GUARDIAN* (Dec. 8, 2016), www.theguardian.com/news/2016/dec/08/mexico-war-on-drugs-cost-achievements-us-billions.

patterns of judicialization that, despite being progressive, do not benefit the majority of the population.

Against this background, in the 2018 election Mexicans gave the presidential seat to Andrés Manuel López Obrador, an old-style politician who was once a member of the Partido Revolucionario Institucional (PRI) and held office as mayor of Mexico City at the turn of the century. He ran twice for the presidency (in 2006 and 2012) under the party that he founded after leaving the PRI (named MORENA). He finally won by a massive vote in 2018, supported by millions who, fed up with the frustrations of standard politics, gave their confidence to the only candidate that seemed to promise real change. In the campaign, he famously promised “*abrazos, no balazos*” (hugs, not bullets), which sounded like a commitment to find a durable solution to the problem of violence in the country.⁴⁰

On gaining office, however, López Obrador took a completely different route. He has applied a strictly populist rulebook and has deployed a large number of reforms that are at odds with progressive politics. His policies and daily gestures are problematic for fundamental rights and respect for the rule of law.

President López Obrador’s distaste for pluralism is visible in his continuous criticisms of civil society organizations, scholars, scientists, journalists, lawyers, judges, feminists, and even the entire middle class (whom he disparages as selfish and “aspirationist”).⁴¹ His daily morning shows (*las mañaneras*) are an occasion to name and shame an unending succession of individuals and groups. The promotion of an insurmountable divide between “them” and “us” – between “our enemies,” “the conservatives,” “the corrupts,” on the one hand, and “the people,” on the other – is explicit and repeated incessantly every day.⁴² These attacks

⁴⁰ José Antonio Belmont, *Con “abrazos, no balazos,” AMLO promete reducir violencia* [With “hugs, not bullets,” AMLO promises a reduction of violence], MILENIO (Apr. 12, 2018), www.milenio.com/politica/abrazos-balazos-amlo-promete-reducir-violencia;

Jannet López Ponce, *En mi gobierno habrá abrazos, no balazos: AMLO* [In my government there will be hugs, not bullets], MILENIO (July 7, 2018), www.milenio.com/politica/en-mi-gobierno-habra-abrazos-no-balazos-amlo; Maria Abi-Habib & Oscar López, AMLO prometió “abrazos no balazos,” pero la violencia continúa [AMLO promised “hugs, not bullets,” but violence persists], N.Y. Times (Aug. 31, 2022), www.nytimes.com/es/2022/08/31/espanol/mexico-violencia-amlo.html.

⁴¹ Jorge Monroy, *López Obrador reitera que la clase media es de “aspiracionistas sin escrúpulos morales”* [López Obrador reiterates that the middle class is “aspirationist without moral qualms”], EL ECONOMISTA (June 14, 2021), <https://tinyurl.com/mr3enj5f>.

⁴² Lidia Arista, *Mañaneras: cuatro años de ataques, agenda y propaganda en el gobierno de AMLO* [The morning show: Four years of attacks, agenda, and propaganda in AMLO’s

have not remained at the level of words but have been accompanied by police reform. The public research centers that were not legally autonomous, for instance, have lost their main sources of funding and have seen partisan individuals appointed as directors.⁴³ The National Research Council has suppressed several scholarship programs,⁴⁴ cut research stimulus to private university researchers, reformed applicable regulations several times, and denounced scientists on criminal grounds merely for being critical.⁴⁵ Civil society organizations, for their part, have endured a reform in their accounting duties that makes it extremely difficult for them to receive donations and other sources of funding on which they are heavily dependent.⁴⁶

In addition, AMLO has pursued a policy of radically shrinking state capacities, with serious consequences in several domains, most notably health and education. Under the banner of austerity, the president has cut back on the funding of research and science, educational programs, health and daycare, and ordinary expenses throughout the entire administration, leaving many departments without the means to fulfill their basic responsibilities and generally nurturing state arbitrariness.⁴⁷ In the

government], *EXPANSIÓN POLÍTICA* (Dec. 23, 2022), <https://politica.expansion.mx/amlo-mananeras-cuantas-van-cuatro-anos>.

⁴³ Nelly Toche, *Conacyt sufre recorte en el PPEF 2023* [Conacyt suffers cuts in the 2023 federal budget], *EL ECONOMISTA* (Sept. 9, 2022), <https://tinyurl.com/5n77f6u2>; Juan Ortiz, *Confirman irregularidades en designación de Romero Tellaeche al frente del CIDE* [Irregularities in the appointment of Romero Tellaeche at CIDE are confirmed], *LA SILLA ROTA* (Dec. 2, 2023), <https://tinyurl.com/47zswa9z>.

⁴⁴ *Comunidad científica pide a Conacyt no eliminar becas de posgrado en el extranjero* [Scientific community asks Conacyt not to eliminate scholarships for graduate programs abroad], *EL UNIVERSAL* (Mar. 4, 2021), <https://tinyurl.com/udatdnum>; *Los planes de López Obrador para el Conacyt: Austeridad y menos poder para las empresas* [López Obrador's plans for Conacyt: Austerity and less power], *EL PAÍS* (Dec. 16, 2022), <https://tinyurl.com/muawbyn2>.

⁴⁵ Emilia López Pérez, *CIDE entrará en "economía de guerra" por recorte del 75% de su gasto operativo* [CIDE will enter war economy mode after 75% cut in its operative funding], *EL FINANCIERO* (May 27, 2020), <https://tinyurl.com/454jshxu>; Dalila Sarabia, *Comisión de Ética del CIDE resuelve que Romero Tellaeche sí plagió, pero no alcanzan votos para sancionarlo* [CIDE's Ethics Commission concludes Romero Tellaeche is a plagiarist, but votes are insufficient to impose a sanction on him], *ANIMAL POLÍTICO* (Sept. 7, 2022), www.animalpolitico.com/sociedad/romero-tellaeche-cide-plagio-votos.

⁴⁶ Unidad de Investigación Aplicada, *Gobierno federal amenaza el funcionamiento de sociedad civil* [Federal government places the operation of civil society under threat], *MEXICANOS CONTRA LA CORRUPCIÓN Y LA IMPUNIDAD* (Oct. 18, 2021), <https://contralacorrupcion.mx/gobierno-federal-amenaza-funcionamiento-de-sociedad-civil>.

⁴⁷ Montserrat Antúnez Estrada, *Las estancias infantiles cumplen un año sin subsidio: Unas cierran y otras suben las colegiaturas* [Daycare without subsidies for one year: Some units close and other raise their fees], *SIN EMBARGO* (Mar. 1, 2020), www.sinembargo.mx/01-

domain of health, the creation of the INSABI (*Instituto de Salud para el Bienestar*) to replace the Seguro Popular (a program for which people outside the other social security subsystems could self-enroll) did not succeed, leaving millions without coverage.⁴⁸ The president decided to rescind existing contracts with pharmaceutical suppliers, yet the inability to secure new ones left the health system in a state of chronic shortage of medicines.⁴⁹ The conflict this caused with the parents of children suffering from cancer, who were left without medicines, is only one visible manifestation of the seriousness of the situation.⁵⁰ In the field of education, the devastating effects of the pandemics were not addressed, twenty-two programs have been suppressed,⁵¹ and the education secretary has been placed under the direction of two people with no expertise.⁵²

True, the president has raised the minimum salary and expanded cash transfer programs – approximately 30 percent of the population

03-2020/3739422; *Los recortes presupuestarios en México amenazan la salud y la igualdad de las mujeres* [Budgetary cuts in Mexico endanger women's health and equality], UNITED NATIONS (Oct. 16, 2020), <https://news.un.org/es/story/2020/10/1482492>.

