A NEW BEGINNING FOR MEXICO’S CONSTITUTIONAL JUSTICE SYSTEM

Mario Alberto Becerra Becerril

“The life of the law has not been logic; it has been experience.” Oliver Wendell Holmes.

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I. Introduction

Over the last decade or so, Mexico's Supreme Court (Suprema Corte de Justicia de la Nación) has emerged as a key institution not only in Mexican law, but also in politics, government, and controversial social debates and transformations. The court has decided groundbreaking cases on highly important national issues that range from governance and government (including cases dealing with issues such as federal and local tax income, financial privacy, limits to executive supplements to legislative bills, antitrust law, access to information, free speech, telecommunications regulation, and due process) to contested social issues (such as abortion, emergency contraception, gay marriage, and HIV/AIDS). In doing so, it has become the focus of media, political, and social attention and controversy. It has also emerged as the key institution in shaping or reshaping law and legal culture in Mexico. However, this was not always so.

While Mexico’s 1917 Federal Constitution guaranteed independence to the judicial power, all Federal courts, which

1 Alejandro Madrazo & Estefana Vela, The Mexican Supreme Court's (Sexual) Revolution?, 89 Tex. L. Rev. 1863, 1863-64 (2011)
2 The Mexican Organic Act of the Judicial Power of the Federation prescribes that this power is exercised by:
I. The Supreme Court of Justice (Suprema Corte de Justicia de la Nación);
II. The Electoral Tribunal of the Federal Judiciary (Tribunal Electoral del Poder Judicial de la Federación);
III. The Circuit Collegiate Tribunals (Tribunales Colegiados de Circuito);
IV. The Circuit Unitary Tribunals (Tribunales Unitarios de Circuito);
V. The District Courts (Juzgados de Distrito);
VI. The Council of the Federal Judiciary (Consejo de la Judicatura Federal);
VII. The Federal Jury of Citizens (Jurado Federal de Ciudadanos); and
include the Supreme Court, remained subordinate to the Mexican President and his ruling Institutional Revolutionary Party (PRI) throughout the 20th century. This situation, as pointed out by Alejandro Madrazo and Estefana Vela, is why until the mid-90’s:

"[T]he Mexican Supreme Court was a rather obscure institution to which the media, politicians, citizenry, and legal scholars paid little attention. The role it played in the development of constitutional law was not substantively different from that of any lower court. It decided cases, but its decisions had little or no impact beyond the parties to the litigation: even when a law was deemed unconstitutional by the court, it was not stricken from the records but was simply held inapplicable to the successful challenger."3

Nonetheless, the democratic transition that started in the mid-90’s with President Ernesto Zedillo, and the subsequent establishment of a democratic government in 2000, has led to a number of important constitutional amendments and judicial rulings that consolidated the Mexican Supreme Court as a Constitutional Tribunal.

On the other hand, the creation of the Electoral Tribunal of the Federal Judiciary (Tribunal Electoral del Poder Judicial de la Federacion -TEPJF-) in 1996 contributed to the transition from hegemonic political party to a system of political parties increasingly more plural, with competitive elections and the possibility of the alternation, as well as a guarantee that all

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VIII. The State Courts and those of the Federal District in the cases established by Article 107, paragraph XII, of the Political Constitution of the United Mexican States and in those in which, by mandate of the law, these courts should act as auxiliaries of the Federal Justice.

3 Alejandro Madrazo & Estefana Vela, supra note 1, at 1864.
the electoral acts and resolution of the electoral authorities and the political parties adjust to the principles of legality and constitutionality in order to assure the celebration of authentic, just, and free elections. There is no question that creation of this Tribunal has changed the way in which democracy is seen and lived in Mexico.

The purpose of this essay is to analyze and describe the 1994, 1996, 2007, and 2011 constitutional amendments, as well as two recent Supreme Court decisions handed down on July 14 and October 25, 2011, since those amendments and judicial decisions: (a) represent some of the most important changes in the Mexican legal system since the promulgation of the Federal Constitution in 1917, (b) played a fundamental role in the formation of the new constitutional justice system in Mexico, (c) marked the beginning of Mexico’s Supreme Court as the highest court in land and the consolidation of electoral justice in hands of the TEPJF, and (c) initiated a whole new era in Mexican constitutional law.

II. The 1994 constitutional amendment: The new structure of the Supreme Court and the expansion of its jurisdiction

Only one month after taking office, President Ernesto Zedillo Ponce de Leon⁴ made one of the most surprising changes in the legislative history of Mexico: a constitutional amendment which profoundly altered the role of Mexico's Supreme Court. Indeed, among other changes⁵, President Zedillo: (a) transformed

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⁴ President of Mexico from December 1, 1994 to November 30, 2000.
⁵ For a complete analyses in Spanish see, Héctor Fix Zamudio and José Ramon Cossío Díaz, El Poder Judicial en el Ordenamiento Mexicano, (México: Fondo de Cultura Económica, 1995) and Joel Carranco Zúñiga,
the composition and structure of Mexico's Supreme Court, and (b) modified and expanded the original jurisdiction of the Supreme Court.

