PART III

Constitutional Reform and Stability

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The Paradox of Mexico's Constitutional Hyper-Reformism: Enabling Peaceful Transition While Blocking Democratic Consolidation

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I. Introduction

Within the conventional mapping of different modalities of constitutional change – replacement, amendment, and interpretation – Mexico exemplifies the reformist strategy taken to an extreme: its 1917 Constitution has been amended, sometimes radically, 706 times.[1] It also illustrates a scenario in which constitutional amendment and democratisation appear to have gone hand in hand: while the rate of amendments was at first moderate, it dramatically accelerated over the last three decades, when political plurality took hold after 70 years of hegemonic party rule.[2] Through continuous, piecemeal reform, the country has progressively incorporated rights, institutions, and regulatory solutions that are part and parcel of the characteristic contemporary Latin American constitutional 'kit', such as a long and robust declaration of rights, instruments of direct democracy, openness to international sources of law, or a multi-faceted system of judicial review.[3]

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[1] We made December 2017 the cutoff date for the count. See 'Sumarios de reformas a la Constitución y Leyes Federales vigentes', available at www.diputados.gob.mx (last accessed 31 January 2018).

[2] María Amparo Casar and Ignacio Marván, *Reformar sin mayorías. La dinámica del cambio constitucional en México 1997–2012* (Taurus, 2014).

[3] Francisca Pou Giménez, 'Constitutionalism old, new and unbound: the case of Mexico' in Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar, 2018).

It could hardly be affirmed, however, that Mexico has been able to consolidate a satisfactory version of democratic-constitutional life, as it can hardly be affirmed that, despite including the characteristic Latin American staples, the country lives under a standard democratic constitutional text. To what extent are the difficulties of consolidating the rule of law, and of attaining a mature constitutional system related to a dynamic of uninterrupted, fragmentary amendments? What is the relationship between the hectic amendment practice and the feeble constitutional life that characterises Mexico?

We argue that, after years of delivering gains, Mexican constitutional reformism is reaching the point of exhaustion. The country is currently trapped in a pattern of constitutional change that we call 'hyper-reformism', which is a particular species of reformism that is now closely associated with the obstacles the country faces in the installation of a recognisable version of rule of law and in the consolidation of constitutional democracy.[4]

Although there are other perspectives for analysing Mexican amendment patterns, in this chapter we focus on the relationships between them and the process of political democratisation and legalisation the country has been experiencing over the last 30 years.[5] We will show that constitutional amendments were first part of a virtuous circle that supported the gradual and largely peaceful transition to democracy. Specifically, during the 1980s and 1990s amendment processes created a space for political negotiation: formal rigidity made governmental commitments credible and gave the opposition parties a guarantee against opportunistic changes by the PRI's (*Partido Revolucionario Institucional*) legislative majority. But reformism had several un-intended consequences on the Constitution itself, both on its content – that became increasingly obscure, convoluted, and incoherent – and on the way politicians started to go about reforming it.

Our point of view is – in contrast with those that consider Mexico's constitutional flexibility mainly a story of success[6] and in contrast with the more favourable views generated by intensive amendment dynamics in countries

[4] We use the term 'hyper-reformism' to systematically account for the pattern of constitutional change in Mexico and take it from the 2015 Symposium 'Constitutional Change and Constitutional Efficacy: Facing Mexico's Hyper-reformism', organised by Tom Ginsburg and Andrea Pozas-Loyo at the UNAM Legal Research Institute in Mexico City. See also Andrea Pozas-Loyo 'A Way Out of Hyper-Reformism? A Project of Constitutional Reorganization and Consolidation in Mexico' *International Journal of Constitutional Law Blog*, 2 March 2016, www.iconnectblog.com/2016/03/a-way-out-of-hyper-reformism-a-project-of-constitutional-reorganization-and-consolidation-in-mexico (last accessed 31 January 2018).

[5] Elsewhere we explore the causes of hyper-reformism, claim that it is a path dependent and identify its mechanisms of self-enforcement: Francisca Pou Giménez and Andrea Pozas-Loyo, 'Self-Reinforcing Hyper-Reformism: The Path Dependent Causes of Mexico's Hectic Constitutional Change' presented at the Symposium on Constitutional Amendment and Replacement in Latin America, Brasilia, September 2016; Francisca Pou Giménez and Andrea Pozas-Loyo, 'Are Constitutional Amendment and Judicial Review Substitutes? Unexpected Lessons from Mexico and Brazil', presented at the Law and Society Annual Conference, Mexico City, June 2017.

[6] Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009), 193–09.

like Brazil,[7] – hyper-reformism is today closely associated with many of the difficulties that Mexico experiences in consolidating a constitutional democracy and the rule of law.

First, as we will see, at the level of the Constitution's *legal* functions, serious problems stem from hyper-reformism (and the constant change, obscurity, disorganisation, and internal inconsistencies that come with it) making it difficult for both citizens and officials to apprehend its mandates and find in it guidance and identifiable reasons for action. This hampers the development and execution of constitutional mandates by legislative and executive means and makes it particularly difficult to build consistent judicial interpretation, all of them central to the adequate functioning of the constitutional system.

Secondly, at the level of the Constitution's *political* functions, hyper-reformism erases the distinction between ordinary and extraordinary law making, and hence the system fails to bestow the benefits derived from not having to address ground rules at any given point. Constant constitutional change alters or impedes the dynamics intrinsic to a healthy democracy, such as the combination of ordinary representative politics with episodes of heightened debate and participation. If legislators ordinarily deal with constitutional reforms, they easily neglect their important role as ordinary-law makers – and vice-versa – and this affects the efficacy of both statutory and constitutional reforms. In addition, when constitutional reforms succeed one another, citizens and NGOs are less likely to oversee and participate in these processes. Hence, hyper-reformism obstructs the adequate development of accountability and participation practices at the constitutional level. Finally, it also damages the integrative function of the Constitution, at a moment when Mexico faces challenges that will be difficult to surmount with a deficit in social cohesion.

Our analysis of the Mexican case may contribute to a debate that, as Elkins, Ginsburg and Melton remark,[8] must be conducted with care and nuance: the debate on the advantages and disadvantages of constitutional longevity. The Constitution of Mexico is already one of the most long-lived in the world, and because of features that assure a sort of 'perpetual motion' at the amendment level, it actually has a very low risk of death and replacement. But unfortunately, at the point we have reached, and given the vicious circle between legal and political dynamics, on the one hand, and constitutional amendment on the other, this is something we should probably not be quick to celebrate.

We divide the analysis into four parts. Section II describes Mexican hyper-reformist patterns, trying to grasp or document the extent of constitutional change through amendment. To this end we provide a combination of quantitative and qualitative dimensions. Section III illustrates some of the effects amendment

[7] Juliano Zaiden Benvindo, 'The Brazilian Constitutional Amendment Rate: A Culture of Change?' www.iconnectblog.com/2016/08/the-brazilian-constitutional-amendment-rate-a-culture-of-change/ (last accessed 31 January 2018).