⁴⁸ Three years later, in 2022, the government recognized the INSABI failure and announced people would start to be covered by IMSS-Bienestar. See Andrea Vega, *Arranca plan B del gobierno para dar atención en salud a población sin seguridad social, tras fracaso del Insabi* [Governmental Plan B to provide health services to uninsured population starts off, following Insabi's failure], ANIMAL POLÍTICO (Apr. 1, 2022), www.animalpolitico.com/salud/plan-b-salud-tras-fracaso-del-insabi.

⁴⁹ Eduardo Esquivel Ancona, *Gobierno de México cancela contrato con UNOPS para compra de medicamentos* [Mexican government cancels medicine provision contract with UNOPS], SDP NOTICIAS (Oct. 18, 2022), <https://tinyurl.com/24vrfm7h>; Beatriz Guillén, *El Gobierno mexicano inhabilita a la farmacéutica Pisa tras meses de tensión* [Mexican government disqualifies PISA Pharmaceuticals after three months of tension], EL PAÍS (Oct. 21, 2020), <https://tinyurl.com/muw8y2uu>.

⁵⁰ Fabiola Martínez, *Acusa AMLO a opositores de protestas de padres de niños con cáncer* [AMLO blames opponents for the protests of the parents of children with cancer], LA JORNADA (Nov. 11, 2021), <https://tinyurl.com/yc8k6wyy>.

⁵¹ Information from a study by Mexicanos Primero, unpublished document on file with the author. See also Felipe J. Hevia et al., *Estimation of the Fundamental Learning Loss and Learning Poverty Related to COVID-19 Pandemic in Mexico*, 88 INT'L J. EDUC. DEV. 102515 (2022).

⁵² Leticia Ramírez, titular de SEP, no sabe cómo un niño de segundo de primaria aprenderá matemáticas [Leticia Ramírez, education secretary, does not know how second-grade children will learn math] SDP NOTICIAS (Sept. 5, 2022), <https://tinyurl.com/mvdytjz9>; Arturo Contreras Camero, *Leticia Ramírez: De la "primavera magisterial" a la Secretaría de Educación Pública* [Leticia Ramírez: From the "teachers' spring" to public education secretariat], PIE DE PÁGINA (Aug. 16, 2022), <https://tinyurl.com/4bjnfv6y>; Marco Antonio Martínez, *Delfina Gómez en la SEP, sin logros y muchos pendientes: Experto* [Delfina Gómez at the public education secretariat: No achievements and many pending issues, expert says], LA SILLA ROTA (Aug. 9, 2022), <https://tinyurl.com/usv4d4c7>.

receive some kind of direct, nonconditional cash benefit.⁵³ Aside from these transfers, however, and the ever-growing sums assigned to the army,⁵⁴ an immense amount of public funds go to Pemex and other projects associated with fossil fuel (like the construction of a refinery in Dos Bocas and the acquisition of another one in Texas) and to flagship works of infrastructure like the Maya Train (traversing ecosystems of great environmental value) or the Felipe Ángeles Airport, not to mention the cancellation of the already half-built Texcoco Airport at a cost of close to USD 5,700 million.⁵⁵ Under his administration poverty has stabilized,⁵⁶ despite a context of relative economic normalcy: the country accumulates gains from nearshoring; the money transfers sent by the US Mexican diaspora have grown; and the currency has not depreciated, thanks to the orthodox monetary policy followed by the government.⁵⁷

⁵³ Stefano Pozzebon, *Aumenta el salario mínimo en México un 20% para 2023: ¿Cuánto será la cantidad y cuándo entra en vigor?* [Minimum salary 20% increase in Mexico for 2023: How much is it and when will it be effective?], CNN LATINOAMÉRICA (Jan. 4, 2023), <https://tinyurl.com/yzbjuu4f>; Luis Miguel González, *¿Por qué no cuadran las cifras de beneficiarios de programas sociales?* [Why do figures for social program recipients not square?], EL ECONOMISTA (Aug. 11, 2021), <https://tinyurl.com/2kxsevv7>; Dulce Soto, *Transferencias monetarias de AMLO aumentan, pero llegan menos a los más pobres* [AMLO money transfers increase but reach fewer of the poorest], EXPANSIÓN POLÍTICA (Feb. 16, 2023), <https://tinyurl.com/mrcw2fny>.

⁵⁴ Alfredo Fuentes, *Sedena gastó 49 mil mdp de más en dos años: MUCD* [Sedena overspends by 49,000 million pesos in two years], EL SOL DE MÉXICO (Oct. 1, 2022), <https://tinyurl.com/mu3pe3zs>.

⁵⁵ Agencia EFE, *Cancelar el aeropuerto de Texcoco en México costó 5.692 millones de dólares* [Cancellation of Texcoco Airport cost 5,692 dollars], SWI SWISSINFO.CH (May 1, 2021), <https://tinyurl.com/3zp9cj24>; Karol García, *ASF: Pemex gastó 2.6 veces lo programado para Dos Bocas* [Pemex overspent Dos Bocas budget by 2.6 times], EL ECONOMISTA (Feb. 20, 2023), <https://tinyurl.com/4cm962jh>; Emmanuel Carrillo, *Refinería de Dos Bocas lleva inversión de 233 mil mdp: AMLO* [Dos Bocas refinery absorbs 223,000 million pesos investment: AMLO], FORBES (Oct. 7, 2022), www.forbes.com.mx/refineria-de-dos-bocas-lleva-inversion-de-233-mil-mdp-amlo/; Karol García, *Pemex pagaría hasta 1,000 mdd más por Deer Park* [AMLO would pay up to 1,000 million pesos more for Deer Park], EL ECONOMISTA (Dec. 9, 2021), <https://tinyurl.com/4stx5nn9>.

⁵⁶ CONSEJO NACIONAL DE EVALUACIÓN DE LA POLÍTICA DE DESARROLLO SOCIAL, *INFORME DE EVALUACIÓN DE LA POLÍTICA DE DESARROLLO SOCIAL 2022* (Feb. 2023), www.coneval.org.mx/Evaluacion/Documents/Informes/IEPDS_2022_Presentacion.pdf (showing the proportion of the population below the poverty level has gone from 41.9 percent in 2018 to 43.9 percent in 2020; and levels of absolute poverty from 34.9 percent in 2018 to 35.4 percent in 2020).

⁵⁷ Orlando Delgado Selley, *Decisión monetaria* [Monetary decision], LA JORNADA (Feb. 16, 2023), www.jornada.com.mx/2023/02/16/opinion/020a1eco.

