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## I. INTRODUCTION

Mexico had a year of contrasts in 2020 with respect to constitutional change. This paper aims to account for them. First, the number of successful constitutional amendments was lower than the historical average (there were eight successful amendments) and, unlike previous years, those reforms arguably did not imply any substantive constitutional change. Second, the number of proposed constitutional reforms was the highest in the last twenty-five years: 529. To understand this impressive number, and the radical constitutional changes, some of these proposals put forward, we reflect on the political role they played. We focus on the judicial reform proposal, arguably one of the most important bills discussed in 2020, which is very likely to be enacted in early 2021. Although the reform aims to fight corruption and nepotism within the judiciary, two of its most persistent and urgent problems, it also features some polemic aspects. Its critics argue that it substantially undermines judicial independence of lower-court judges vis-à-vis their superiors, enhancing the political gains of capturing the head of such a vertical judicial system. We also discuss several executive unilateral actions taken in the context of the COVID-19 pandemic. Arguably, some of these unilateral actions have *de facto* transformed the constitution, empowering the Armed Forces and the executive in ways that will be hard to reverse. We close with an account of the Supreme Court's constitutional role during 2020.

## II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Regarding constitutional reforms, 2020 was an atypical year in Mexico. It was atypical in two important respects: First, the number of successful constitutional amendments was lower than the historical average and, unlike previous years, those reforms arguably did not imply any substantive constitutional change. Second, the number of proposed constitutional reforms was the highest in the last 25 years, and several of those proposals put forward changes that, if approved, are likely to transform our constitutional structure in important ways. In this section we present a brief account for these two points and show how they fit together.

Let us start giving some context for the discussion that follows. As is well known, the 1917 Mexican Constitution is the third most amended charter in modern constitutionalism. From its enactment, in February

1917, until January 2021 Mexico's Constitution has had 737 amendments.<sup>1</sup> Moreover, few constitutions have been more enduring. Hence, no other existing codified constitution has been subjected to such a constant pattern of renewal through amendments.<sup>2</sup> Moreover, this pattern of hyper-reformism is a relatively recent development, seventy percent of the total number of amendments is post-1982, and almost forty percent of them passed from 2006 to 2018.<sup>3</sup>

As a result of a landslide victory in July 2018, the coalition led by President Lopez Obrador's party took control of both chambers of Congress creating a unified government for the first time since 2000, when PRI lost the Presidency after 70 years of hegemonic rule. The election of Andres Manuel Lopez Obrador (AMLO) has brought an important transformation in the power configuration of the political elite. For this reason, many thought hyper-reformism would end, and a new Constitution could be enacted. This did not happen: the Constitution has been amended forty-two times since the new administration was inaugurated in December 2018. As we have argued elsewhere this pattern of constitutional change has most probably become self-reinforcing.<sup>4</sup> Moreover, at least for now, the President has signaled that no constitutional convention is required, since the Constitution has been, and will probably continue to be, "transformed" through amendments.

*Prima facie*, 2020 was not a paradigmatic year of such a hyper-reformist pattern. In this year, only eight constitutional amendments were successful. Eight amendments may not seem a negligible number from a comparative perspective, but within the Mexican context they are not many. From 1982 to 2020 the mean number of amendments passed per year is 13.5.

Should we conclude that 2020 was a calm year for Mexico's frenetic standards of constitutional activity? In what follows, we argue that such a conclusion would be misleading: 2020 was very dynamic in

1 In Mexico, reforms are formalized by the issuance of a constitutional reform decree. Decrees can involve a single change to a specific article or several changes to different articles. Our measure of constitutional amendments follows most Mexican scholars who usually define "one amendment" as a change in one article made at a particular moment in time through the issuance of the corresponding decree.

2 By a "codified constitution" we mean a rigid written constitution. The amendment formula in Article 135 requires the affirmative vote of 2/3 of attending members in each federal chamber, plus ratification by half of the state's legislatures.

3 Francisca Pou-Giménez and Andrea Pozas-Loyo, *The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition While Blocking Democratic Consolidation*, (Hart Publishing 2019).

4 Francisca Pou-Giménez, Andrea Pozas-Loyo, and Camilo Saavedra-Herrera, *The Dynamics of Mexico's Self-Reinforcing Hyper-Reformism* (2020), research paper under review.

constitutional terms, but most of the activity took place either through constitutional bargains and threats of constitutional change of which the staggering number of amendment proposals are a symptom, or through the unilateral actions promoted by the executive in the context of the pandemic. As we discuss in the following section, the central constitutional debate in 2020 was whether some of the administration's "decrees" and "agreements" (two forms of executive unilateral actions) are unconstitutional, and to what extent some have already led to *de facto* constitutional changes that will be difficult to undo, such as the empowerment of the Armed Forces and the concentration of power in the executive.