[8] Elkins, Ginsburg and Melton (n 6) 34.

intensity has had on the text and structure of the Constitution. Section IV then describes how one of the mechanisms that has operated in the country as a positive trigger of reforms – the fact politicians used constitutional reform as a default option for facing credible commitment and coordination problems – created a scenario in which a progressive opening to political plurality seemed palatable for the former hegemonic political force, and thus was conductive to a slow process of democratic transition in the country. Finally, Section V illustrates how, today, hyper-reformism in contrast hampers the adequate fulfilment of the legal and political functions of the Constitution. A brief conclusion will close our chapter.

II. Hyper-reformism: The Intensity of Amendment Dynamics

For normative constitutional theory, constitutional reform is a notion with great conceptual and systemic weight, since it signals the entry into play of a modality of constituent power – 'the derived constituent power' – a particular instantiation of the will of the People, as opposed to that of the representatives who ordinarily govern in their name.[9] For this reason, it is habitually portrayed under an air of extraordinariness: it evokes an exceptional episode, an interruption of ordinary dynamics naturally imagined not to happen very often. The influence the US experience has exerted on legal and political imagination – explained, in part, by the power asymmetries that pervade the political economy of global knowledge[10] – has also nurtured the idea that constitutional amendment is intrinsically rare.

In fact, as the burgeoning field of comparative constitutional studies based on 'large-n' analysis has shown, constitutional amendment is far more frequent than assumed by this theoretical image. Ginsburg and Melton's analysis about amendment dynamics between 1800 and 2010 shows an amazing increase in amendment

[9] See Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 2, 342 (reconstructing the development of this notion and other closely associated ones in the domain of constitutional theory), and William Partlett, 'The Rules and Roles of Democratic Constitution Making Institutions,' paper presented at the Constitution Making in Democratic Orders Conference in Mexico City, August 2016, 1–4 (echoing the distinction between original and derived constituent power and noting that, both in the case of amendment and in the case of replacement, constitution-making is assumed to be different from ordinary politics in terms of popular engagement and in terms of encouraging more deliberative and consensual elite decision-making than ordinary politics). Along the same lines, Gabriel Negretto, 'Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America', (2014) 46 *Law & Society Review* 749, 751; Walter Murphy, *Constitutional Democracy. Creating and Maintaining a Just Political Order* (Johns Hopkins, 2007), 498; Joel Colón-Ríos, 'The Legitimacy of the Juridical: Constituent Power, Democracy and the Limits of Constitutional Reform' (2010) 48 *Osgoode Hall Law Review* 199, 236.

[10] Daniel Bonilla Maldonado, 'The political economy of legal knowledge,' in Crawford and Bonilla Maldonado (n 3).

rates over time: the number of constitutions amended per year was less than four in 1850, 10 by 1950, 40 in the 1990s, and 30 in the 2000s.[11] In an analysis that covers 18 Latin American countries from 1789 to 2001 – minimalistically computing all amendments enacted in one year as only one amendment – Negretto documents 141 amendments, making 0.28 the mean amendment rate – that is, the mean number of amendments that regional constitutions have endured per year of life.[12]

Certainly, these ciphers give only an approximate sense of the prevalence of constitution amendment processes. The same body of literature clearly suggests that capturing and measuring the 'amount of reform' in any given constitutional system is something fraught with methodological complexity. Calculations in terms of averages hide considerable variability among countries and cause a very different impression when they control for the durability of constitutions – when it is 'rates' that are calculated. But most of all, calculations are typically based on different definitions of what an 'amendment' is: some count by article – so that several changes to the same article count as a single amendment; others by subject matter – so that the number of articles amended is not relevant if they all touch on the same issue; and others by aggregate packages – so that all the changes to constitutional provisions enacted at the same moment in time, or over the same period of time (typically, a year), count as 'one amendment'.[13]

But additionally, most people agree that, to really capture the phenomenon, quantitative assessments must be complemented with qualitative ones, though it is not clear in what exact way.[14] There is no necessary relationship between the quantitative amount of change and its qualitative effects. As we know, a small change in words or syntax can have a huge impact in terms of meaning – legal rules being the meaning of words, not the words themselves. Sometimes the impact is so far-reaching that, as Richard Albert suggests, we should probably stop talking in terms of 'amendments' – a word he suggests reserving for efforts to continue the original constitutional project – and rather talk of 'revisions' or 'dismemberments' – efforts to 'unmake' the Constitution, to change it in radical ways.[15] Conversely, a

[11] Tom Ginsburg and James Melton, 'Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty' (2015) *International Journal of Constitutional Law* 13 (3), 686. These authors underline that the increase is partly explained by decolonisation, which multiplied the number of constitutions, and so the number of fora where amendment can take place; but only partially, since it does not explain the steep increase from the 1960s onwards.

[12] On a counting that goes from 1946 to 2008, this author calculates a mean number of amendments per constitution of 6, and a mean amendment rate (amendments per year of life of each constitution) of 0.19. Negretto (n 9), 765.

[13] Negretto (n 9), 765.

[14] Elkins Zachary, 'Constitutional revolution in the Andes?' in Rosalind Dixon and Tom Ginsburg (eds) *Comparative Constitutional Law in Latin America* (Edward Elgar, 2017).

[15] Richard Albert, 'Amendment and Revision in the Unmaking of Constitutions' in David Landau and Hanna Lerner (eds), *Comparative Constitution-Making* (Edward Elgar, forthcoming, 2019); Richard Albert, 'Constitutional Amendment and Constitutional Dismemberment' 43 *Yale Journal of International Law* 1 (2018).

considerable amount of formal change may leave core structures and decisions untouched. Juliano Benvindo remarks, for instance, that although the number of amendments passed in Brazil over the last 30 years looks pretty impressive – 92, an average of more than three per year – they have not significantly affected the substantive core of the 1988 constitution.[16] Ginsburg and Melton have struggled to account for the relevance of content variation by coming up with a 'weighted amendment rate' which abandons the assumption – implicit in conventional approaches to amendment rate calculation – that all amendments are equal. This weighted magnitude takes into account both frequency and the 'index of similarity', which compares the contents of a constitutional text before and after an amendment has been passed.[17] Again, however, the strategy has intrinsic limits because assessment of content change is based on the analysis of a list of variables that are insensitive to changes that may look irrelevant from the viewpoint of registered institutional and regulatory choices, but have significant impact in legal or political life.[18]

What can we say, within the limits of these methodological caveats, about Mexican constitutional amendment patterns? From a *quantitative* stance, numbers look imposing. The counting starts at the beginning of the twentieth century, when the Mexican Revolution led to the summoning of the Querétaro Constitutional Assembly and the subsequent approval of the 1917 text, still in force.[19] The amendment formula, enshrined in Article 135, requires the positive vote of two thirds of attending members in each chamber of the federal Congress and ratification by half of the state legislatures.[20] Mexican scholars usually track down amendment evolution by defining 'one amendment' as a change in one article formally enacted

[16] Benvindo (n 7).

[17] Ginsburg and Melton (n 11), 17. On the index of similarity, see also Elkins, Ginsburg and Melton (n 6), 56–57, 222–24.

[18] An example would be a change in the period Congress is in session, or a change in the date the Government must send Congress the Budget bill, which can have an important impact on Executive-Legislative relations, as evinced by the Mexican experience in Eric Magar, 'Los contados cambios en el equilibrio de poderes,' in María Amparo Casar and Ignacio Marván (n 1). Another would be the addition of collective *amparo*, besides the individual one, which may completely alter access to justice and several important dimensions of protection of rights, as shown by the Argentinian experience in Roberto Saba, *Más allá de la igualdad formal. Qué les debe el Estado a los grupos desaventajados?* (Siglo XXI Editores, 2016).