Overall, AMLO's challenges to the rule of law are numerous, as the following two sections illustrate. The president has repeatedly expressed a deep distaste for all things legal. He has portrayed the law as an instrument of the *ancien régime* and legal requirements as hurdles in the way of attaining the "Fourth Transformation of Mexico."⁵⁸ A painful, paradigmatic illustration of this approach to the law is the executive decree that declared public works of infrastructure (such as the construction of the Maya Train) to be "national security" issues, obliging all administrative units to issue the corresponding permits notwithstanding any statutory norm to the contrary.⁵⁹

An abundance of developments reveal tensions along the five dimensions that Shaffer and Sandholtz identify as defining a goal-oriented understanding of the rule of law. To illustrate some of them, this chapter focuses on two clusters of developments. The first is the frontal attack on the National Electoral Institute, the independent agency that remains the key guarantor of electoral regularity. The second is the militarization of state functions – first, public security, and later a much wider set of state responsibilities, including the provisions of public services and the construction of public works.

All of them reveal a willingness to eliminate checks and balances; a general disregard for the idea of reason-giving; a decline in the predictability of public action since many measures are processed speedily (with or without the intervention of a dominated legislature), often in open violation of legal requirements. As in other situations of autocratic legalism, the pattern is gradual, with the overall impact being greater than the sum of its parts. Intertwined with that pattern, however, is degree of legal contestation that has no precedent in Mexico. In the face of inaction on the part of the political opposition, many agents are

⁵⁸ Diego Badillo, *Para AMLO, el derecho es un estorbo: Juristas* [For AMLO law is an annoyance, say lawyers], *EL ECONOMISTA* (Dec. 1, 2020), <https://tinyurl.com/3ztck7wf>; *Que AMLO demerite la ley afecta al estado de derecho en México* [AMLO's downplaying of the law damages the rule of law in Mexico], *EL FINANCIERO* (May 29, 2022), <https://tinyurl.com/36u6mv7t>.

⁵⁹ Acuerdo por el que se instruye a las dependencias y entidades de la Administración Pública Federal a realizar acciones que se indican, en relación con los proyectos y obras del Gobierno de México considerados de interés público y seguridad nacional, así como prioritarios y estratégicos para el desarrollo nacional [Agreement instructing the agencies and entities of the Federal Public Administration to carry out the actions indicated in relation to the projects and works of the Government of Mexico considered of public interest and national security, as well as priority and strategic for national development] (Nov. 22, 2021), www.dof.gob.mx/nota_detalle.php?codigo=5635985&fecha=22/11/2021#gsc.tab=0.

using instruments and spaces that were unavailable in previous historical instantiations of rule-of-law disregard.

V The Quest against Electoral Reliability

The construction of a strong independent authority capable of organizing clean elections and the reform of the electoral system based on administrative rule of law was the keystone of the Mexican transition.⁶⁰ The country was not emerging from a military dictatorship and it had never formally abolished elections. However, under the political system progressively installed by the PRI, elections were rigged and won by the person designated by the president. The PRI was to a certain extent inclusive of various social groups and provided a system of elite rotation.⁶¹ It also provided peace and stability in a country that had endured significant turmoil during the nineteenth century.⁶² But it was not a democracy: there were formal elections, but no actual rule-of-law preconditions to ensure free voting and political competition.

When it ultimately became impossible to maintain the system without changes, several constitutional reforms introduced electoral competition and progressively built independent electoral authorities.⁶³ An institution called IFE (Instituto Federal Electoral) was created in 1990, together with parallel institutions at state level. In 1996, the IFE gained complete independence from the executive, and in 2013 a constitutional reform renamed the institution INE (Instituto Nacional Electoral) and gave it more powers over the organization and monitoring of elections at state level. The institution soon established itself as one marked by professionalization (its employees are career officials) and a model of election organization and supervision that included extensive input from the citizenry and was grounded in administrative rule of law. Thus, the voting booths in Mexico are managed by citizens who are selected on the basis of their birth month, trained before the elections by the INE, and

⁶⁰ Tom Ginsburg defines the rule of law in the administration of elections as a key component of democracy. TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* 21 (2021).

⁶¹ See Philip Paolino, *The PRI's Position in Mexican Politics*, 16 *POLÍTICA Y GOBIERNO* 321, 348 (2009).

⁶² See Lucía Álvarez Mosso, "Estabilidad": *Un logro de la coalición priista* [Stability: An achievement of the Priistas coalition] (Review of ROGER D. HANSEN, *LA POLÍTICA DEL DESARROLLO MEXICANO*), 11 *PROBLEMAS DEL DESARROLLO* 163, 165 (1972).

⁶³ For an overview of the Mexican electoral transition to democracy, see WOLDENBERG, *supra* note 38.

who count the votes and make the results public before taking them personally to the INE offices. The INE General Council's members do not need to be lawyers.

The INE is a huge institution responsible for many tasks: it issues voter ID; it organizes the elections and trains the citizens who run the voting and do the counting; it reviews whether candidates satisfy the conditions of eligibility and monitors observance of legal requirements concerning access to and use of funding and access to mass media space and time during campaigns and precampaigns; and it supervises certain aspects of political party life outside electoral processes.

Despite winning 53.19 percent of the vote in an election that, by all accounts, was impeccable, AMLO soon leveled fierce criticism at the INE – initially, as part of a broader campaign against all independent agencies as well as the judiciary. The attacks on INE, however, continued to grow and, over time, reached astounding levels. (The 2006 election had been narrowly won by Felipe Calderón, and from that moment AMLO became disillusioned with the INE, despite the great credibility of the system and the political alternation in the presidency.) One of the more worrying episodes occurred in April 2021, when the INE, applying existing law, cancelled the candidacy of Félix Salgado Macedonio in the Guerrero gubernatorial election because he failed to report on his pre-campaign expenditures (paid in Mexico with public money).⁶⁴ Salgado then mounted a demonstration in front of the INE, which included the presentation of a huge coffin and the issuing of assassination threats against the INE president; threats were also made against INE counselors, whose home addresses Salgado urged his followers to locate. Salgado (who had also been denounced for several instances of sexual abuse) was the candidate AMLO wanted to win in Guerrero, and the president did not abandon him. He rather defended Salgado, saying that the INE should have imposed a fine but not prevented him from running.⁶⁵ In the end, MORENA selected the daughter of Salgado Macedonio as the candidate – and she won the election. The incident gave the impression that the president was happy to validate the most egregious attacks on

⁶⁴ See Ley General de Instituciones y Procedimientos Electorales [LGPE], as amended, art. 229, Diario Oficial de la Federación [DOF], May 5, 2014.

⁶⁵ Almudena Barragán, *López Obrador defiende a Salgado Macedonio frente al INE: “Sanciónenlo, pero no le quiten el derecho de participar”* [López Obrador defends Salgado Macedonio against INE: “Sanction him, but let him run”], EL PAÍS (Apr. 13, 2021), <https://tinyurl.com/2p9zpru9>.

institutions (and persons) if there were political gains in return, in violation of basic rule-of-law norms.