President Zedillo summarized the constitutional changes in the legislative initiative, which he submitted to the Senate, as follows:

"The purpose of this initiative is to strengthen the Constitution and its legality as the basic foundations for a safe, ordained and tranquil social life. The strengthening of the Judicial Power, and (the corresponding) alterations to its internal organization and functions, and the jurisdiction of those institutions in charge of (public) security and the administration of justice, are proposed herein . . . These changes entail an important step in the development of our democratic régime, strengthening the Judicial Power to accomplish a better balance among the Federal Powers, thus creating the bases for a system of administration of justice and public security that responds in a better way to the determination of all Mexicans to live in a nation of law and order."  

II.1 The composition and structure of the Supreme Court


The 1994 constitutional amendment, which went into effect on January 1\(^7\), 1995, as well as the amendments to the secondary legislation (Organic Act of the Judicial Power of the Federation -Ley Orgánica del Poder Judicial de la Federación-), modified the structure and composition of Mexico’s Supreme Court.

The two most important modifications in the composition and structure of the Supreme Court are:

a) The constitutional amendment reduced the number of Supreme Court justices from twenty-one to eleven, removed the sitting justices and appointed new ones, and established stricter qualifications for nominations. In addition to changing the manner in which the Justices are appointed, their tenure was limited to fifteen years; and

b) The amendment states that the Court will function both in “Pleno” (en banc -all eleven justices-), and in two “Salas” (Chambers), each composed of five Justices. Every year, the Court must have two sessions: the first, from January until mid-July, and the second, from August until mid-December.

II.2 The expansion of the Supreme Court jurisdiction

With the intention of creating a truly Constitutional Court, the 1994 Mexican constitutional amendment modified the original jurisdiction of the Supreme Court and expanded it by incorporating two new procedures of judicial review: the acciones de inconstitucionalidad (actions of

\(^7\) See the Diario Oficial de la Federacion (Official Gazette of the Federation) of December 31, 1994.
unconstitutionality) and controversias constitucionales (constitutional controversies).

Furthermore, the incorporation of these two new constitutional procedures (actions of unconstitutionality and constitutional controversies), changed the relationship of the Supreme Court with all the other branches of the local and federal government (executive and legislative powers), since the Supreme Court became a constitutional arbiter in conflicts between branches and levels of government:

“The new procedures that were set up to channel political conflicts allowed the court, for the first time in Mexican history, to strike down laws it deemed unconstitutional. The amendment did not, however, modify the writ of ‘amparo’, a long-standing and very limited procedure that gives ordinary citizens access to the federal judiciary when their fundamental rights are impinged upon, but does not allow striking down a law--at most, a law is simply not applied to those, and only those, who sought and won the amparo. In other words, the court was refurbished to take on a new role as referee when political classes came into conflict, but the tools it was equipped with to address the protection of citizens' rights remained the old and rusty ones.”

The Supreme Court, however, has gone beyond its role as constitutional arbiter of political conflicts and has flexed its new muscles. It has increasingly taken on cases that concern the citizenry directly. Questions that demand the articulation of fundamental rights have been brought before it, either through political actors who intentionally or unintentionally voice

8 Alejandro Madrazo & Estefana Vela, supra note 1, at 1865-67.
citizens' concerns, or through the reinvigoration of the rusty 
writ of amparo stemming from the court's newfound notoriety. The 
court initially focused on the concerns of government officials 
(be they legislative minorities or elected officeholders), some 
very relevant to the functioning of government, some less so. 
But its new role as constitutional referee made the court the 
focus of public attention to an unprecedented degree. In turn, 
citizens increasingly sought to reach this privileged forum to 
voice their demands for the articulation of fundamental rights, 
and politicians acquiesced to using their standing in acciones 
and controversias to take up causes dear to their 
constituencies.\(^9\)

The next two sections will briefly describe the functions 
of the *acciones de inconstitucionalidad* (actions of 
unconstitutionality) and *controversias constitucionales* 
(constitutional controversies).

**II.2.1 Constitutional Controversies**

Constitutional controversies involve problems between 
different levels of government, both horizontal and vertical.

Article 105, section I, of Mexico’s Federal Constitution 
grants exclusive powers to the Supreme Court of Justice to 
resolve constitutional controversies that arise between:

(a) The Federation and a state or the Federal District;

(b) The Federation and a municipality;

\(^9\) *Id.*
(c) The Federal Executive Branch and the Congress of the Union; the former and either of the Chambers of the latter, or in its case, the Permanent Commission;

(d) A state and another state;

(e) A state and the Federal District;

(f) The Federal District and a municipality;

(g) Two municipalities located at different states;

(h) Two powers within a State in disagreement about the constitutionality of their actions or general provisions;

(i) A state and one of its municipalities, in disagreement about the constitutionality of their actions or general provisions;

(j) A state and a municipality located in a different state, in disagreement about the constitutionality of their actions or general provisions; and

(k) Two organs of government in the Federal District, in disagreement about the constitutionality of their acts or general provisions.