First, let us present a brief account of the eight constitutional articles that were amended in 2020, which, as we have told, do not constitute any substantive constitutional change. These reforms are grouped in four constitutional decrees. Six of the eight reforms constitutionalized President AMLO's public policies. Arguably, the most consequential modified article 4 to constitutionalize the new Health Institute for Wellbeing (INSABI). The federal executive submitted the bill in November 2019 and the reform was published six months later. Its approval was the last step on a long debate over public health insurance programs. The INSABI substitutes *Seguro Popular*, a health insurance that covered approximately 60 million people in the informal sector. The critics of this reform argued that the previous program's catastrophic expenses protection fund had proved its efficiency and economic viability. President AMLO argued that it enabled corruption and was part of a neoliberal inherited institutional framework to be discarded. With the new scheme, the federal government gains discretion over the allocation of resources. The amendment also establishes the obligation for the Mexican State to provide economic support to elderly and disabled persons, as well as to establish scholarships for public schools.

The other "policy amendments" of this year are the following: Article 28 was amended to forbid tax condonations (this amendment was published on March 15<sup>th</sup>). Articles 4, 73, 115 and 112 were amended to establish the State's obligation to promote policies for the comprehensive development of youth. Those economic transfers (to the elderly, a section of youth, and some students) are part of the social policy of this administration, which is consistent with their distrust with institutional structures, have chosen direct cash payments. Finally, in December, article 4 was amended to recognize the right to mobility and article 73 to grant Congress faculties to issue secondary legislation on mobility matters.

Now, the amendments proposed in 2020 could hardly be more contrasting to the amendments actually ratified this year. On the one hand, their quantity is impressive: the bills proposing at least a constitutional reform amount to 529. Actors linked to the coalition in government submitted 49.7% of them (187 belong legislators affiliated to MORENA, 49 to the Labor Party, 24 to Social Encounter Party, and 2 more were formalized by the Federal Executive). Regarding the topics covered, 20.8% are related to legislative branch, 17.8% to human rights, 9.4% to social development, 9.3% to public security and the 8.7% to elections. It is important to note that 514 out of the 529 initiatives are in process of analysis in congressional committees.

To understand the impressive number of proposed amendments and the radical constitutional changes some of them put forward, it is

necessary to reflect on the political role those proposals have played in an increasingly polarized country. Although this year has had the largest number of proposed amendments in the last 25 years, it is part of a trend that has characterized the current legislature (in which 1317 bills proposing at least one constitutional amendment have been submitted). Arguably, amendment proposals, and particularly radical ones, have been used as threats and exchange chips among political actors. As we argue elsewhere, this role has been part of Mexico's constitutional processes since the late 1970s.

The judicial reform was arguably one of the most important bills discussed in 2020, and also the only one presented and approved by 2/3 of present members of Congress before the end of the year. It has not been officially enacted because ratification by the majority of states' legislatures is still pending. The reform seeks to fight the corruption and nepotism, which for decades have affected the judiciary, through the renovation of the rules governing the judicial career. But, at the same time, it introduced some polemic changes. Several members of the legal community have argued that it substantially undermines judicial independence of lower-court judges vis-à-vis their superiors (i.e. internal independence), enhancing the political gains of capturing the head of such an extremely vertical judicial system.<sup>5</sup> It is worth noting that, in the midst of this polemic, the Chief Justice often argues that it is important to remember that several more radical amendment proposals were presented in Congress, and that his proposed reform is much better than several of the alternatives. This line of argument shows the important role amendment proposals can play in constitutional bargains.

### III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In Mexico there are not unamendable rules, and the Court has refrained from exercising explicit review of constitutional amendments.<sup>6</sup> Moreover, as we explained above, the amendments passed in 2020 do not constitute substantive constitutional changes; hence, they cannot be considered dismemberments.

Nevertheless, 2020 was a year of important constitutional changes. In substantive terms, the most radical constitutional modifications came in the form of unilateral executive actions; the most important being the *Militarization Agreement* published in May.<sup>7</sup> It could be argued that this unilateral action does constitute the last step in the dismemberment process of the civil-military relations that characterized the Mexican constitutional system since 1942.

The *Militarization Agreement* authorizes Armed Forces to make detentions, seize assets, execute arrests warrants, preserve, secure,

5 Julio Ríos Figueroa, Mexico's Constitutional Reforms: Threats to Judicial Independence from Within?, (2021) Available at <<https://constitutionnet.org/news/mexicos-constitutional-reforms-threats-judicial-independence-within>> Accessed on February 14, 2021.