In November 2021, the MORENA-controlled Congress approved the budget for the year 2022, and it did not assign to INE the funds that it had precalculated. In particular, the INE was not given the funds necessary to organize the presidential recall consultation that the president had already scheduled for August 2022 to forecast his popular support. The INE then filed two constitutional claims before the Supreme Court: one to protect its counselors from incurring administrative or criminal liability if they organized the recall in disregard of legal parameters for lack of money to comply with them; and the other denouncing the unconstitutionality of the budgetary cut.⁶⁶ In February 3, 2022, the Supreme Court declared that the INE could and should organize the presidential recall as best it could with existing funds and the reduced budget passed by Congress,⁶⁷ and on June 1, 2022, it declared the budget cut to be invalid.⁶⁸

At the time, President López Obrador had already decided to submit the proposal of a constitutional amendment to change the existing architecture of the electoral system. The reform proposed five main changes: the transformation of INE into a National Institute of Consultations and Elections, headed by counselors elected by popular vote from candidates selected by Congress, the executive, and the Supreme Court; a reduction in the amount of public funds received by political parties; electronic voting; a reduction in the number of members of Congress, state legislatures, and municipal councils; and changes in the size of the electoral districts for the election of deputies by proportional representation.⁶⁹ While some of these

⁶⁶ Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Press Release No. 396/2021 (Dec. 22, 2021), www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6704.

⁶⁷ SCJN, Feb. 3, 2022, Controversia Constitucional 209/2021; see Jorge Monroy, *Avalan que INE organice consulta con los recursos que tiene* [Organization of consultation with the resources INE enjoys is authorized], *EL ECONOMISTA* (Feb. 3, 2022), <https://tinyurl.com/e3ypzesv>.

⁶⁸ SCJN, June 1, 2023, Controversia Constitucional 244/2021. The Court ordered the Chamber of Deputies to reanalyze the INE proposal for allocations in the 2022 budget and authorize or reject the resources asked for following a process of “reinforced motivation.” The Chamber, however, simply announced in the Official Gazette (DOF, October 4, 2022) that it was reiterating the same allocation of resources, without developing any “reinforced motivation.” See Jorge Monroy, *INE presenta queja ante la SCJN por recorte presupuestal en 2022* [INE complains before SCJN over 2022 budget cut], *EL ECONOMISTA* (Nov. 16, 2022), <https://tinyurl.com/5d4wv6bw>.

⁶⁹ Belén Zapata, *¿Cómo es la reforma electoral de México? ¿Qué propone y qué causa controversia?* [What is Mexico’s electoral reform like? What are the proposals and what

changes were reasonable and not particularly dangerous in rule-of-law terms, they were packaged with the first proposal, the risks of which unbalanced any other potential gains. The proposal to elect counselors by popular vote would have allowed the government to remove all existing counselors and bring ordinary party politics into an institution that should operate as a neutral electoral arbiter. It would have generated an “adverse selection” effect, in view of the trouble associated with the need to launch a political campaign to be an electoral counselor, after being included on a short list largely rigged by the executive (given its control of the legislative branch, and its unpredictable future influence on the Supreme Court).⁷⁰

In November 2022, this reform was discussed in Congress against a background of high political contestation. A popular demonstration in support of the INE, called by a heterogeneous assembly of civil society groups, took place on November 13, and its success surpassed everyone’s expectations. The streets of Mexico City around the Monument to the Revolution and Reform Avenue were filled by an organized throng of thousands of families and groups of citizens, and the same occurred in the main cities outside the capital.⁷¹ A few days before, the president had asked his followers to “allow” the demonstration, while qualifying those planning to attend as “racist” and “classist.”⁷² The day after the march, clearly upset, he summoned his followers to attend a “response” demonstration on November 27 “to celebrate the gains of four years of Transformation” – which also was a success.⁷³

The constitutional reform did not pass, however. Having lost the capacity to amend the constitution alone after the results of the intermediate 2021 election, MORENA was unable to secure the necessary

is controversial?], CNN LATINOAMÉRICA (Nov. 15, 2022), <https://tinyurl.com/5n6mh5b7>.

⁷⁰ Erika Hernández, *Los riesgos de la reforma electoral, según el INE* [The risks of the electoral reform, in INE’s opinion], REFORMA (Jan. 28, 2023), <https://tinyurl.com/5b4tmwkk>.

⁷¹ Ricardo Raphael, *La marcha a favor del INE y las razones de la retórica polarizante de AMLO* [The march in favor of INE and the reasons for AMLO’s polarizing rhetoric], WASH. POST (Nov. 16, 2022), <https://tinyurl.com/kzhjwa6h>.

⁷² AMLO pide a sus simpatizantes permitir marcha a favor del INE, aunque la descalifica [AMLO asks followers to permit the pro-INE march, but discredits it], ANIMAL POLÍTICO (Nov. 7, 2022), www.animalpolitico.com/politica/amlo-ine-marcha-provocaciones.

⁷³ Zedryk Raziel, *López Obrador encabezará una manifestación para mostrar el apoyo a su Gobierno tras la marcha contra su reforma electoral*, EL PAÍS (Nov. 16, 2022), <https://tinyurl.com/2hwk8szp>.

support by negotiating with the other political parties, which felt the pressure of the popular march.⁷⁴ A few days later, however, on December 13, 2022, with the holiday season about to start, the president made a surprising move and submitted to Congress the so-called Plan B electoral reform. This contained a proposal to amend six statutes (something MORENA could do by a simple majority vote). At its core, it involved a radical shrinking and weakening of INE as an institution, to the point of compromising its ability to organize and supervise elections under the rule of law.⁷⁵

Several parts of the project are perfectly acceptable, even to be welcomed, such as the overdue guarantee of the right for people in prison to vote, the regulation of online trials, the simplification of complaint procedures, the need to implement gender parity in elections for state governors, and the restructuring of the calendar for federal and state elections. Yet other proposals are sensitive, and some deeply troubling. In this last category are the elimination of the rule that had so far prevented individuals holding public office (and in receipt of a salary paid with public money) from engaging in political advocacy in electoral campaigns; the elimination of the INE administrative apparatus across the country, endangering electoral IDs and the training of citizens who serve on election day; the reorganization of the INE's internal units, with the immediate removal of the executive secretary, the dissolution of the trusts guaranteeing the salaries of INE employees (which would now depend on annual budgetary allocations); and the provision (tailored to "save" a future Salgado Macedonio) that being sanctioned by the INE for violating electoral law is no impediment to run for elections (only a criminal conviction is).

Plan B was published in two steps. After the publication of a first package, more than one hundred constitutional *controversias* were filed by municipalities, which maintained that their powers of self-organization

⁷⁴ Noticias del Congreso, *Desechan en San Lázaro reforma constitucional en materia electoral*, CANAL DEL CONGRESO (Dec. 6, 2022), <https://tinyurl.com/bdsyw5sd>.

⁷⁵ See JAVIER MARTÍN REYES & MARÍA MARVÁN LABORDE, *RADIOGRAFÍA DEL PLAN B: LA REFORMA ELECTORAL DE 2023 A EXAMEN* [Plan B: Electoral reform under scrutiny] (2023); see also Instituto Nacional Electoral, *Plan B de reforma electoral pone en riesgo derechos político-electorales de personas históricamente discriminadas* [Plan B of electoral reform endangers political rights of historically discriminated people], CENTRAL ELECTORAL (Feb. 8, 2023), <https://tinyurl.com/bddn75n7>; Samedi Aguirre, *Presupuesto del INE: Cuánto es para elecciones y cuánto más para los partidos* [INE budget: How much for elections and how much more for political parties], ANIMAL POLÍTICO (June 4, 2021), <https://tinyurl.com/2s49tj3c>.

were curtailed, and by actors, who argued that the reform affected electoral processes already underway, thus disregarding the prohibition on making amendments to electoral rules in the ninety days preceding an election.⁷⁶ Before the publication of the remaining package of reforms, civil society organizations summoned a new march in defense of the vote on February 26, 2023, with great success. This time, people gathered at the Zócalo, the tectonic power center in Mexico, and available estimates put the attendance in Mexico City and other cities across the country at approximately 700,000.⁷⁷

On March 4, 2023, however, the second package of Plan B was published. A few days later, the INE filed two *controversias* against the reform and two groups of Congress members filed *acciones de inconstitucionalidad*.⁷⁸ As the demonstrators in the February march made clear through their banners and chants, protection of democracy and the rule of law would depend on the Supreme Court.