According to the Federal Constitution, the resolutions of the Supreme Court in constitutional controversies, in principle, have effect only with respect to the parties in the controversy. However, they can have general effect if two conditions are accomplished:
(a) If the controversies have origin in general provisions (either laws or bylaws) of the states and municipalities that are challenged by the Federation; of the municipalities challenged by the states; between the Executive power, Congress of the Union, one of its Chambers or the Permanent Commission; between the powers of the same state with respect to the constitutionality of their actions or general provisions or between the organs of government of the Federal District with respect to the constitutionality of their actions or general provisions; and

(b) If the resolution of the Supreme Court of Justice that declares them invalid is approved by a majority of at least eight votes.

II.2.2 Actions of Unconstitutionality: The birth of “abstract” judicial review in Mexico

A number of countries in Europe and Latin America have introduced an important mechanism in the field of constitutional law: abstract review of legislation. Through this procedure, a law can be tested for its constitutionality on its face, without having to wait for a specific controversy to arise. And the challenge can be brought directly to the highest court, without having to run up the judicial pyramid. The power of the court at the apex is thus greatly increased. Its determination that a law is unconstitutional produces “general effects” (erga omnes effects). The statute that is declared to be invalid gets
eliminated from the legal system and can no longer be applied to any case by any judge.\textsuperscript{10}

In contrast with the constitutional controversy, the action of unconstitutionality grants the Supreme Court exclusive abstract review power over the constitutionality of state and federal laws, as well as international treaties. That means that a law or international treaty can be challenged without the need to have concrete cases to which it has been applied. The state-actors entitled to exercise the action are:

(a) Thirty-three percent of the members of the Chamber of Deputies of the Congress of the Union appealing laws passed by the Congress of the Union;

(b) Thirty-three percent of the members of the Senate appealing laws passed by the Congress or international treaties celebrated by the Mexican State approved by the Senate;

(c) The Attorney General of the Republic, against federal, state and Federal District laws, as well as international treaties celebrated by the Mexican State;

(d) Thirty-three percent of the members of one of the state legislatures, against laws passed by the same organ;

(e) Thirty-three percent of the members of the Assembly of Representatives of the Federal District, against the laws passed by the same Assembly,

\textsuperscript{10} Victor Ferreres Comella, Commentary: Courts in Latin America and the Constraints of the Civil Law Tradition, 89 Tex. L. Rev. 1967, 1968-69 (2011)
(f) The National Human Rights Commission, against federal, state or Federal District laws and international treaties approved by the Senate, that violate any human rights recognized in the Federal Constitution and/or the international conventions celebrated by Mexico; and

(g) The political parties registered before the Federal Electoral Institute, through their national chairmanship, against federal or local electoral laws; and the political parties with state registration, through their chairmanship, exclusively against electoral laws passed by the legislature of the state.

The resolutions of the Supreme Court of Justice have \textit{erga omnes} effects only if they are approved by a majority of at least eight justices. If such majority is not achieved, the action of unconstitutionality is dismissed.

III. The 1996 and 2007 constitutional amendments: The consolidation of electoral justice in Mexico

The 1994 elections were widely hailed as a great advance in the competitive character of Mexico’s electoral system. However, post-electoral negotiations started as soon as President Zedillo was inaugurated\textsuperscript{11}. According to Zedillo himself, it was:

“...increasingly necessary in the context of political pluralism to resolve political disputes between rival parties through the rule of law, in a manner which avoided the erosion of presidential authority.”\textsuperscript{12}


\textsuperscript{12} \textit{Id.}
With the opposition insisting on the need of a truly independent electoral authority, a constitutional amendment was approved in 1996. This constitutional reform, among other things:

(a) Created the TEPJF as the highest judiciary authority in electoral matters;

(b) Gave the TEPJF jurisdiction over federal, state and municipal elections;

(c) Created a Superior Court (Sala Superior) compromised of seven judges, and five Regional Courtrooms (Salas Regionales), one in each electoral region, composed of three judges;

(d) Stipulated that all electoral judges must be proposed by the Supreme Court justices and elected by the two-thirds of the members present in the Senate; and

(e) Gave the TEPJF the responsibility for the final count and declaration of the result of presidential elections, the resolutions of complaints related to federal electoral issues, the constitutionality of the rulings of relevant authorities at local levels, and the protection of the electoral and political rights of citizens.

Except for the action of unconstitutionality against electoral laws under the competence of the Supreme Court of Justice, whose resolutions are final and unappealable.
On the other hand, the 2007 constitutional amendment stipulated that:

(a) All electoral judges shall hold office for a nine-year period, and must be elected in a staggered way;

(b) The five regional courtrooms must be permanent and function all year (not only during local or municipal elections);

(c) Modified and expanded the jurisdiction of the Superior Court and the five Regional Courtrooms; and

(d) Granted the TEPJ the power to order the inapplicability of electoral laws that opposes the Federal Constitution.