6 On the debate around the judicial review of amendments in Mexico see: Pou-Giménez F, Pozas-Loyo A and Saavedra-Herrera C, *Interpreting the Ship of Theseus: Constitutional Hyper-Reformism and Judicial Review in Mexico (1917-2019)* (2020), research paper under review

7 Agreement by which the permanent Armed Forces are available to carry out public security tasks in an extraordinary, regulated, supervised, subordinate and complementary manner, (2020) Available at <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5593105&fecha=11/05/2020](https://www.dof.gob.mx/nota_detalle.php?codigo=5593105&fecha=11/05/2020)> Accessed on February 13, 2021. See also: Andrea Pozas-Loyo, *On the Possible Legal and Political Effects of the COVID-19 Pandemic in México*, (2020). Available at <<http://www.iconnectblog.com/2020/06/on-the-possible-legal-and-political-effects-of-the-covid-19-pandemic-in-mexico/>> Accessed on February 14, 2021.

investigate, and process evidence in crime scenes (among other functions). It also gives the Armed Forces the tasks of preventing crime, maintaining order and social peace in all the places subject to federal jurisdiction, such as airports, customs, and federal roads. Moreover, it establishes that all the actions taken by the Armed Forces in the fulfillment of this agreement will be under the supervision and control of a military authority not subjected to transparency laws, and without clear accountability mechanisms to a civilian authority. In sum, this unilateral action transforms the role of the Armed Forces (empowering them above the constitutional limits), arguably impinges on the functions of other important constitutional actors (e.g. the Federal Prosecutor), and it is in conflict with several constitutional rights.<sup>8</sup>

Let us now turn to the Supreme Court's constitutional role during 2020. From our perspective, in general terms, the Court avoided to challenge the government's agenda, at least partially, on strategic grounds. As we have seen, a judicial reform was discussed this year, and the Court knew the risks it involved. Moreover, there is a widely shared perception that the Court has ideologically moved a step closer to the current government. The appointment of three new justices in the first year of this administration played an important role in this change. Two of the three vacancies were scheduled due to the end of the 15-year constitutional term of justices Cossío and Luna. The third vacancy, on the other hand, emerged from the resignation of justice Medina Mora, who left the Court eleven years before the end of his term.

In 2020, the Court adjudicated a total of 3958 cases. This year the Court received 525 constitutional cases, 171 more than in 2018. Given the space limit, we focus on three sets of cases that have particular constitutional importance.

Let us start with the important decision on the constitutionality of a referendum (popular consultation) on whether five former presidents should be criminally prosecuted. The consultation originated in September 2020 when President AMLO, resorting to a prerogative established in Article 35 of the Constitution, requested Congress to officially call the consultation.<sup>9</sup> As it is constitutionally forbidden to carry out referenda on certain matters (e.g. human rights, electoral and financial issues, public security and the organization and performance of the AF), article 35 also grants the Supreme Court the faculty to rule on the constitutionality of the matter to be consulted before Congress formalizes a referendum (i.e. it gives it the Court the capacity to exercise *a priori* constitutional review of referenda's matters).

In October 2020, after an intense debate, the Court ruled in favor of President AMLO in a 6 to 5 decision. On the one hand, the five justices in the minority argued that, as proposed by the President, the consultation implied to vote over human rights, one of the matters prohibited by the Constitution. According to them, if there is an alleged crime, the alleged victim(s) has the right to an investigation, and the prosecutorial authorities have the obligation to investigate. Hence, such an obligation cannot be subject of a popular consultation. On the other hand, the majority led by Chief Justice Arturo Zaldívar and the three justices

nominated by President AMLO considered that the reform that incorporated popular consultations to the Constitution produced a major redesign of Mexico's form of government as it implied a transition from a representative to a participatory democracy. So, following the nature of the reform, the consultation should not be ruled unconstitutional. Nevertheless, the Court's majority decided that, to be constitutional, the specific question had to be rephrased, and they did so in a very ambiguous fashion, taking away any reference to any specific individuals, and referring "a process of clarification" of "the political decisions taken in the last years".

The second set of cases we want to focus on, are linked to the militarization agreement we discussed above. This unilateral action was challenged in federal courts immediately after its enactment. The central arguments are that the president does not have the prerogative to issue agreements of this nature, and that it does not comply with the 2019 Constitutional Reform that mandates the creation of the National Guard under civilian authority and the progressive de-militarization of public safety tasks. Most of the challenges derived from *amparo* demands (individual constitutional claims) filed in District Courts. Among the decisions rendered so far, two stand out because the judges in charge determined the unconstitutionality of the agreement arguing that regulation of Armed Forces is a faculty that belongs to Congress, not to the executive. This argument was also present in the constitutional controversies (concrete review) filed in the Supreme Court by Laura Rojas as the president the Chamber of Deputies, as well as by different governors and municipalities. The demands not only claim that the presidency violated the competences of the legislative branch, but also that the enforcement of this unilateral action will result in gross human rights violations. In this connection, the National Human Rights Commission and the United Nations High Commissioner for Human Right in Mexico have expressed great concern about the effects of this agreement. The final decision on the constitutionality of this unilateral action by the Supreme Court is still pending. In September 2020, the Second Chamber of the Court postponed the analysis of a project drafted by Justice Yasmin Esquivel —one of President AMLO's appointees—proposing to dismiss the Chamber of Deputies' demand.