AMLO has striven to undermine the Court using all means. He has taken advantage of the opportunity to appoint four justices, two of whom are unconditional supporters, while the other two have proven to be fairly independent. Yet, for a statute to be declared void in abstract review in Mexico, and disappear from the books, there must be a qualified majority of eight votes – a threshold difficult to pass in any scenario, but specially so in the current climate. Further, for four years the presidency of the Court was held by Arturo Zaldívar, who was quickly criticized for cultivating an excessive closeness to the government. Under his presidency, the Court delayed decisions in many politically sensitive cases.

In the electoral domain, however, the Court's decision-making is subject to time limits. And its performance as regards Plan B has been admirably solid, even in the face of all imaginable kinds of pressure. In admitting the cases, the Court thus precautionarily suspended the effects of the reforms,⁷⁹ to which MORENA “responded” the next day by filing

⁷⁶ Eduardo Murillo, *Admite SCJN 17 controversias contra primera fase de “Plan B”* [Supreme Court admits 17 *controversias* against first phase of “Plan B”], LA JORNADA (Mar. 9, 2023), <https://tinyurl.com/mtxtfrk8>.

⁷⁷ Alejandra Lisette, *Marcha INE: decenas de miles de mexicanos protestaron contra el Plan B de López Obrador* [Tens of thousands of Mexicans protest against López Obrador's Plan B], INFOBAE (Feb. 26, 2023), <https://tinyurl.com/yckazah7>.

⁷⁸ SCJN, *Acciones de Inconstitucionalidad* 29/2023, 30/2023, 31/2023, 37/2023, 38/2023, 43/2023, 47/2023.

⁷⁹ SCJN, Feb. 20, 2023, *Incidente de suspensión en la Acción de Inconstitucionalidad* 29/2023 y sus acumuladas 30/2023, 31/2023, 37/2023, 38/2023, 43/2023 y 47/2023. See also Instituto Nacional Electoral, *Suspende INE implementación de Reforma Electoral 2023*

a bill of constitutional amendment for the entire judiciary to be selected by popular vote.⁸⁰ And in May and June 2023, applying precedents developed and regularly enforced since 2005, the Court invalidated the two segments of Plan B for reasons everyone in Mexico had witnessed in the media: the flagrant disregard of the requirements safeguarding legislative procedure,⁸¹ without any need to assess the content of the statutes. This came as a relief to many, but the government again responded by redoubling its attacks on the judges.⁸²

VI The Militarization of Public Life and State Functions

From the 1940s and throughout the rest of the twentieth century, in contrast to the situation in other countries in the region, the Mexican army was securely subordinated to civil authorities. It was in this subordinated quality that the army was involved in the dark episodes of the “dirty war” of the 1970s.⁸³ Yet, during the gradual transition to democracy of the 1980s and 1990s, the military was generally held in high regard by the population – which would associate it with assistance during natural disasters, among other tasks of that sort.

The situation changed when Felipe Calderón won the presidency in 2006. Some two years later, although the matter had been mentioned during his campaign, Calderón decided to launch a “war against drugs” that put the army on the streets in several parts of the country without any legal basis for doing so. In December 2017, during the presidency of Enrique Peña Nieto, and partly responding to demands from the army

y operará con normatividad anterior [INE suspends the 2023 electoral reform and will operate under the previous regulation], CENTRAL ELECTORAL (Mar. 28, 2023), <https://tinyurl.com/yc2cy963>.

⁸⁰ Beatriz Guillén, *Morena propone modificar un artículo para que los jueces sean elegidos por voto popular* [Morena proposes modification of an article to have all judges elected by popular vote], EL PAÍS (Mar. 24, 2023), <https://tinyurl.com/59z7hxsx>.

⁸¹ Zewdryk Raziel, *El Supremo invalida la primera parte del Plan B de López Obrador* [Supreme invalidates first part of López Obrador’s Plan B], EL PAÍS (May 8, 2023), <https://tinyurl.com/4dwtxbvt>.

⁸² José Ramón Cossío, *Drama constitucional en tres actos: ¿Por qué culpar a otros de la propia arrogancia o impericia?* [Constitutional drama in three acts: Why blame others for one’s own arrogance or lack of skill?], EL PAÍS (June 27, 2023), <https://tinyurl.com/re26tmbz>.

⁸³ During the so-called Dirty War (extending from the 1960s until the 1990s), the Mexican army deployed irregular operations against individuals and guerilla groups in Guerrero, Oaxaca, Hidalgo, Morelia, Chiapas, and other states, engaging in forced disappearance, sexual abuse, torture, and illegal detention. See Jorge Mendoza García, *Torture in the context of Mexico’s “Guerra Sucia”: An exercise of collective memory*, 7 POLIS 139 (2011).

itself, aware of the absence of legal grounds for its street-level operations, Congress enacted the Interior Security Act (*Ley de Seguridad Interior*), which enabled military personnel to participate alongside the police in ordinary tasks of maintaining public security in the country's public spaces.⁸⁴

The national ombudsperson and several state counterparts filed challenges against the Interior Security Act before the Supreme Court, which declared it invalid in November 2018.⁸⁵ The Court found a violation of Article 21 of the Constitution, which allowed for army participation only in tasks associated with national security; the statute wrongfully allowed for army participation in ordinary daily tasks of public security, which had to be fulfilled by ordinary political forces.⁸⁶

By the time AMLO became president, the degree of damage caused in the country by the “war against drugs” was already incalculable.⁸⁷ Everybody expected a change of strategy from López Obrador, who during the campaign had advocated for the massive problems of violence to be managed “with hugs, not bullets” (*abrazos, no balazos*). Soon after taking office, however, in March 2019, with the cooperation of the inoperative “opposition” parties, he submitted an amendment to Article 21 of the Constitution to create the National Guard.⁸⁸ Congress approved fast-tracking this reform and four complementary statutes: the Law of the National Guard, the Law on the National Registry of Detentions, the National Law on the Use of Force, and the General Law of the Public Security System,⁸⁹ all of them raising frontal challenges to controls over the arbitrary exercise of power under the rule of law.⁹⁰

⁸⁴ Jaime Cárdenas Gracia, *Ley de seguridad interior y militarización* [Homeland security law and militarization] 40 CUESTIONES CONSTITUCIONALES 277 (2019).

⁸⁵ SCJN, Nov. 15, 2018, Acciones de inconstitucionalidad 6/2018, 8/2018, 9/2018, 10/2018, 11/2018.

⁸⁶ *Id.* §§ 117–61.

⁸⁷ Francisca Pou Giménez & Catalina Pérez Correa, *Prohibitionist Drug Policy in Mexico: A Systemic Constitutional Underminer*, 31 WASH. INT'L L.J. 58 (2021).