III.1 Responsibilities of the TDPJF

According to articles 41, section IV; 60, second and third paragraphs; and 99, fourth paragraph, of the Federal Constitution, as well as article 186 of the Organic Act of the Judicial Power of the Federation, the TEPJF has the responsibility to settle, in a final and irrefutable manner, the following issues:

(a) Dissents against the results of the elections for President of the Republic, representatives and senators;

(b) Appeals against acts and rulings made and pronounced by the federal electoral authority;
(c) Trials of constitutional electoral review of final and firm acts and rulings pronounced by the authorities responsible for organization, assessment or settlement of contestations on the state electoral processes, which may be decisive in the electoral process or could affect the final result of the elections;

(d) The trials for protection of citizens’ political-electoral rights against acts and rulings that infringe the right to vote, the right to be elected, the right to assembly and the right to join a political party;

(e) Labor conflicts between the TEPJF and its public servants; and

(f) To order the inapplicability of electoral laws that opposes the Mexican Constitution, without erga omnes effects.

III.2 Jurisdiction of the Superior Court

The Superior Court is responsible for hearing and solving disputes related to the elections for President of the Republic, governors of the states, Head of the Federal District Government, as well as federal representatives and senators elected through the principle of proportional representation. The Superior Court also hears and solves contestations against acts or rulings pronounced by the main organs of the Federal Electoral Institute (Instituto Federal Electoral).

In addition, the Superior Court of the TEPJF hears and solves claims about infringement of political-electoral rights by decisions taken by the political parties while choosing their
candidates for the elections mentioned above and while electing the heads of their managerial national organs.

**III.3 Jurisdiction of the Regional Courtrooms**

Since 2007 the regional courtrooms of the TEPJF are permanent organs. Within their jurisdiction, they have the responsibility to hear and solve disputes related to: (a) the federal elections for representatives and senators through the principle of relative majority; (b) the elections for local deputies and members of the Federal District Assembly of Representatives; (c) the elections for public offices in city councils; (d) the elections for the heads of the political-administrative organs located in the Federal District suburbs; (e) the elections for several local public servants; and (f) acts and rulings pronounced by the decentralized bodies of the Federal Electoral Institute.

The regional courtrooms also hear and solve claims about infringement of political-electoral rights by decisions taken by the political parties while choosing their candidates for the elections mentioned above and their leaders, different to the national ones.

**IV. The 2011 constitutional amendment (Part I): The modification of the writ of “amparo”**

The writ of amparo is a legal institution created in Mexico mid-way through the nineteenth century. Furthermore, the writ of amparo is the only judicial mechanism available to individuals in order to protect their constitutional rights. Indeed, the
amparo in Mexico is the applicable procedure for the constitutional control of all actions of authority, which include judgments of any nature and is under the exclusive jurisdiction of the country’s federal courts (District Courts, Collegiate Circuit Courts and of course, the Supreme Court of Justice).

As explained by Hector Fix-Zamudio, the Mexican amparo is a combination of various procedural instruments, each with its own specific protective function: (a) protecting human rights; (b) attesting to allegedly unconstitutional laws; (c) contesting legal decisions; (d) petitioning against official administrative acts and resolutions; and (e) protecting the social rights of farmers subject to Agrarian Reform Laws.¹⁴

Notwithstanding the importance of the writ of amparo, for many decades now, only partial reforms have been made, quite important ones, but the majority of them dealing with problems of competence to resolve the work load within the Federal Judicial Branch.

However, the amendment published in the Official Gazette of the Federation on June 6, 2011, is probably the most important one that has been made to amparo proceedings since the 1917 Federal Constitution went into effect.

The amendments to articles 94, 103, 104 and 107 of the Mexican Constitution are the result of joint work among academics, attorneys, lawmakers, members of the Federal Judicial

Branch and the Federal Executive Branch. Based on the bill discussed in Congress and which gave rise to this reform, it was conceived with the main purpose of eliminating the technicalities and formalities that hinder not only the access to this procedure of constitutional control, but also to its scope of protection.\footnote{The bill of the secondary law (Ley de Amparo or Ley Relamentaria de los articulos 103 y 107 de la Constitucion Politica de los Estados Unidos Mexicanos) is expected to be approved by the Federal Congress over the next few month.}

Below, I will try to list the most important points of the 2011 constitutional amendment:

(a) The constitutional amendment, broadens the protection in *amparo* proceedings so that, within its object, are encompassed general norms, statutes, acts or omissions that violate the human rights recognized not only in the Federal Constitution, but also in any international treaty in which Mexico is a party member.