[19] The XIX century was dominated by replacement, not amendment. Thus, after a brief period in which the country proclaimed the Constitution of Cádiz as its own (1812–14, 1820–21), and after an influential constitution-making process in Apatzingán (1814), whose resulting text never entered into force, the country approved several constitutions in a row, in 1824, 1836, 1843 and 1848. Then the pattern changed, and several decades were spent under the formally long-lasting liberal 1857 constitution – which was only intermittently in force because of great political instability. The 1857 Constitution was amended 34 times, O.56 reforms per year. see Flores, I B La Constitución de 1857 y sus reformas a 150 años de su promulgación, *El proceso constituyente mexicano. A 150 años de la Constitución de 1857 y 90 de la Constitución de 1917* 285–324.

[20] At the moment, 32 state legislative bodies. Mexico City was traditionally a Federal District, not a State, and for this rather formal reason it was excluded from the ratification process. This oddity was suppressed with the constitutional amendment on 'Mexico City political reform' published on 29 January 2016.

at a particular moment in time[21] – something that notably underplays the amount of change given the large amount of subsections (and paragraphs within subsections) that many of the articles have today. From 1921 to September 2017, there have been 706 amendments. Figure 1 provides the snapshot, organising amendments by Presidential term.

As we can see, it was from the 1980s onwards, as political pluralism progressively grew after decades of PRI hegemonic political control – and contrary to natural expectations under Section 135's formula – that amendments increase sharply. 70 per cent of the total is post-1982; almost 40 per cent of them passed during President Calderón (2006–12) and President Peña Nieto's (2012–18) presidential periods. In only the first year of his presidency, Peña Nieto promoted six major reforms in the areas of education, telecommunications, energy, antitrust, transparency and the electoral system which touched around 60 per cent of the total number of constitutional sections, besides adding to the Constitution an extraordinarily long, detailed, codified body of transitory provisions, which do not deal with problems of temporal efficacy, as would be expected, but rather develop detailed public policy regulations in all those regulatory fields.

Figure 1 Constitutional amendments by Presidential period (1921–2017)

Period	Reforms	Percentage	Decrees	Words	Increase
1920–1924	8	1.13	2		
1924–1928	18	2.55	5		
1928–1934	28	3.97	12		
1934–1940	15	2.12	10		
1940–1946	18	2.55	10		
1946–1952	20	2.83	13		
1952–1958	2	0.28	1		
1958–1964	11	1.56	9		
1964–1970	19	2.69	8	27 638	
1970–1976	40	5.67	14	28 532	+864
1976–1982	34	4.82	14	29 938	+1406
1982–1988	66	9.35	19	34 916	+4978

(continued)

[21] Héctor Fix Fierro and Diego Valadés, 'Toward the Reorganization and Consolidation of the Text of the Constitution of the United Mexican States of 1917. Introductory Essay' (2015), 12, fn 1. https://archivos.juridicas.unam.mx/www/bjv/libros/9/4050/2a.pdf accessed 23 January 2019. See also Jorge Carpizo, 'La reforma constitucional en México. Procedimiento y realidad' (2011) *Boletín Mexicano de Derecho Comparado* Vol. XLIV, May–Aug 2011, 543–98. The change may be a word or, as we said, a great number of sentences and paragraphs within an article. Mexican scholars habitually also refer to 'amendment decrees', which are the legal instruments that contain all amendments enacted (and officially published) at the same moment in time.

Figure 1 (*Continued*)

Period	Reforms	Percentage	Decrees	Words	Increase
1988–1994	55	7.79	15	36 856	+1940
1994–2000	77	10.91	18	42 802	+5946
2000–2006	31	4.39	17	45 365	+2653
2006–2012	110	15.58	38	54 815	+9450
2012–2017	154	21.81	27	71 572	+16757
Total	**706**	**100.00**	**232**		

Source: Fix Fierro and Valadés (n 21), working with the data available at the Diputados website (www.diputados.gob.mx) and, for 2012–16, our own data, working with the same source.

This figure also registers increases in constitutional length, leaving out transitory provisions. If we do include the transitory provisions – as we should, given the surprising amount of substantive regulation contained in them – the dimension of constitutional growth becomes more transparent: while in January 2010, only five years ago, the Constitution had 78,295 words, in September 2017 it has 126,241 words. In 2010, transitory provisions represented 28 per cent of the constitution; they now make for 43.5 per cent.[22]

What can we say about Mexican amendment patterns from a *qualitative* viewpoint, from a stance attentive to the substantive import of all those changes? The impact of those more than 700 amendments on the normative contents of the Constitution has been, by all accounts, far-reaching. In their 2006 study – which does not reflect the sweeping changes of the last 10 years – Elkins, Ginsburg and Melton already concluded, for the Mexican case, that the cumulative effect of amendments from 1917 to 2006 was more substantial than the change reflected by the approval of the 1917 Constitution – that is: the Constitution was in 1917 closer to the Constitution of 1857 than to its present-day instantiation or version.[23] Available content-based evaluations echo the profundity of changes in all areas, including the creation of dozens of new institutions and the complete redirecting of core constitutional decisions in all areas,[24] and – as we see in the

[22] It is true that contemporary constitutions are often long, the last-wave Latin American ones particularly so: the 1991 Colombian text has 45,111 words, the 2009 Bolivian Constitution has 39,549 words, and the 2008 Ecuador Constitution has 52,649 words. But still, note that the Mexican, is the longest of them all. If we include transitory provisions, it is three times longer than any of them. It is 2.8 times longer than the Colombian, 3.2 times longer than the Bolivian and 2.4 times longer than Ecuador's (our data. We thank Samuel González Cataño for assistance in completing all the counts).

[23] Elkins, Ginsburg and Melton (n 3), 59. According to their calculations, the comparison between the 1917 text and the amended version of 2006 produces an index of similarity of 0.69, while the index of similarity with the 1857 document is 0.87. That is to say: with respect to the scope of topics covered, the 1917 Constitution matches its predecessors in 87% of its content (ibid, p 57).

[24] See Fix Fierro and Valadés (n 21), 13–14, and the various chapters in Casar and Marván (n 2), organising amendment activity in 5 main areas: rights, federalism, separation of powers, the judiciary, the electoral branch and transparency and accountability matters. The studies exclusively map

following section – through developments that go more in the direction of addition or accumulation, than of substitution, with no systematic concern for the maintenance of systemic harmony.

There is a last conspicuous trait, in addition to quantity and quality, we believe must be added to fully portray Mexican amendment dynamics and ground the hyper-reformist diagnosis: the nature of the amending *process*. Though, again, the traditional theoretical reverberations of the notion of 'constitution making' should not define the canon, it seems natural to associate the prospect of changing the Constitution with a moment of political discontinuity of some sort, in terms of inclusion, participation, procedural adequacy, or at least in terms of public opinion mobilisation. In Mexico, however, constitutional reform is just another incidence of ordinary politics. Partly because Article 135 does not require action by special actors outside the ordinary political process, nor special steps, partly because of other political factors that we will later explore, there are really no traces of 'higher law making.'[25] Amending the Constitution in Mexico is legislating by other means: constitutional bills are presented and wait their turn just as legislative bills do; they are lobbied for as easily as ordinary law; and emerge from elite negotiation as much as ordinary law does.[26] Public opinion, and even the legal community, often finds out about amendments once they have already been passed. Occasionally, certain changes become higher profile – but just in the way some statutory bills generate more debate from time to time.