⁸⁸ Decreto por el que se reforman, adicionan y derogan disposiciones de la Constitución Política de los Estados Unidos Mexicanos en materia de Guardia Nacional [Decree amending, supplementing, and repealing the provisions of the Constitution concerning the National Guard], DOF, Mar. 26, 2019, www.diputados.gob.mx/LeyesBiblio/proceso/docleg/64/235_DOF_26mar19.pdf.

⁸⁹ Decreto por el que se expide la Ley de la Guardia Nacional [Decree enacting the National Guard Law], DOF, May 27, 2019, www.dof.gob.mx/nota_detalle.php?codigo=5561285&fecha=27/05/2019#gsc.tab=0.

⁹⁰ In 2019, several crimes were added to those punished by automatic pretrial imprisonment: use of social programs for electoral purposes; corruption in connection with illicit enrichment and abusive exercise of functions; cargo theft in any modality; theft of

A month later, Article 19 of the Constitution also was reformed and the range of cases in which judges are obligated to order automatic pretrial imprisonment (an institution incompatible with standard due process guarantees) was greatly expanded.

Many in civil society, wary of the president's militarized conception of the National Guard and knowing how lethal the army's record was, organized the platform "*Seguridad sin guerra*" (security without war).⁹¹ The great efforts they made before Congress resulted in the Constitution providing that the National Guard remains ultimately subordinated to civil authorities – specifically, the Secretary of Public Security.⁹² However, the decree creating the National Guard included a transitory provision that few noticed at the time, allowing the army to "perform tasks of public security in an extraordinary, regulated, supervised, subordinated, and complementary manner" for a period of five years. These were the exact words that the IACtHR had used when condemning Mexico in its *Alvarado Espinoza* ruling⁹³ concerning a woman whom the army forcibly abducted while deploying tasks of ordinary security. The IACtHR declared that the army's involvement in these tasks was inadmissible; only in an extraordinary, regulated, supervised, subordinated, and complementary manner could the army be involved in them.⁹⁴

The statutes relating to the National Guard were deeply troubling and were soon challenged before the Supreme Court by the national ombuds-person (still directed by a person appointed during the former administration).⁹⁵ The Law on the National Guard, for instance, defines the functions of the National Guard in a most open-ended way, paving the way to clearly unconstitutional action. It empowers the National Guard to investigate ordinary crimes and to supervise and check migrant people, but fails to define torture and forced disappearance as serious

petrochemicals, petroleum, or oil and gas; crimes related to forced disappearance of persons committed by private parties; and crimes committed by violent means such as weapons and explosives.

⁹¹ Colectivo Seguridad sin Guerra, *Elementos para la construcción de una política de seguridad pública* [Elements for the construction of a public security policy] (Jan. 2019), www.seguridadsinguerra.org/#block-10549.

⁹² Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, art. 21, DOF, Feb. 5, 1917: "The institutions of public security, including the National Guard, shall be civil, disciplined, and professional in nature. . . ."

⁹³ *Alvarado Espinoza v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 370 (Nov. 28, 2018).

⁹⁴ *Id.* ¶¶ 177–85.

⁹⁵ SCJN, Apr. 25, 2023, Acciones de inconstitucionalidad 62/2019, 63/2019, 64/2019, 66/2019. See also Amparo en revisió 24/2022.

crimes.⁹⁶ The Law on the National Registry of Detentions, for its part, leaves out essential elements required by the Constitution. It does not indicate what action is to be taken when events occur that put the detentions database at risk, and it is ambiguous regarding the obligations of the army when participating in tasks of public security, since it can be interpreted to mean that the army is not subject to the constitutional obligation to immediately communicate any detention to the police and provide the information necessary for it to be properly registered, and thereby allow oversight of rule-of-law protections.⁹⁷

The National Law on the Use of Force similarly fails to regulate the minimum elements required by the constitutional amendment that created the National Guard and fails to specify the scope of crucial notions such as *fuerza epiletal*. Another provision could be interpreted as authorizing deadly use force from the moment operations are planned, as opposed to being a last-resort response to an actual or imminent aggression. Moreover, the law is unclear about the possibility of using force in demonstrations; interpreted *contrario sensu*, it opens the door to the use of all levels and means of force, including firearms and deadly weapons, in “illicit” demonstrations – a notion that is left undefined – or demonstrations that become violent.⁹⁸ The General Law of the Public Security System, for its part, violates the right of access to public information by authorizing total *ex ante* withholding of all information in the national public security information system and national registries, preventing public access to this information to defend rule-of-law guarantees.⁹⁹

While these cases were at the Supreme Court, the army was given an ever-growing number of responsibilities: the administration of the main ports,¹⁰⁰ the administration of customs,¹⁰¹ and the construction of a wide range of

⁹⁶ These problems were identified and denounced by the National Commission of Human Rights in its claims before the Supreme Court, in CDHN, INFORME ESPECIAL SOBRE ACCIONES DE INCONSTITUCIONALIDAD 48–51 (2019), <https://tinyurl.com/4bmae5pn>.

⁹⁷ *Id.* at 51.

⁹⁸ *Id.* at 52.

⁹⁹ *Id.* at 52.

¹⁰⁰ Elías Camhaje, *López Obrador anuncia la militarización de puertos y aduanas para frenar el contrabando y el narcotráfico* [López Obrador announces militarization of ports and customs to stop smuggling and drug trafficking], EL PAÍS (July 17, 2020), <https://tinyurl.com/4kytsdb8>.

¹⁰¹ Alberto López, *López Obrador militariza las 50 aduanas de México* [López Obrador militarizes Mexico’s 50 customs authorities], INFODEFENSA (June 2, 2022), <https://tinyurl.com/mt496p4s>.

public works, including 1,500 branch offices of Banco del Bienestar, the Maya Train and the Felipe Ángeles Airport.¹⁰² This means that the army has immense economic power at the moment.¹⁰³ The so-called Guacamaya leaks demonstrated the army's ubiquity (both legal and illegal) in all areas of public life in Mexico.¹⁰⁴ As of June 2023, the marines have been given the administration of the main Mexico City airport and the government continues negotiations to buy Mexicana de Aviación – one of Mexico's first commercial airlines, which went into insolvency in 2010 – for it to be run by the army.¹⁰⁵

The army manages the training of the National Guard, 75 percent of whose members are former soldiers.¹⁰⁶ In May 2020, the president, taking advantage of the window opened by the transitory constitutional provision,¹⁰⁷ issued an executive decree providing that the army would assist the National Guard in performing public security tasks for a period of five years. In a surreal turn, the heading of the decree (known in Mexico as *Acuerdo militarista*) reads: "Decree providing for the

¹⁰² Jacobo García, *El Ejército mexicano aumenta su poder con la construcción y explotación del nuevo aeropuerto* [Mexican army increases its power with construction and operation of new airport], *EL PAÍS* (Mar. 20, 2020), <https://tinyurl.com/2ybs8ytd>; Yulia Bonilla, *Diputados alistan reforma para que ganancias del AIFA, Tren Maya y otras obras vayan a pensiones de militares* [Deputies prepare reform to transfer profits from AIFA, Maya Train, and other public works to military pension funds], *RAZÓN* (Feb. 22, 2023), <https://tinyurl.com/2ffp48r6>.