(b) Prior to the reform, one of the main principles of the *amparo* procedure was the one known as “principio de relatividad de las sentencias” (principle of relativeness of the judgments). This principle was based on the fact that the effects of the *amparo* judgment did not have *erga omnes* effects and only benefited the party who obtained it, without making a general statement of the law or action it refers to. Thus, even if in one or several successful cases a party obtained favorable *amparo* judgments considering a law to be unconstitutional, this declaration of unconstitutionality would only benefit the party who obtained it and for that
specific case. Now with the 2011 reform, when two consecutive judicial precedents are established, by means of which a general norm or statute is ruled unconstitutional, excepting those referred to tax matters, the Supreme Court, by means of a procedure of prior warning to the issuing legislative or administrative organ and not correcting the norm being challenged, shall notify the same issuing authority, which has ninety calendar days to amend its unconstitutionality and, if during this lapse of time, the constitutional issue is not overcome, the Supreme Court, by a super majority of eight votes, must issue a general ruling of unconstitutionality, setting its scope and conditions.

(c) There is another important principle that establishes that an amparo is admissible only by submission of the affected party. Before the amendment, amparo was granted to whoever proved that their legal interest had been personally affected. With the constitutional amendment, the interest to be proven is extended to consider not only a legal affected interest, but also legitimate affected interest, which is a much broader concept that will facilitate access to the suit for amparo. Similarly, this legitimate interest may be individual or collective. This implies that the presentation of an amparo by a person can benefit those who suffer the same legal breach, even if they are not claimants to the suit.

(d) Before the reform, any contradiction of court precedents issued by Collegiate Circuit Courts (composed by three judges) had to be resolved by the Supreme Court of Justice. With the reform, Circuit Plenaries are created, which may resolve contradictions of precedent of Collegiate Courts that
belong to the same circuit. In other words, the authority to create jurisprudence by contradiction of court precedents is extended to these Circuit Plenaries.

In other words, the 2011 constitutional amendment introduces the figure of circuit courts sitting en banc, organs to be set up in each judicial circuit, by law, and whose function is to settle the contradictions of the criteria emerging from the case law set by the Three-Judge Collegiate Courts from the respective circuits\textsuperscript{16}.

(e) One of the most important measures on the amparo procedures are the injunctive measures (\textit{suspension del acto reclamado}). Due to its urgency, in some cases the granting of injunctive measures is even more important than obtaining the amparo in its substance. Before the reform, judges and courts that analyzed injunctions were governed by certain criteria, and jurisprudence (judicial precedent) added an extremely important criterion called “the appearance of good law” (\textit{fumus boni iuris}). Under this principle, it was possible for a judge to grant an injunction when he or she found that with the evidence available at the moment, a certain degree of truth of the unconstitutional actions could be found. With the constitutional reform, this principle of the appearance of good law or \textit{fumus boni iuris} is incorporated as an

\textsuperscript{16} The judicial precedents by the Three-Judge Courts (Collegiate Courts) are set when they rule, by the unanimous vote of the three magistrates, on three matters consecutively in the same sense. This jurisprudential criterion is binding for Circuit Three-Judge Courts and for the rest of the federal courts, with the exception of the Supreme Court of Justice of the Nation, and likewise binding for local courts throughout the country.
obligation to any judge at the time of ruling any injunction measures in the amparo.

(f) Two very important procedural matters of the amparo were modified: (i) the expiration of the proceeding has been repealed. Before the reform, an amparo procedure could expire based on the procedural inactivity of the petitioner. This expiration due to inactivity no longer exists; that is, the pro actione principle is respected and the protection of rights is privileged over procedural rules; and (ii) no proceeding in which there is a pending compliance of an amparo judgment by an authority responsible (autoridad responsable) may be terminated and/or archived.

(g) In the case of direct amparos (essentially referring to those that are imposed against judgments), all involved parties in the procedure (even the ones who obtained favorable amparo) are obliged to also impose an amparo if they consider that there are any procedural breaches and if they do not do so, it shall preclude their right to allege these procedural breaches in subsequent suits for amparo. In addition, in cases when an amparo is granted for a new judgment to be issued, the obligation is established for Collegiate Circuit Courts to fix precise terms in which the new judgment shall be issued. What is intended in both cases is to avoid multiplication of suits of amparo, as frequently occurs nowadays.

(h) The 2011 reform modifies and establishes new mechanisms or tools in the area of enforcement the amparo rulings, which surely will redound in greater effectiveness so that the
final judgments of the courts of the Judicial Branch of the Federation can be carried out in due time and proper form.

(i) Finally, the constitutional amendment establishes the mandate to resolve urgent affairs, which implies that the Supreme Court should give priority to processing and resolving affairs that the chambers of the Congress of the Union or the President of the Republic request, of course justifying the urgency as a function of social interest or public order.

There is no doubt that two main aims were achieved with this important constitutional modification: wider protection of a person’s rights and to make the writ of amparo more flexible and accessible.