Fast track dynamics is further reinforced by the fact that judicial review of constitutional amendments has been progressively foreclosed by the Supreme Court, in contrast to the situation in Brazil or Colombia, and quite paradoxically in a country that lives under hectic constitutional change. No doubt, among the factors that prompted the Supreme Court of India to develop its bold doctrines on the matter, one can count the frenzied dynamics of constitutional amendment propelled by Indira Gandhi and kept alive after that.[27] In Mexico, in contrast, the Court has closed the door both to substantive and procedural control in all channels of review.[28] It is not that this sort of review is unproblematic – particularly if the Constitution does not contain stone clauses and does not explicitly grant

amendments in the 15 years between 1997 and 2012. The area with the least substantive change is the horizontal division of powers (see Magar, n 14).

[25] Bruce Ackerman, *We the People* (Harvard University Press, 1993).

[26] Even the celebrated 2011 Human Rights reform was a top-down product of elite negotiation. See Natalia Saltalamacchia and Ana Covarrubias Velasco, 'La dimensión internacional de la reforma de derechos humanos: antecedentes hitóricos' in Miguel Carbonell and Pedro Salazar (eds), *La reforma constitucional en materia de derechos humanos: un nuevo paradigma* (2011) (describing how the reform emerged from high-level contacts between politicians, international actors and a few selected civil society organisations).

[27] Gary Jacobsohn, 'An unconstitutional constitution? A comparative perspective' (2006) 4 *International Journal of Constitutional Law* 460; Manoj Mate, 'State Constitutions and the basic Structure Doctrine' (2014) 44 *Columbia Human Rights Law Review* 442.

[28] See CC 82/2001 (no review of procedural or substantive regularity in constitutional controversies); AAII 168/2007 and 169/2007 (no review of procedural regularity in actions of unconstitutionality); and AR 488/2010 (procedural and substantive flaws not ultimately reviewable in *amparo*).

this power to the judges.[29] The point is that the absence of the more complex interaction between courts and legislators this review would produce reinforces a dynamic of quick and unbounded constitutional change.

III. Hyper-Reformism: The Textual Impact of Amendment Dynamics

As seen so far, describing and measuring something so apparently simple as the number of amendments to a country's constitution is less obvious an attempt than one may think.[30] In the former section we have combined three elements to that effect, and we have argued that Mexican dynamics must be described as very intense because of the frequency of amendments, because of their import in terms of substantive change in the constitutional system, and because they derive from a decision-making process that makes amendment just another incident of daily political life.

In what follows, we will briefly illustrate the effects of hyper-reformism on the constitutional text itself, which is a necessary step in order to fully understand the effects the pattern of constitutional evolution has exerted on legal and political dynamics in the country. We are interested in underlining two main aspects: the impact of constitutional amendment on the length and detail of the Constitution, on the one hand, and on the other, its role in producing a text with tensions and incoherencies.

As already reflected in our quantitative presentation in the first section, in Mexico reforms have led to an extraordinarily long and detailed text. Beyond the aggregate number of words, it is the extraordinary detail of specific articles that increases the overall sensation of length in the Mexican Constitution. Article 27, for instance, which famously regulates property, has 3,885 words; Article 41, which deals with elections and political parties, has 4,384 words; Article 122, about the political regime of Mexico City, has 2,864 words; and Article 107, which draws the boundaries of jurisdiction of the federal judiciary, has 3,190 words. The Constitution has only 136 articles, but while some of them occupy four or five sentences,

[29] See Andrea Pozas Loyo 'Los jueces constitucionales latinoamericanos frente al espejo: sobre la procedencia de juzgar la constitucionalidad de una reforma constitucional' in Rafael Rojas, Pablo Mijangos y Adriana Luna (coords), *De Cádiz al siglo XX: Dos siglos de constitucionalismo en México e Hispanoamérica* (México: CIDE-Taurus) and Juan González Bertomeu in this volume.

[30] Note that we are not assessing whether a particular amendment rhythm is excessive, moderate, or insufficient, from an external, systemic viewpoint concerned with maintaining harmony between environmental demands for reform and actual reform. Negretto has this wider perspective in mind when he points out that the idea of formulating a universal standard to capture what would be a 'moderate amendment rate' seems implausible because such a standard would depend on how frequently the Constitution needs to be modified, and this, in turn, 'will vary across cases as a result of extra-constitutional factors, such as the relative stability of the political, social and economic environment' Negretto (n 9), 760.

others are true codifications of entire areas of public policy or integral regulations of state structures. It is, then, actually quite difficult to separate longitude from detail in the overall perception of what the text communicates.

Much of this over-detail and longitude are byproducts of the political dynamics that characterise hyper-reformism. As we will later remark, constitutional reforms have been used to make political commitments credible and shield them from majoritarian tampering, hence the need to include all the details in the political negotiation. A clear example of this is the constitutionalisation of extremely specific political agreements on electoral matters. Consider for instance the provisions in Article 41.III.A.a, stating the following: 'From the run-up to the election campaign until Election Day, the National Electoral Institute shall have forty eight minutes daily, distributed in two to three minutes segments per hour in each radio station and television channel'.[31] Or consider the 890-word long regulation of the transparency agency in sub-section VIII of Article 6, strangely inlaid in the bill of rights, in an article that starts by enshrining the right to information (added 7 February 2014), and that includes dozens of detailed rules touching on the agency's various dimensions of operation. So detailed a regulation naturally touches on several other parts of the Constitution that need to be modified in turn. For instance, to include in Article 6 the provisions that the President and the Senate may use to regulate the agency Commissioners,[32] it was necessary to simultaneously amend Articles 76 and 89, which list in detail the President and the Senate areas of jurisdiction – they now give the former power to 'appoint the commissioners' and the latter power to 'object to the appointments of the commissioners'. And it was necessary to amend sub-sections XXIX-R, XXIX-S, and XXIX-T of Article 73, to give federal Congress jurisdiction to dictate general statutes developing the basic principles regarding transparency, access to State information and data protection, in addition to changing archive regulation to create a National Archive System capable of assuring their homogeneous management at all government levels. And when, in January 2016, a long constitutional amendment conferring a new political status to Mexico City was passed, these sub-sections of Article 6 were among those which had to be amended because the Constitution has traditionally referred to 'the Federation, the States, the Federal District, and municipal

[31] Mexican Constitution, January 2017. This example is taken from Héctor Fix-Fierro, 'Por qué se reforma tanto la Constitución Mexicana', in *Cien Años Cien Ensayos* (IIJ-UNAM, 2016).