¹⁰³ Raul Trejo Delarbe, *El Ejército hace política y hace negocios* [Army is doing politics and business], *CRÓNICA* (Nov. 21, 2021), www.cronica.com.mx/opinion/ejercito-politica-negocios.html.

¹⁰⁴ Press Release, Comisión Nacional de Derechos Humanos, CNDH manifiesta preocupación por espionaje a periodistas y defensores de DDHH [National Commission of Human Rights expresses concern over spying of journalists and human rights defenders], No. DGC/195/2021 (July 21, 2021); *¿Qué se sabe del espionaje a periodistas durante el gobierno de AMLO?* [What do we know about spying of journalists during AMLO's government?], *EXPANSIÓN POLÍTICA* (Oct. 4, 2022), <https://politica.expansion.mx/mexico/2022/10/04/claves-espionaje-amlo-sedena-periodistas>; Jacobo García, *Una masiva filtración expone el poder del ejército mexicano en la vida pública* [Massive leak shows power of Mexican army in public life], *EL PAÍS* (Oct. 1, 2022), <https://tinyurl.com/9ywa4rpc>.

¹⁰⁵ AMLO plantea que aerolínea del Ejército se llame Mexicana de Aviación; utilidades se usarán en pensiones de soldados, dice [AMLO suggests the army airline be called Mexicana de Aviación and says profits will go to soldier's pensions], *ANIMAL POLÍTICO* (Oct. 5, 2022), www.animalpolitico.com/politica/amlo-aerolinea-sedena-mexicana-aviacion-pensiones.

¹⁰⁶ INEGI, Censo Nacional de Seguridad Pública Federal [National Federal Public Security Census], www.inegi.org.mx/contenidos/programas/cnspf/2021/doc/cnspf_2021_resultados.pdf.

¹⁰⁷ See Part IV.

participation of the Army in public security tasks in an extraordinary, regulated, supervised, subordinated, and complementary manner.” Yet these adjectives do not appear in the body of the text; on the contrary, the text of the decree fails to place any conditions on the participation of the army,¹⁰⁸ thus disregarding IACtHR doctrine and the fact that the Constitution’s reference to those limitations meant that they had to be observed and taken up by the legislative branch.

The *Acuerdo militarista*, too, was challenged before the Supreme Court. Three municipalities filed *controversias* denouncing infringement of jurisdiction, and the Chamber of Deputies filed another one arguing that the president had bypassed Congress in addressing the matter by way of a decree, without prior enabling legislation.¹⁰⁹ This time, the National Commission of Human Rights, now under the direction of a close ally of the president, did not react.¹¹⁰

To complete the circle, at the request of the president, the Law on the National Guard was amended in September 2022, so as to place its operation more fully under military command.¹¹¹ The law was fast-tracked and, after being passed in the Chamber of Deputies without discussion by commissions, was approved by the Senate within twelve hours of receipt.¹¹² As Estefanía Vela and Nuria Valenzuela observe, the

¹⁰⁸ Acuerdo por el que se dispone de la Fuerza Armada permanente para llevar a cabo tareas de seguridad pública de manera extraordinaria, regulada, fiscalizada, subordinada y complementaria [Agreement whereby the permanent armed forces are available to carry out public security tasks in an extraordinary, regulated, supervised, subordinate, and complementary manner], DOF, May 11, 2020, https://dof.gob.mx/nota_detalle.php?codigo=5593105&fecha=11/05/2020#gsc.tab=0.

¹⁰⁹ Poder Ejecutivo del Estado de Michoacán, 17 de junio de 2020, CC 87/2020; Municipio de Colima, Colima, 7 de julio de 2020, 85/2020; Alcaldía de Pabellón de Arteaga, Aguascalientes el 26 de junio de 2020, CC 91/2020; Cámara de Diputados, CC 90/2020.

¹¹⁰ Gloria Leticia Díaz, *La CNDH traiciona a la gente, acusan consejeros* [Counselors accuse CNDH of letting people down], PROCESO (Nov. 22, 2022), <https://tinyurl.com/mryrff7j>; Víctor Ballinas & Andrea Becerril, *Rosario Piedra Ibarra enfrenta las críticas de la oposición* [Rosario Piedra confronts criticism from opposition], LA JORNADA (Dec. 8, 2022), <https://tinyurl.com/mrxvs3vr>.

¹¹¹ Sonia Corona, *La Cámara de Diputados aprueba las reformas para que la Guardia Nacional pertenezca al Ejército* [Chamber of Deputies approves amendments that make National Guard belong to army], EL PAÍS (Sept. 3, 2022), <https://tinyurl.com/yc46c2mf>.

¹¹² Maritza Pérez, *Morena impone una discusión “fast track” de la iniciativa para pasar la Guardia Nacional a la Sedena* [Morena forces a fast-track debate on bill to transfer National Guard to Sedena], EL ECONOMISTA (Sept. 3, 2022), <https://tinyurl.com/mstfbhpx>.

“civil” National Guard is now an empty shell.¹¹³ The reforms do not comply with the conditions put forward in the Constitution and entrust the SEDENA (the Secretary of National Defense) with full financial, administrative, and operative control of the National Guard.¹¹⁴ A formal mention of the Secretary of Public Security means nothing in a detailed regulation that places the body under the leadership of a person designated by the president on the basis of criteria that only high-ranking military officers can meet, and which situates operation and infrastructure under military control.¹¹⁵ A group of senators again challenged the law before the Supreme Court.

A Supreme Court under siege has dealt unevenly with these cases, often in a minimalist way, but also refraining from acknowledging the legitimacy of the militarist onslaught. On November 29, 2022, the Court declared the “Militarist Decree” valid on the basis of the purely formal argument that it did not contradict the literal text of the Constitution,¹¹⁶ ignoring IACtHR decisions. Yet on April 20, 2023, on the basis of a draft prepared by one of AMLO’s appointees, the Supreme Court declared the transfer of the National Guard to the military branch invalid and ordered civilian control of this body from January 1, 2024.¹¹⁷ Given the amount of political pressure the judges had endured – including insertions in national newspapers paid by MORENA governors requiring the Court to certify the validity of the reform – this was seen as an immense victory by the law’s opponents.

The Court also discussed the question of automatic pretrial preventive imprisonment, but there was no consensus over declaring it invalid. The fact that it features in the Constitution, and not just in statutes, posed a great problem for a Court that has never declared the unconstitutionality of a constitutional amendment. Shortly afterward, in any case, the IACtHR decided the cases *Tzompaxtle Tecpile v. Mexico* and

¹¹³ Nuria Valenzuela & Estefanía Vela, *Ahora sí, guardia militar* [Now it is really here: military guard], *ANIMAL POLÍTICO* (Sept. 8, 2022), www.animalpolitico.com/blog-de-intersecta/ahora-si-la-guardia-militar/.

¹¹⁴ *Id.*

¹¹⁵ Santiago Aguirre, *La iniciativa sobre Guardia Nacional: Cambiar la ley para evadir la Constitución* [National Guard bill: Changing the law to evade the Constitution], *NEXOS* (Sept. 1, 2022), <https://tinyurl.com/49jjcrxd>; Lidia Arista, *Guardia Nacional: 41 meses de operar bajo mandos y protocolos militares* [National Guard: 41 months to operate under military commands and protocols], *EXPANSIÓN POLÍTICA* (Nov. 19, 2022), <https://tinyurl.com/mrx9pcb4>.