V. The 2011 constitutional amendment (Part II): A new human rights era

The constitutional amendment published in the Official Gazette of the Federation on June 10, 2011, modified Title One, Chapter I, renaming it “On human rights and guarantees”, and introducing amendments to eleven articles of the Federal Constitution.¹⁷

Undoubtedly, this is another of the major constitutional reforms since the issuance of our Constitution of 1917. It will noticeably change the functioning of the Mexican legal system regarding the protection of human rights, since it binds all of

¹⁷ Those articles are: 1, 3, 11, 15, 18, 29, 33, 89, 97, 102 and 105.
the country’s authorities, not only the judges, to procure the protection of those rights.

For purposes of this essay, I am going to concentrate solely on articles 1 and 29 which are the basis for this entire system of protection and the new protectionist framework for fundamental human rights.¹⁸

V.1 Article 1: the relevance of international law and the protection of rights by all Mexican authorities

The text of three first paragraphs of the new modified article 1 of the Mexican Constitution establishes that:

"Article 1. All persons shall enjoy the human rights enshrined in this Constitution and in the international human rights treaties to which Mexico is party, as well as the guarantees for their protection, which cannot be restricted or suspended, except in cases and under the conditions that the Constitution itself establishes.

Norms relative to human rights shall be interpreted in conformity with this Constitution and with international treaties on the subject, affording persons the broadest protection at all times.

¹⁸ Article 3 of the Federal Constitution was modified so as to establish the obligation of inculcating students with respect for human rights; article 33, established the guarantee of a hearing prior to expulsion of foreigners from the country; article 89, establishing, among the principles that the Executive has to heed in the area of international politics, that of respect, protection and promotion of human rights; articles 97 and 102, passing on the faculty regarding serious violations to human rights from the Supreme Court of Justice to the National Commission on Human Rights; and article 105, adjusting the faculty of the National Commission on Human Rights to file unconstitutional actions when, in its judgment, there are violations, not only to the Constitution, but also to international treaties on the subject.
All authorities, in the exercise of their respective functions, have the obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressive realization. As a consequence of this obligation, the State must prevent, investigate and sanction human rights violations. [...]"

As the reader might have notice, the modifications of article 1 of the Mexican Constitution have an enormous relevance since:

(a) It elevates the rights enshrined in international treaties signed by Mexico to equal footing alongside the rights guaranteed by the Mexican Constitution (first paragraph);

(b) Incorporates the pro personae principle\(^\text{19}\) (second paragraph);

(c) Integrates the principles of universality, interdependence, indivisibility, and progressiveness of human Rights (third paragraph); and

(d) Establishes the obligation of the State to prevent, investigate, punish and repair human rights violations (fourth paragraph).

\(^{19}\) The pro personae principle is a human right principle mandating that, when in doubt, a judge or any authority must prefer the interpretation most favorable to the person in danger of having a right violated.
V.2 Article 29: The definition of how and under what circumstances a state of emergency may be declared, and what human rights may be suspended

International human rights standards limit the rights that may be suspended during states of emergency, and establish basic rules that States must respect when derogating such rights. First, human rights may only be derogated “in times of public emergency that threaten the life of the nation.”\(^{20}\) Second, certain basic human rights are non-derogable, and thus may never be suspended.\(^{21}\) And third, restrictions on derogable rights must be strictly required by the exigencies of the situation, as well as provided by law, exceptional, and temporary.\(^{22}\)

The amendments of article 29 of the Mexican Supreme Law incorporated these rules into the Constitution, and establish a legal and procedural framework for establishing a state of emergency that complies with Mexico’s international obligations. Such reforms will certainly help to ensure that the severity, duration and geographic scope of derogations are proportionate to the nature and extent of the threat to the nation. They will also safeguard the rights of citizens against excessive derogations of rights during states of emergency.

The new article 29 of the Federal Constitution establishes:

"Article 29. The exercise of the right to non-


\(^{21}\)Id., article 4, paragraph 2.

\(^{22}\)ICCPR, article 4, paragraph 1. See also the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.
discrimination, to recognition of legal personality, to life, to personal integrity, to protection of the family, to one’s name, to nationality; the rights of children; political rights; freedom of thought, conscience and religion; the principle of legality and retroactivity; the prohibition of death penalty; the prohibition of slavery and servitude; the prohibition of enforced disappearance and torture; and the judicial guarantees essential to the protection of such rights shall never be restricted or suspended.

Any restriction or suspension of the exercise of these rights and guarantees shall be founded and justified by the terms established in this Constitution, be proportionate to the threat at hand, and always be consistent with the principles of legality, proclamation, publicity and non-discrimination.

When a restriction or suspension of the exercise of rights and guarantees comes to an end, either because it has expired or because Congress has decreed it to, all legal and administrative measures adopted since its inception shall be immediately considered void. The Executive shall not be entitled to make any observations to the decree by which Congress revokes the restriction or suspension.

Any decrees issued by the Executive during the restriction or suspension period shall be subject to an ex officio and immediate review by the Supreme Court, which shall decide on their constitutionality and validity with the utmost speed.”