[32] The provisions are the following: 'The guarantor institution is composed of seven commissioners. To appoint them, the Chamber of Senators, after conducting a broad consultation with civil society, following the proposals of the parliamentary groups supported by a 2/3 vote of attending members, will select the commissioner who will fill the vacancy, following the procedure prescribed by law.' 'The appointment', then it adds, 'will be open to objection by the President for a period of ten business days. If the President does not object to the appointment in that period, the commissioner's vacancy will be filled by the person selected by the Senate.' But '[i]f the President objects, the Senate will make a new proposal, following the steps of the former paragraph, but under a vote requirement of 3/5 of attending members. If this second option is objected, the Senate, following the steps of the former paragraph, with a vote of 3/5 of attending members, will select the commissioner who will fill the vacancy'.

authorities', instead of using a generic, more 'durable' expression (such as 'all levels of public authority').

We find the same dynamics in countless areas: the hyper-detailed nature of the regulation makes, in turn, further additional and piecemeal reforms necessary, both because it becomes obsolete sooner, and because it naturally touches on countless provisions – contained in constitutional clauses that are, themselves, very detailed – which therefore must be referred to in the amendments even if there was no direct intention of doing so.

Secondly, amendments have generated a constitutional framework full of *lagunae* and internal tensions because, in perfect hyper-reformist style, amendments are not made with an eye on their impact on the pre-existing constitutional body. Certainly, substantive heterogeneity is always reached to some extent in constitutions, which are typically the result of political transaction – and, as has been noted, producing a constitution *ex novo* does not ensure coherence either.[33] Moreover, a certain degree of internal tension is arguably inherent to the constitutions of plural societies, both because they must include a wide range of values and principles in order to have a chance of being accepted and because basic values and rights, outside of their structure and nature, are prone to enter into conflict in the context of specific cases. But in Mexico, the pattern of un-ending, fragmentary change, stirred by political conjuncture, pushed forward by politicians who ostensibly see gains only in what they add to the text – not in what they do to harmonise novelties with the extant clauses – have produced a set of sometimes very troubling inconsistencies and dysfunctions.

We find this in both the 'organic' and the 'dogmatic' part of the Constitution. Let us take some examples. As far as the organic part is concerned, a trait of constitutional evolution in Mexico has been the creation of many independent agencies. While this development is common to many countries, what is characteristic of Mexico is that no less than 13 have been enshrined in the Constitution and, most of them, are regulated there in great detail. They are often called OCAs (*organismos constitucionales autónomos*). For many years, more and more OCAs were added to the Constitution, with nobody accounting for the huge impact their creation has on the pre-existing schemes of the division of power. Even if no explicit changes were made to the corresponding articles, OCA proliferation has detracted powers and functions from the Executive and the Legislative branches, both at the federal and State level, in turn profoundly altering an already very complex federal system.

Over time, conflicts naturally grew between traditional branches and OCAs, and among the latter, but the Constitution offered no channel for solving them because no adjustment had been made to the articles defining who enjoys proper

[33] See Justin Blount, Zachary Elkins, and Tom Ginsburg, 'Does the Process of Constitution-Making Matter?' in Tom Ginsburg (ed) (2012) *Comparative Constitutional Design* 50 (stressing that, for all contemporary emphasis on constitutional design, many factors remain operative in actual constitution making, propitiating heterogeneity).

standing to begin a 'constitutional controversy' before the Supreme Court. Finally, in February 2014, the occasion was taken to amend Article 105 and enlist hypothesis of conflict between 'two autonomous constitutional institutions, and between one of them and the Federal Executive or Congress, whenever they dispute the constitutionality of general acts or rules'. But then an additional sentence was added: 'This will be applicable to the guarantor institution regulated in Article 6' (that is, to the Transparency Agency). What does this last sentence imply? Does non-standing reach other OCAs? Yes, because the first sentence is more encompassing. But the fact that this amendment was passed when the transparency agency was created led amending politicians to add this specific mention that now only creates doubts.[34]

Similar problems derive from the amendment of sub-section II of the same Article 105, which regulates standing on 'action of unconstitutionality' – abstract review. This sub-section, after the 2014 amendments, gives standing to *three* specific OCAs – the National Commission of Human Rights and analogous state institutions, the Article 6 'Transparency guarantor' agency, and the Attorney General's Office – and is *not* complemented with a more general standing clause.[35] This will surely generate new amendments, as soon as the excluded parties discover they cannot defend themselves against certain general statutes and rules.

The domain of federalism is another area in which amendment-associated disorder prevails. José María Serna shows, for instance, that from 1997 to 2014 there were 26 constitutional changes in the constitutional regulation of federalism arguably having been 'predominately motivated … [by] disorder, dispersion, and ambiguity with regard to the different levels of government's competencies, which translate into lack of clarity with regard to their responsibilities and inefficacy in policies'.[36] Fragmentary and constant changes create ambiguity and inconsistencies that in turn motivate more fragmentary reforms.

The bill of rights is in no better shape, even if its heterogeneity and inconsistency do not trigger more reform as systematically because changes typically affect disempowered citizens, not high-ranking public officials and government institutions. A first general problem derives from the great heterogeneity in style of the rights clauses: while some follow the typical abstract pattern and refer to the value that must be protected, others must be thought of as the implied 'negative' face of a bundle of specific rules about what authorities may or may not do.[37] But the most troubling difficulties stem from the fact that there are blatant, open contradictions among certain rules. The number of contradictions increased when, in 2011, the human rights constitutional reform gave constitutional hierarchy to the rights enshrined in treaties without simultaneously getting rid of previous provisions

[34] See Article 105. I, letter (l).

[35] See Article 105. II, letters (g), (h), (i).

[36] José María Serna de la Garza, 'Las reformas al federalismo mexicano', in María Amparo Casar and Ignacio Marván (n 2).

[37] Moreover, some of them find a counterpart in the federalist division of power – ie they are treated as areas of jurisdiction attributed to certain levels of government – and others do not.

incompatible with these. As a result, the Constitution at the moment contains several anti-conventional provisions, such as the one that denies political rights to persons undergoing criminal processes – in conflict with Section 23 of the ACHR and with the right to the presumption of innocence enshrined in Section 20.B.I of the Constitution[38] – the ones allowing Prosecutorial detention for as long as 80 days in some cases – in conflict with Article 7 of the ACHR[39] – or the imposition of community-labour penalties by administrative authorities – incompatible with at least three major international law sources.[40]

IV. Constitutional Change and Democratic Transition

The notably contorted picture offered by the Mexican Constitution, as a text, after 100 years of life is, nonetheless, the end-result of a process that had delivered significant gains for the country in the past. Let's briefly recall how it all started, around the end of the 1970s.

As is well known, after the Revolution and the approval of the Constitution of 1917, Mexico progressively attained a reasonable degree of political stability that had not been enjoyed in the nineteenth century. During those first decades of the century, the Mexican state apparatus grew dramatically and asserted an unprecedented degree of control over people and territory. This was done, however, under the leadership of a single political force, the PRI – previously called the PNR and the PRM – that gradually installed a hegemonic party system which controlled all power resorts and political behaviour at all levels. The political dynamics developed under the PRI effectively suffocated political pluralism in a context in which cooptation of interest groups, power-sharing and strategic circulation of elites replaced the dynamics of contestation and representation, effectively preventing the operation of both democracy and the rule of law.