Finally, the cases dealing with the austerity measures of the current administration require special attention. Austerity has been a central piece of President AMLO's rhetoric for a long time, but after his inauguration it inspired the creation of new pieces of legislation such as the Federal Act of Republican Austerity and the Federal Act of Public Servants Remunerations, that have been subject of thousands of *amparo* demands since their enactment in 2019. More recently, already in the context of the COVID pandemic, the President transformed one of his interventions in his daily press conferences into a decree known as the "Austerity Decree" introducing further cuts for the Federal Administration. Among the measures this unilateral action mandates are a 75% cut to the operation budget of all public agencies and a "voluntary" progressive reduction in the salary of all "high" public servants up to a 25% cut. In addition, most governmental expenditures have been postponed (with the exception of the administration's megaprojects). Through this decree President AMLO made substantive modifications to the 2020 federal budget, which is a faculty of the Chamber of Deputies.

The Austerity Decree has been criticized not only for upsetting the system of checks and balances, but also for endangering the State's

<sup>8</sup> For a detailed discussion see: Nuria González-Martín, *Emergencia Sanitaria Por Covid-19: Un Acuerdo Desconcertante ¿emergencia Por Motivos de Salud o de Seguridad?* (UNAM 2020).

<sup>9</sup> Article 35 was amended in 2012 to introduce different mechanisms of direct democracy. One of these mechanisms is the "consulta popular" (popular consultation), which can be requested by the Presidency, thirty-five percent of the members of either chamber of Congress, or at least the two percent of the electoral roll.

capacity both in the short run through this year's budget cuts, and also in the longer term through in human capital, organizational capacity, and infrastructure's losses. This decree has been challenged in federal courts, but a final resolution has not been made yet. Nevertheless, it has produced severe consequences in multiple public agencies. For instance, the commissioner of the Executive Commission for Victims Assistance resigned just a few weeks after this decree's enactment, arguing that budget cutbacks virtually paralyzed the Commission in a context of extreme violence, and therefore of great need for victims' assistance.

#### IV. LOOKING AHEAD

Hyper-reformism has persisted as the main path of constitutional change despite the significant political and ideological changes that emerged from the 2018 general election. Instead of promoting a new Constitution, the coalition led by President AMLO has successfully resorted to constitutional amendments to develop its agenda. In view of the number of amendments and proposals accumulated in 2020, it is difficult to foresee the end of the hyper-reformistic trend in the near future.

Furthermore, the government has made explicit the intention to promote reforms that would further centralize power in the executive. In this connection, President AMLO's criticisms against the Constitutional Autonomous Organs indicate they might be the main target of constitutional change in the coming months. These organs, which resemble the independent regulatory agencies that exist in other countries, are in charge of designing, implementing and even adjudicating disputes in multiple policy areas such as elections, transparency and access to information, human rights, energy, economic competence, telecommunications, among others. They are central to the constitutional structure of checks and balances produced by the democratic transition, and their suppression or transformation would arguably constitute a dismemberment of such structure.

The 2021 midterm-elections' results will be consequential for the direction of constitutional change in Mexico. A positive outcome for the opposition might moderate the content of the reforms. Although some analysts think that, given the great popularity of President AMLO, if blocked by a legislative majority, he could push through a constitutional convention. If the President's coalition gets a wider legislative majority, the amendments that concentrate power in the executive would most likely continue. Either way, future constitutional debates will probably be focused on the Constitutional Autonomous Organs, created in the last 30 years, which aimed to check and limit the executive power.

In the previous section, we emphasized the impact the judicial reform's discussion and approval on the Supreme Court behavior. Now, the reform is the final process towards its enactment—the only aspect pending is the ratification by state-legislatures—. It is therefore worth reflecting on its likely short-term consequences. The main one would be a major renovation of judicial personnel through the enforcement of new recruitment rules. The Federal Judicial Institute, the academic branch of the Federal Judicial Council, will soon be transformed into the Federal School of Judicial Training and, as result, will be granted with wider competences for recruiting judges and law clerks through merit examinations. Before so, however, the Institute is already carrying out a process to fill 120 positions in appellate courts, which represent the 14.8% of all the positions of this level (*magistrados*).

The renovation of the judiciary will not take place in lower court but also in the highest one. Justice Fernando Franco is scheduled to leave the bench in December 2021. If President AMLO's coalition does well in the midterm elections, another ally of the president will likely replace him. This would reinforce the administration's influence on the constitutional tribunal, which has already ideologically and politically moved closer to the president. Of course such a change would be very consequential for Mexico's constitutional future.

#### V. FURTHER READING

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