VI. The Rosendo Radilla case and the Mexican Supreme Court: the birth of the conventionality and diffuse control in Mexico

On July 14 and October 25, 2011, the Mexican Supreme Court issued two decisions that changed the whole constitutional
justice system in Mexico. However, before the analysis of those judicial decisions, and in order to truly understand its magnitude, three issues must be previously addressed: a) the centralized, decentralized and hybrid models of constitutional review; (b) the Supreme Court’s interpretation of Mexico’s “Supremacy Clause”; and (c) the 2009 Inter-American Human Rights Court decision in the case Rosendo Radilla vs. the United States of Mexico.

VI.1 The centralized, decentralized and hybrid models of constitutional review

There are at least two models for the organization of constitutional judicial review within a court system: the decentralized model and the centralized model.

The decentralized model (also known as the “American” or “diffuse” model involving “incidental review) is represented by the organization of the United States’ judicial jurisdiction. A key characteristic of this model is that the jurisdiction to engage in constitutional interpretation is not limited to a single court. It can be exercised by many courts, state and federal, and is seen as inherent to any ordinary incident of the more general process of case adjudication.

The centralized model (also called the “Austrian” or “European” model) is characterized by the existence of a special court, with exclusive or close to exclusive jurisdiction over constitutional rulings. The Austrian Constitution of 1920 created such a court, theorized by legal scholar Hans Kelsen, and similar “constitutional courts” exist today in many European

countries. Often, in such legal systems, there is a Constitutional Court that decides on the constitutionality of legislation, and at least one Supreme Court with jurisdiction over matters of statutory interpretation and administrative law. Centralized constitutional courts are, in a sense, “specialists” in constitutional decisionmaking, that sit outside of, rather than on top of, the normal structure of judicial jurisdiction.\textsuperscript{24}

Yet hybrid models also exist, in which the ordinary courts may have the power to refuse to apply an unconstitutional law, but one single court or a number of federal courts, which might include the Supreme Court, has the power to declare a law invalid or unconstitutional.\textsuperscript{25} Bewer-Carias has argued that Latin America deserves the credit for originating hybrid systems in the 19\textsuperscript{th} century.\textsuperscript{26}

VI.2 The interpretation of the Mexico’s “Supremacy Clause”

Following the “Supremacy Clause” of the U.S. Constitution, article 133 of Mexico’s Constitution says:

\textbf{“Article 133.} This Constitution, the laws of the Congress of the Union that emanate from it and all the treaties that are in accord therewith, executed and that shall be executed by the President of the Republic, with the approval of the Senate, shall be the Supreme Law of the entire Union. The judges from each state shall adhere to said Constitution, laws and treaties, notwithstanding provisions to the contrary that may be present in the constitutions or laws of the states.”
For many years, it was disputed that constitutional interpretation might nonetheless be labeled as “exclusive” in favor of Federal Courts. The “Supremacy Clause” is called to have independent value, and since state judges are bound by the Federal Constitution, there must be cases in which state judges might exert a minimum degree of constitutional judicial review. In the early 20th century the Supreme Court’s declaration that state courts might be able to refute the application of laws that “openly” and “directly” violate the Constitution seemed to support this doctrine. Nevertheless, in 1998, the Supreme Court rejected this possibility.27

The Supreme Court determined that the Mexican “Supremacy Clause” provision establishing that state judges shall be bound by the Federal Constitution in spite of any local law to the contrary, was not be constructed literally, but taking a structural and “systematic” approach. Thus, those procedures established within the scope of Federal Courts (amparo, constitutional controversies and unconstitutional actions) are the only means of challenging laws deemed unconstitutional since that was the design in mind of the framers of the Constitution when regulating those judicial review procedures, otherwise useless is state courts had the same power.28

28 Id.
Therefore, since 1998, according to the Supreme Court decision, Mexico had a centralized system of judicial review: only Federal Courts had the power to review the constitutionality of any law.

VI.3 The 2009 Inter-American Human Rights Court decision\textsuperscript{29}: Rosendo Radilla vs. the United Sates of Mexico.

On August 25, 1974, Mr. Rosendo Radilla Pacheco was an alleged victim of forced disappearance committed by the Mexican Army stationed in the municipality of Atoyac de Álvarez, in the state of Guerrero. After several complaints filed to State and federal instances by family members of Mr. Rosendo Radilla Pacheco, on November 15, 2001, the Mexican Commission for the Defense and Promotion of Human Rights and the Association of Relatives of the Disappeared and Victims of Violations against Human Rights in Mexico filed a complaint against the Mexican Government before the Inter-American Human Rights Commission.

Since the Mexican State failed to assume the recommendations made by the Inter-American Commission on March 15, 2008, the mentioned international body brought the case before the Inter-American Human Rights Court. On November 23, 2009, the Court handed down a conviction sentence and notified the Mexican State on February 9, 2010. On the same date, an excerpt of the case Radilla Pacheco was published in the Official Gazette of the Federation.