In the late 1970s and early 1980s, however, the hegemonic party confronted a series of social, political, and economic crises that threatened the stability of the regime. In this scenario, President López Portillo decided to open the political arena (just enough) to the participation of other political forces through constitutional reforms in exchange for a certain degree of cooperation. In 1977 the first of

[38] Article 23 of the ACHR refers to the regulation (not denial) of the right to vote (not the range of political rights referred to in Article 38.II of the Mexican Constitution), and only for persons convicted (not those simply charged with certain counts; the charges could of course have no merit, yet a person can according to Article 38 have already been banned from running for elected office).

[39] See the regulation of the so-called *arraigo* (house arrest) in Article 16 of the Mexican constitution, which is incompatible with the provisions of Article 7 of the ACHR.

[40] See Article 21 of the Mexican Constitution, which contradicts Articles 1 and 2 of the ILO Covenant 29, Article 8 of the ACHR and Article 8.3 of the International Covenant on Civil and Political Rights (exempting community work from being 'forced labour' wherever it is dictated by a *judge* after due proceedings). See, generally, Francisca Pou Giménez, 'Las reformas en materia de derechos fundamentales' in Casar and Marván (n 2).

these reforms took place. President José López Portillo convened a dialogue with opposition parties and associations to discuss a set of constitutional reforms. They all met at the Ministry of Interior and their agreements were constitutionalised. On the one hand, 'the reform was seen by the government as a preventive operation capable of providing a channel for discontent, a place for the "minorities"'.[41] On the other, the opposition movements perceived this reform as a platform from which to further their goals. We believe that the political importance of this reform exceeds its content. It gave the Constitution a role that would later determine its future: it became the space for sealing political negotiations.

In the ensuing years, due to further social and economic crises, the opposition won more spaces. In 1988 the PRI lost the capacity to unilaterally amend the Constitution since it no longer retained the two thirds super-majority in the Chamber of Deputies. As a consequence, the role of the Constitution as the space for sealing political negotiations was reinforced. From then on, constitutionalising the commitments and deals among the three main parties' elites (PRI, PAN and PRD) meant shielding them from future majoritarian defection.[42] In this way, in the early years of the long transition to democracy the Constitution became an extremely successful device for enabling credible commitments between the authoritarian regime and the opposition parties, something that no doubt was critical to attaining a consensual and, to an important extent, pacific change of regime.[43]

Constitutional amendment helped insert and stabilise political plurality in a further sense. As has been remarked, when constitution-making processes – aimed either at replacing or amending a constitution – are multilateral (not controlled by a single political group), there is a tendency to produce institutions that distribute power. The different groups within the constituent body 'face a constraint on the type of institutional framework they can attempt to enact: the other group's veto'.[44] Thus, in Mexico the constitutional framework created over the last decades through a broad, long line of constitutional reforms, has distributed both power and resources, to the great benefit of the three leading political parties. And these benefits are important in explaining the stability and peacefulness of the transition process.

Electoral reforms, for instance, created a system in which Congress is elected through a combination of majoritarian and proportional representation formulae both at the federal and the state level, which in turn has led to an increasingly plural political arena. They also created an enormous and extremely well-funded

[41] José Woldenberg, *Historia mínima de la transición democrática en México* (El Colegio de México, 2012) 20.

[42] Pedro Salazar, 'Sobre la democracia constitucional en México (pistas para arqueólogos)' in *Política y derecho. Derechos y garantías. Cinco ensayos latinoamericanos* (Fontamara, 2013).

[43] Woldenberg (n 38); Francisco Valdés Ugalde, *La Regla Ausente* (FLACSO-IIS-UNAM, 2010).

[44] Andrea Pozas-Loyo and Julio Ríos Figueroa, 'Enacting Constitutionalism. The Origins of Independent Judicial Institutions in Latin America' (2010) 42(3) *Comparative Politics* 298.

electoral branch with probably no peer at the comparative level, in whose context political parties are controlled, but who also have an important say.[45] Similarly, as we have already mentioned, multilateral hyper-reformism has created an institutional framework populated by autonomous agencies, creating or modifying pre-existing institutions to increase their autonomy. Among them we can find the National Human Rights Commission (1992–99), the Bank of Mexico (1993), the National Electoral Institute (1996–2007–14), the National Institute of Statistics and Geography (2005), the National Institute for the Evaluation of Education, the Federal Economic Competition Commission, the Federal Telecommunications Institute, the National Council for Evaluation of Social Development Policy (all in 2013), the Federal Institute for Access to Information and Protection of Personal Data (2014), the Federal Judicial Council (1995–99), the Superior Audit Office (1999–2009–15). Not to mention the reforms directed at the Supreme Court of Justice (1987–94–96–99), that fortify its functions and its independence vis-a-vis the other branches.[46] This immense constellation of bodies has given the three main political forces ample space and opportunities to negotiate the forms and the fora for sharing political presence as well as the economic benefits linked to public offices in Mexico.

This explains why most of the amendments over the last 30 years have been passed with more than the two-thirds majority required by the Constitution[47] and why states have *never* vetoed a constitutional reform.[48] The three main parties together enjoy a super-majority in Congress and strong influence over local legislatures, which is more than enough to keep the 'amendment machine' working.[49] Since 2014 this trend has only got deeper. The bulk of the 90 constitutional amendments passed from 2012 to 2015 were the result of the 'Pact for Mexico,' a high-profile political agreement between the leaders of the three main parties sponsored by the President.[50]

Constitutional amendment, in short, played a central role in the Mexican transition process. It enabled credible inter-party commitments within a scheme that delivered large gains by the three leading parties, thus becoming central to our process of democratic transition.

[45] Javier Aparicio and Jacaranda M Pérez,'Financiamiento público a partidos políticos' in *Grandes Temas para un Observatorio Electoral Ciudadano*, *Vol. III – Sistema Político Electoral* (IEDF, 2007), 211–32; Pou Giménez (n 3); Ricardo Becerra, Salazar Pedro and José Woldenberg, *La Mecánica del Cambio Social en México* (Cal y Arena, 2000); Lorenzo Córdoba Vianello, 'Las reformas en materia electoral' in Casar and Marván (n 2).

[46] Fix Fierro and Valadés (n 21).

[47] Casar and Marván (n 2) 40. As these authors document, from 1997 to 2014, favourable votes were made 83% of the time by the 3 leading parties.

[48] Remember Article 135 requires approval of at least a majority of the state legislatures for an amendment to pass.

[49] Our goal here is simply to note how a very particular and long-lasting political dynamics helps understand the counter-intuitive scenario in which we have smooth, continuous reform under an amendment rule that requires the approval of more than 15 states. A complete explanation would require an account of the party structure that we cannot provide here.

[50] See Mariana Velasco Rivera, in this volume.

V. Constitutional Change and Democratic Consolidation

Despite its very relevant political role in the recent past, our point of view is that today hyper-reformism seriously impairs the adequate deployment of basic constitutional functions, setting unnecessary and maybe insurmountable obstacles to the construction of a society governed under the rule of law and democratic principles. Let us elaborate on some of these problems.