¹¹⁶ Haydeé Gómez & Regina Isabel Medina, *Los (des)tiempos de la Suprema Corte frente a la militarización* [(Mis)timings of Supreme Court with regard to militarization process], *NEXOS* (July 5, 2021), <https://tinyurl.com/33b8vcns>.

¹¹⁷ SCJN, Apr. 20, 2023, *Acción de Inconstitucionalidad 137/2022*.

García Rodríguez v. Mexico, declaring that *arraigo* (pretrial unsupervised house arrest by the prosecutor) and automatic preventive imprisonment were incompatible with the American Convention.¹¹⁸ The IACtHR has directed Mexico to enact the necessary changes in national law – that is, the Constitution.¹¹⁹ Again, this was experienced by many in civil society as an immense triumph of rights in defense of the rule of law. The day after *Tzompaxtle* came out, the home affairs secretary (*Secretario de Gobernación*), an individual close to the president and prospective candidate in the next presidential election, declared that the ruling was not to be complied with. In the buildup to the 2024 election, we will see how this saga and the many dozens of others underway unfold for the future of the rule of law in Mexico.

VII Concluding Considerations: A War of Attrition, and the Difference the Constitution Makes

This chapter's account, while providing overwhelming evidence of challenges to the rule of law in Mexico, is based on only a few paradigmatic examples of current dynamics. The AMLO administration in Mexico viewed basic rule-of-law requirements as daily obstacles to the fulfillment of its political program. In contrast to other autocratic legalists, who have tried to conceal contortions of the law or bypass, rather than openly disregard, constitutional requirements, President López Obrador has not hidden his distaste for legal “barriers.” He has defied them, among other reasons because he knows that the law is something people can be polarized about in countries where compliance with the law has not historically been an unconditional good, and where constitutional democracy has not brought about the material progress expected.¹²⁰

¹¹⁸ *Tzompaxtle Tecpile et al. v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 470, ¶ 173 (Nov. 7, 2022), https://corteidh.or.cr/docs/casos/articulos/seriec_470_ing.pdf; *García Rodríguez et al. v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 482, ¶ 298 (Jan. 25, 2023), https://corteidh.or.cr/docs/casos/articulos/seriec_482_ing.pdf.

¹¹⁹ See *Tzompaxtle*, operative provisions 7 and 8; *García Rodríguez*, operative provisions 13 and 14 (“13. The State shall repeal in its domestic legislation the provisions relating to pre-procedural *arraigo*, pursuant to paragraphs 292 to 294, 298 to 300, and 302 to 303. 14. The State shall adapt its domestic legal system in relation to mandatory pretrial detention, pursuant to paragraphs 292 and 293, 295 to 299 and 301 to 303. . .”).

¹²⁰ UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

The Mexican president has substantially progressed in his quest to weaken the checks and balances that the other branches apply to the executive. He has striven to suppress, defund, or leave unstaffed the independent agencies that in Mexico underpin the constitutional division of powers. He has tried to neutralize the judiciary through a mixture of partisan appointments to the Supreme Court, personal public attacks on judges, efforts to negotiate with the former president of the Court, and continual threats of radical reform. He has engaged in fast-track maneuvers to push through the enactment of core political measures, without opening them to public debate and deliberation. Day after day, he has trashed the individuals and groups that shape public opinion and watch over the exercise of power, like the press, the scientific and academic community, civil society organizations, and a varied assortment of other groups. He has structurally changed the nature of public (and economic) power in Mexico by putting the military on an equal footing with the executive. The number of problematic initiatives and actions that he and his parliamentary allies promote every week is astounding. And added to that, López Obrador has engaged in a strategy of attrition—, consisting in uninterrupted legal defiance that leaves political and social actors overwhelmed, without time and energy to react.

We have nonetheless seen that several decades of democratic constitutionalism have placed significant hurdles to this project of personalistic rule that violates core aspects of the rule of law. Concentrating all power has not been ultimately as smooth as imagined for López Obrador, even after a massive electoral victory that left him without any meaningful opposition in Congress. The existence of a highly detailed constitution, as well as fourth-branch institutions with constitutional status, has been crucial in slowing down (and until now preventing) the destruction of the electoral arbiter. Had the INE not been regulated in the Constitution, had it not been designed the way it was, and had it lacked standing to defend its jurisdiction before the Supreme Court, electoral credibility in Mexico might now be something of the past. The results of the intermediate election – which, importantly, diffused power by leaving MORENA as the majority party but unable to amend the Constitution alone – could not have happened without an independent electoral authority.

The presence of reinforced judicial structures with a wide menu of responsibilities and diversified channels of access, has maintained the engagement of the Supreme Court and lower-ranked judges, propelling procedural innovations that will help supervise power in the future, no matter who holds public office. If the national ombudsperson, a body

with constitutional status, had not been designed to be appointed on a six-year basis, the militarist statutes enacted at the beginning of AMLO's term would not have been challenged before the Supreme Court. The Inter-American regional system of rights protection has been equally crucial in aiding national judges under severe pressure. Public criticism of regressive pieces of public policy and regulation would have been impossible without the human rights reforms that have fortified civil society.

Latin America has been able to halt several neo-authoritarian processes. Even if the ups and downs of the political landscape signal a great need for political redirection in ways that genuinely benefit the people, they also show that the sustained, unbridled exercise of presidential power could be something of the past. The dangers of hyperpresidentialism are still here, but the evolution of the region gives some cause for hope. In Ecuador, Lenin Moreno ran for office as a close ally of former president Rafael Correa, but soon became a moderate, and the Council of Social Accountability and Participation provided an appropriate framework for a reappointment process that reversed the presidential capture of state institutions. Colombia lived for eight years under a right-wing populist president, Álvaro Uribe, whom the Constitutional Court stopped from reforming the Constitution so he could run for a third term. Respect for institutions was restored under Juan Manuel Santos, and in 2021, Gustavo Petro won the presidential election with a leftist program committed to reform in crucial areas like land tenure, social policy, and the environment. In Brazil, Bolsonaro deployed policies with immense cost in terms of social justice, pluralism, and democracy. But he lost the election to Lula da Silva and had to leave office, even with his supporters using force in an effort to prevent it.

The hypothesis proposed in this chapter regarding the case of Mexico is that these signs of contestation and recovery in response to challenges to the rule of law by populist leaders have been critically supported by the regional human rights regime as accompanied by broader constitutional developments. The analysis illustrates how important have been features such as the creation of new independent constitutional agencies underpinning the division of powers and the diversification and strengthening of the judiciary, which together have multiplied spaces and occasions for public mobilization. It also suggests, however, that most constitutional resources are activated *ex post* and place an immense burden on the courts. More effective, systemic prevention of rule-of-law erosion would require the enhancement and use of preemptive solutions, both in the

domain of rights and in the domain of the organization of powers. Constitutions in the region are being seriously tested. Nonetheless, carefully pondering their positive contributions in times of crisis gives us reason to continue using the resources they provide in defense of the rule of law, offering resistance to the neo-authoritarian onslaught, and hopefully paving the way to a better future.