\textsuperscript{29} With the recognition of the contentious jurisdiction of the Inter-American Court of Human Rights (IACHR) in 1998, and the previous ratification of the American Convention on Human Rights in the 1980’s, Mexico recognized that the IACHR’s judgments are final and indisputable.
Among other issues, paragraph 339 of the 2009 Inter-American Humans Rights Court decision established that:

“339. With regard to judicial practices, this Tribunal has established, in its jurisprudence, that it is aware that the domestic judges and tribunals are subject to the rule of law and that, therefore, they are compelled to apply the regulations in force within the legal system. But once a State has ratified an international treaty such as the American Convention, its judges, as part of the State’s apparatus, are also submitted to it, which compels them to make sure that the provisions of the Convention are not affected by the application of laws contrary to its object and purpose, and that they do not lack legal effects from their creation. In other words, the Judiciary shall exercise a “control of conventionality” ex officio between domestic regulations and the American Convention, evidently within the framework of its respective competences and the corresponding procedural regulations. Within this task, the Judiciary shall take into consideration not only the treaty but also the interpretation the Inter-American Court, final interpreter of the American Convention, has made of it.”

VI.4 The 2011 Supreme Court’s decisions

As a result of the Radilla case, on July 14, 2011\(^\text{30}\), the Supreme Court of Mexico issued a ruling to determine what obligations resulted for the Mexican State and, specifically, for the Judicial Branch of the Federation, having reached a series of fundamental definitions regarding the concrete obligations to be carried out by the Judicial Branch.

\(^{30}\) File “Varios 912/2010”. 
According to the Supreme Court’s ruling, paragraph 339 of the 2009 Inter-American Court’s decision imposed the Judiciary Power a particular obligation: the exercise of ex officio conventionality control and the implementation of a diffuse model of constitutionality control constitutionality. With regard to the conventionality control ex officio in a model of diffuse control of constitutionality, the Mexican Supreme Court ruled:

(a) That the obligations contained in the new Article 1 of the Constitution are must be read together with the provisions of Article 133 of the Federal Constitution, in order to determine the framework in which this conventionality control should be carried out, which shall clearly be different from the concentrated control which traditionally operated in our legal system.

(b) That although state judges all across the country cannot make a general declaration regarding invalidity or reject from the legal system the norms that they consider contrary to the human rights contained in the Constitution and in the treaties, they are indeed bound to stop applying these inferior norms, giving preference to the contents of the Constitution and treaties thereto.

(c) That the parameter of analysis of this type of control that all judges nationwide have to exercise consists of the following:

   (i) All the human rights contained in the Federal Constitution (on the grounds of Articles 1 and 133),
as well as the case law issued by the Judicial Branch of the Federation;

(ii) All the human rights contained in international treaties to which the Mexican State is a party member; and

(iii) The binding criteria (decisions) issued by the Inter-American Court of Human Rights set forth in the rulings in which the Mexican State has been a party, and guidelines of case law and precedents of above Courts, when the Mexican State has not been a party in the dispute.

(d) That the possibility of non-application by the judges of the country at no time supposes the elimination or ignorance of the presumption of constitutionality of the laws, but, rather, starts from this presumption by permitting contrast prior to its application.

(e) That this type of interpretation by the judges (non-application of laws that are contrary to international treaties) presupposes taking three steps:

(i) Compliant interpretation sensu lato (Interpretacion conforme en sentido amplio). Which means that all judges, just like all other authorities of the Mexican State, are to interpret sources of the law in the light of, and according to the human rights established in the Constitution and in the international treaties to which the Mexican
State is party, affording at all times the broadest protection to all persons;

(ii) Compliant interpretation sensu stricto (Interpretacion conforme en sentido estricto). Which means that when there are various legally valid interpretations, judges must prefer the one that makes the law adhere to the human rights established in the Constitution and in the international treaties to which the Mexican State is a party, so as to avoid having a bearing on or violating the essential content of these rights; and

(iii) Avoiding application of the law when the preceding alternatives are not possible. Since this does not affect or break the logic of the principle of the division of powers and federalism, but strengthens the role of judges to be the last recourse to ensure the primacy and effective application of the human rights established in the Constitution and in the international treaties to which the Mexican State is a party.

(f) Finally, the Supreme Court reiterated in that ruling that all other authorities of the country, within the scope of their competences, are bound to apply the corresponding norms, applying the interpretation most favorable to the person so as to achieve the broadest protection, without having the possibility of avoiding the application or declaring the incompatibility of the same.
The Supreme Court, however, did not stop there, on October 25, 2011, a new decision was issued, clearly inspired in the above mentioned ruling. Indeed, the Supreme Court decided to abandon the 1998 interpretation of the Mexican “Supremacy Clause” and established a diffuse control of the Constitution and of international treaties, for all judges. Unfortunately this new ruling has not been published.

VII. Conclusion