Normative constitutions – that is, constitutions conceived as enforceable and often directly applicable legal rules – can be attributed to many functions, but two among them seem paramount: legal functions and political functions. Viewed from the viewpoint of the role it plays within the legal system, a constitution is a norm that sets a basic programme for the structuring and management of collective life and provides tools for its own enforcement. We can call this dimension the *legal* function of the Constitution. The Constitution is a key element in a distinctive system of social regulation – the law – which competes with other normative systems that also project demands on people, and aspires to have distinctive advantages over them: advantages because of its origins – who produces legal rules – because of its content – potentially more acceptable in plural societies than the rules of other systems – and because the law aspires to guarantee its own enforcement and dedicates many resources to that end. A constitution, specifically, sets a basic substantive programme for the organisation of collective life. At a preliminary level, its provisions are intended to motivate citizens and authorities and attain a fair degree of self-enforcement. But constitutions also create a large apparatus of legislative and executive structures to implement, develop, and enforce, the substantive programme they set forth. And they create a judiciary, and charge judges with the responsibility of directly enforcing constitutional rules, or of setting in motion processes that operate as a motivational reinforcement for citizens and authorities.[51]

Unfortunately, the now hyper-amended Mexican constitutional text, both for content-dependent and for content independent-reasons – that is, because of its impermanency – works very poorly as a piece of legal machinery. Huge areas of the Constitution, and the text holistically seen – in so far as extraction of a general 'constitutional ethos' is sometimes attempted – are unable to really motivate citizens and public authorities because they do not convey understandable messages, and because, to the extent people know they change all the time, do not constitute for them strong 'reasons for action'.[52] Although it is probably the case that constitutions are poorly known by citizens everywhere, the text of the Mexican

[51] See Juliane Kokott and Martin Kaspar, 'Ensuring Constitutional Efficacy' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) (mapping different judicial and non-judicial models as methods to assure the efficacy of the Constitution).

[52] Joseph Raz, *Practical Reasons and Norms* (Oxford University Press, 1999).

Constitution is a distinctively mysterious text both for lay citizens and specialists. It is fair to assume that even those that 'feel' subjectively motivated by it, and show appreciation for the Constitution if asked, are moved not by the actual content of the text, but rather by what they imagine this content to be.[53]

This opens great margins for unintended non-abidance by both citizens and public officials and creates difficulties at the level of legislative and administrative 'development' of the Constitution – precisely a dimension that should be well served in a system where the Constitution endures.[54] But where pathologies are perhaps more blatant is at the critical level of constitutional adjudication. A distinctive institutional responsibility of the judiciary is to provide the community with a clarification of what the law says – of what counts as law – constructing narratives about the meaning of the Constitution that can be defended as coherent across time. As we well know, interpretation tasks are never simple due to a wealth of factors.[55] But in Mexico this complexity is multiplied by an amazingly above-average degree of internal constitutional heterogeneity and by the dynamics of perpetual change.

A painful example of this is the amount of time and effort Mexican judges must currently devote to what would be, in Dworkin's terms, mere 'pre-interpretative' tasks: tasks oriented not at ascertaining what the Constitution means in order to resolve conflicts under it, but to ascertaining what the Constitution *is*.[56] This is what happens, for instance, with the brand new Mexican Bill of Rights, after the 2011 reform, for the reasons we described before. The Supreme Court has spent more than three years trying to come up with a scheme capable of making sense of the relative position of national and international sources of rights within the Constitution, paying a very high cost in terms of the internal divisions this has created within the Court, and in terms of failing to provide the guidance the community expected from it. The Court crafted a first 'clarification' ruling in the *Varios 910/2012* case. The criteria set down in this ruling were painfully revisited but confirmed in the *AI 155/2007* case, then disregarded in several cases decided by the Second Chamber in 2013, and finally overruled in the *CT 293/2011* case, that sets criteria which are internally in tension, and that do not fully dissipate doubts about the contours of the Bill of Rights and the relative position of national

[53] People may, for instance, retain a loose sense of what the great social and political deals the 1917 text meant to convey were; a quite radical social conception of property and the separation of church and state would no doubt be among them. In actual fact, amendments to sections 25, 26, 27, together with the economic provisions that the 2013 amendments added to the transitory clauses, have radically altered the property regime, as have the July 2013 amendments to section 24 as far as the constitutional treatment of religion is concerned, though it is very difficult to ascertain in what exact direction.

[54] Elkins, Ginsburg and Melton (n 6), 19–20 (underlining that constitutional endurance promotes the development of ancillary institutions).

[55] Among them, the fact that interpretation can be attempted from many different perspectives, the fact that there are no shared meta-rules about how to choose among the different interpretive methods, and the fact that constitutions are very special rules whose interpretation and application require a special approach.

[56] Ronald Dworkin, *Law's Empire* (The Belknap Press of Harvard University Press, 1986).

and international sources of rights.[57] These cases struggle with problems created to a great extent by irresponsible dynamics of amendments. The transformative potential of changes ends up mortgaged by the un-ending amount of technical talk produced for confronting the problems caused by extreme internal inconsistency. The community cannot yet focus on the task of having the Constitution *enforced* because it is not even clear what the Constitution *says*.

The Mexican Constitution, in sum, offers little guidance and, by the same token, also little constraint. While the degree to which different legal forms are constraining is variable and never absolute,[58] law retains its functionality to the extent that not everything can be convincingly argued in legal terms. Following the rules of the 'game of law' must be perceivably different from following the rules of other social games – violence, exclusion or corruption. In Mexico, by contrast, central traits of hyper-reformism – constitutional obscurity, and the fact that public authorities are often in the position of choosing between abiding the Constitution or changing it – debilitate the position and functionality of the legal system.

The second main function of a constitution is to provide a framework for an adequate expression of the democratic will. We may call this dimension the *political* function of the Constitution. A constitution marks points of equilibrium and division of labour between majorities and minorities, between the government and the governed, and between past, present and future generations. By drawing lines between different kinds of decisions and decision-making processes, it tries to ensure the productive and non-abusive development of the democratic conversation. Thus, the Constitution identifies what issues must be debated giving ample consideration to decisions taken in the past, and which ones are more freely manageable in the present; it distinguishes issues in which non-utilitarian, right-based thinking must prevail from those in which majoritarian political logics is less constrained; it separates questions in which the private judgement of individuals or groups enjoys wider space than those in which the margin is small, and it generally liberates political life from the duty of addressing anything at any point. When citizens and institutional actors respect these lines (ie, when enforcement is attained), discuss where those lines are drawn by the Constitution (ie, when they engage in constitutional interpretation) or should be drawn (ie, when they partake in normative criticism), democratic political life ensues with certain intelligibility and order.

[57] About this judicial saga, see Fernando Silva García 'Derechos humanos y restricciones constitucionales: ¿reforma constitucional del futuro vs. interpretación constitucional del pasado? (Comentario a la CT 293/2011del pleno de la SCJN)' [2014] 30 *Cuestiones constitucionales* 251; Rubén Sánchez Gil, 'Notas sobre la Contradicción de tesis 293/2011', [2014] 21 *Revista Iberoamericana de Derecho Procesal Constitucional* 133 (January–June); and Francisca Pou Giménez, 'Lo que quisiera que la Suprema Corte hiciera por mí: lealtad constitucional y justicia dialógica en la aplicación de la CT 293/2011' in Caballero y Rubén Sánchez Gil (eds), *Derechos constitucionales e internacionales. Perspectivas, retos y debates* (Tirant lo Blanch, 2018).

[58] Jean D'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2011).

For instance: if a constitution is rigid, but can be amended, it draws certain lines to the tasks of the judiciary that are democratically enriching. As Rosalind Dixon and Adriane Stone have argued, constitutional amendment is democratically critical because it provides a channel for political majorities to 'respond' to courts even in strong judicial review systems, providing a way for diluting the problem of the judiciary having the last word.[59] In their view, 'political constitutionalists' like Waldron have too easily discarded this argument because they take the US experience as a paradigmatic case, which is in fact, when contemplated from an informed stance, an exceptional constitutional case of what we would call hypo-reformism.[60]

Finally, an additional important political function of constitutions has to do with their capacity to enhance the development of a sense of political *demos* around the constitutional text[61] or, in other words, to deploy an 'integrative function'[62] that can be of critical importance in divided societies. And as several authors have underlined, whether a constitution is successful in this sense may depend on its content, but often depends, crucially, on how the Constitution is made – including how amendments are made – and the extent to which constitution-making processes make people feel the Constitution is 'theirs'.[63]

Unfortunately, none of the dimensions identified by this portrayal of political functionality are well served in the hyper-reformist scenario. For starters, hyper-reformism empowers legislators and judges well beyond the frontiers expected in the context of a constitutional democracy that seeks the sort of equilibriums identified above. In Mexico, for instance, it is very difficult to hold the legislature accountable because of the difficulty of ascertaining what the Constitution says, and because legislative chambers in Mexico simultaneously attempt statutory and constitutional change. It is difficult to say, for instance, whether the 2014 Federal Telecommunications and Broadcasting Act fully respects the Constitution, because it is very difficult to ascertain what is really set forth in the extremely long constitutional transitory provisions on the matter, combined with those in Articles 6, 25, 26, 27 and 28.

The judiciary is, for its part, over-empowered even more. The spectrum of the arguments they can present is as broad and heterogeneous as the Constitution itself.

[59] Rosalind Dixon and Adrienne Stone, 'Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection' in *Philosophical Foundations of Constitutional Law* (David Dyzenhaus and Malcolm Thorburn (eds), Oxford University Press, 2016), 95–96.

[60] ibid, 102–06.

[61] Elkins, Ginsburg and Melton (n 6).

[62] Dieter Grimm, 'Integration by Constitution' (2005) 3 *International Journal of Constitutional Law* 193 (nos 2 and 3, Special Issue May 2005); Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press, 2007).

[63] Stefan Voigt, 'The Consequences of Popular Participation in Constitutional Choice: Towards a Comparative Analysis' in Anne van Aaken, Christina List and Christoph Lutge (eds), *Deliberation and Decision. Economics, Constitutional Theory and Deliberative Democracy* (2003); see Blount, Elkins and Ginsburg (n 33).

Moreover, hyper-reformism debilitates both internal controls within the judiciary and the external supervision of its tasks. For one thing, judges (and the Supreme Court in particular) lack incentives to make the sustained effort necessary for building strong interpretive doctrines under the constraints of integrity: it is foolish to make such an effort if one knows the constitutional provisions these doctrines gloss upon may be replaced tomorrow. By the same token, professors, practitioners and political commentators lack incentives to develop the sort of critical apparatuses that would make the judges feel closely supervised, and hence both their professional tasks and the quality of the public debate are hampered by the difficulties of, again, pointing out what the Constitution says. On the top of that, an incoherent and ever-changing constitution prevents the country from reaping the deliberation-reinforcing benefits of judicial review understood as an institution that, by forcing majorities to pause, on the basis of arguments that articulate the meaning of the Constitution, allows for an overall richer democratic debate.[64]

Nor does it allow for the sort of dialogue between judges and amending majorities that Dixon and Stone have imagined (see above). For even if legislative branches 'respond' to a judicial ruling with an amendment, the Constitution will be the unpredictable result of combining this response with the heterogeneous pool of existing provisions, and judges may easily insist on their previous views by presenting them as derived from a different combination of constitutional ingredients. And while this may happen everywhere, the Mexican over-amended Constitution allows this potentially very rich interaction to proceed with a distinctive degree of arbitrariness. Even if it is true, therefore, that present-day generations in Mexico have the Constitution more at their fingertips than in other countries, in our view this does not translate into gains in terms of obtaining a more robust, healthy democratic or constitutional life.

The Mexican Constitution does not fulfil, either, its potentially very relevant identity-related functions. Its elite-driven constitutional change fails to provide the gains in terms of heightened popular participation and debate that are attained under other patterns of constitutional change.

Note, then, that the problem all along has not been that Mexico lives under a constitution that does not matter. The Constitution has important effects, symbolic and material. The problem lies in the sort of effects it deploys and the sort of obstacles it poses to even the best-intentioned of actors, to play the 'game of law' and the 'game of constitutional democracy'.

[64] We mean to refer to the sort of dynamics that John Ferejohn and Pascale Pasquino, analysing Friedman's argument along those lines, call 'the counter-majoritarian opportunity' in John Ferejohn and Pascale Pasquino, 'The Countermajoritarian Opportunity' (2014) 13 *University of Pennsylvania Journal of Constitutional Law* 353. See also Víctor Ferreres Comella, 'Una defensa de la rigidez constitucional' (2000) 23 *Doxa* 29.

VI. Conclusion

In this chapter, we have shown that in the last 30 years Mexico has exhibited a pattern of constitutional change that can be characterised as *hyper-reformism*, because of the large number of constitutional reforms, because of the scope of the changes involved, and because of the sort of fast-track political process they derive from. We have portrayed some of its different political and legal effects over time, and we have argued that while this pattern was critical for transition to democracy, it now constitutes an obstacle for the consolidation of constitutional democracy.

To conclude, we would like to underline two implications of the analysis. First, we believe that taking patterns of constitutional change as units of analysis enables the evaluation of their effects, regardless of the effects of evaluation of individual reforms – which is the stance constitutional lawyers tend to automatically adopt. We can think of the consequences that the pattern itself has, analytically separate them from the evaluation of the particular consequences of particular amendments, and as a result reach a broader and more encompassing understanding of constitutional realities. In connection with this, we argued that hyper-reformism in Mexico has had negative effects on the consolidation of the rule of law and constitutional democracy even if it paradoxically was central to the transition to democracy. This evaluation captures the effects of the pattern of change on different aspects of the rule of law and reaches conclusions that would have been different had we focused on the effects of individual reforms. We believe, moreover, that this kind of approach could be fruitful in identifying and better understanding the dynamics of constitutional change in other countries. For instance, studying the causes and effects of hypo-reformism (as the one present in the US), or other modalities of hyper-reformism, could enable a better understanding of amendment processes in general, and make some fruitful comparative inferences possible.

Finally, claiming that a pattern exists naturally leads to the inquiry of its causes. As a derivation of our analysis here, the next step in the study of Mexican hyper-reformism must be to strive to produce an account of the mechanisms of reproduction behind this pattern.[65] If, as we have argued, hyper-reformism has become an obstacle for the consolidation of constitutional democracy in Mexico, then understanding those mechanisms is not only an important academic aim, but also a necessary step to transform a troubling reality.

[65] We present an account of these mechanisms in Pou Giménez and Pozas-Loyo, 2016 (n 5).