

# Constitutional Amendment as a Political Weapon: The Mexican Case

---

Roberto Mancilla\*

*This article will account for the misuse of constitutional amendments with the purpose of furthering the agenda of a group or coalition in detriment of the overall system. In Mexico this practice has been used successfully for decades to ensure that the interests of political majorities –first by the PRI and then by a PAN-PRI coalition- are furthered and protected from any disruption. This analysis will be done in three parts: in the first, there will be an introductory exposition of the political situation of Mexico in the past century; the second part will give three examples of weaponized constitutional amendments- one direct and two indirect- and the way they relate to the way the political majorities are constituted and the reasons of why they are used (constitutionalization of unconstitutional policies, preemption of courts and review, creation of privileges and advantages and policy entrenchment). The third part comprises the study of the possibility of review and reversal of constitutional amendments, giving a history of constitutional review by means of the amparo suit (human rights protection suit) and an analysis of an amendment made to Amparo Law, where a suit is now inadmissible if it attempts the review of a federal constitutional amendment.*

---

\* LL.B. Instituto Tecnológico y de Estudios Superiores de Monterrey; LL.M, J.S.D., University of California, Berkeley  
[robi357@hotmail.com].

## Introduction<sup>1</sup>

The following study bears the fruit of my work as litigator and researcher for a medium sized political party on the left; it is partly the product of practical experience and means to account for how the constitutional amending procedure has been used in Mexico, by political majorities, to enact change and entrench policies according to their interests. As a personal note, I can say that one of these examples and some others, which are not mentioned in this paper, were litigated by the author.

These notes from the trenches have the intention to show, above all, the way in which the mechanism for legal change can be used by elites in their benefit, turning a constitutional limitation into a powerful tool. This practice has been used successfully for decades, to ensure that the interests of political majorities - first by the PRI and then by a PAN-PRI coalition - are furthered and protected from any disruption.

I will make my argument in three parts: in the first, there will be an exposition of the political situation of Mexico in the past century, starting with the rise and consolidation of the Partido Revolucionario Institucional (PRI), which was the dominating political force for over 70 years, then its loss of the presidency to the Partido Acción Nacional (PAN), and then its later resurgence and return to the presidency and its alliance with the PAN. To complete the introductory section, insight into the amendment process of the Constitution and the position of academia within it will be given; mainly, the point is to show that academia (and as I will show later, judges as well) have been averse in the idea of reviewing constitutional change, which has been of the political benefit of the ruling elites.

The second part will give a brief definition of what a political weapon is, by building on Phillip Selznick's definition of organizational weapon; afterwards, three examples will be given of weaponized constitutional amendments and the ways they can be executed: first is the amendment made to Article 123, related to workers' rights, where a Part B was

---

<sup>1</sup> All legal materials, unless explicitly stated otherwise, are translated by the author.

instituted to create special instances - and some exceptions - for state workers, which is a case of direct-approach amendment. The second is related to an amendment made in 2011 pertaining to a very much-needed constitutional amendment to criminal law, which was used as leverage to pass the constitutionalizing of house arrest, which had previously been deemed unconstitutional by the Supreme Court; this is an example of an indirect approach. The third case pertains to an amendment made in 2014, regarding changes to state-owned land and the usage of oil, where bylaws were used, to write secondary legislation (with constitutional hierarchy) instead of enacting the amendments, as they are meant to.

After this, the uses of weaponized constitutional amendments will be seen. They include the constitutionalizing of unconstitutional policies, the preemption of courts and review, the creation of privileges and advantages and policy entrenchment.

Finally, the possibility of the review and reversal of constitutional amendments will be studied: first as a history of constitutional review by means of the *amparo* suit (a human rights protection suit) by means of the analysis of precedents and then by analyzing an amendment made to *amparo* law, which regards a suit as inadmissible if it attempts the review of a federal constitutional amendment.

On a personal note, I can say that the importance of the *amparo* suit and other means of constitutional review have been, that they have been the last resort of the opposition when it comes to fighting the changes made by overwhelming majorities and which now have been substantially reduced, (although there were not a lot of tools to begin with).

## 1. Historical Context

The purpose of this section is to give the readers a small introduction to the political history of the country; this is due to the fact, that there is a direct correlation between the way the political actors have related to each other and the way approaches to amending the constitution have been

used. Knowing this also shows us, that constitutional amendments can function as legalistic instruments of political discipline.

The political panorama of Mexico in the 20<sup>th</sup> century was dominated by the Institutional Revolutionary Party (PRI), which was founded in 1929 by Plutarco Elías Calles (president from 1924-1928) as the National Revolutionary Party (PNR), to represent the forces that had triumphed in the Mexican Revolution, and to give stability to the country by means of the institutionalization of the agreements made during the Mexican Revolution, after a period of instability and conflict that included the assassination of President-elect Álvaro Obregón in 1928.<sup>2</sup>

This organization can be described as a “State party” - that is, the political force that determined the goals and direction of the Mexican State continuously for over 30 years, until the presidency was lost in 2000. It was supported by the popular sectors (the workers, the peasantry, and the employees of the State) as an advocate of reform (thus, “Revolutionary”) and as a purveyor of stability (“Institutional”). The leaning of the party was considered to be center-left until the 1980’s, where it took a great turn towards the right.<sup>3</sup>

From 1928 to 1936, Calles held the government by means of subservient presidents Emilio Portes Gil, Pascual Ortiz Rubio and Abelardo L. Rodríguez in a period called *el Maximato*. In 1934, General Lázaro Cárdenas was elected president and after some confrontations with Calles, he had him and other associates arrested or exiled. His was the most popular and successful presidency of the 20<sup>th</sup> century and it was under his tenure that the party was renamed the "Party of the Mexican Revolution" (PRM).

From the 1940’s to the 1970’s, the country experienced a period of economic growth and stability known as *el Milagro Mexicano* (the

---

<sup>2</sup> K. Larry Storrs, *Mexico’s Political History: From Revolution to Alternation, 1910-2006* (Congressional Research Service, 2006). <<https://www.hsdl.org/?view&did=459875>>

<sup>3</sup> Ibid.

Mexican Miracle) with sporadic periods of intense political unrest, including the student massacre of 1968. During this period, Mexico was governed by PRI presidents who were elected with more than 74% of the vote and were named by the president in power. The party also controlled the 64-seat Senate, and around 80%-90% of the 300-seat Chamber of Deputies, which meant that policies sent by the president were approved most of the time.<sup>4</sup>

Because of a general perception of complete domination and thus an overall lack of democracy, electoral reform came in 1977 in the form of an additional 100 seats to the Chamber of Deputies, which were assigned on the basis of proportional representation to all parties with fewer than 60 deputies. This meant that the PRI's controlled the Chamber of Deputies after the 1979 elections slip to 74%, which was still more than enough to approve legislation.<sup>5</sup>

From 1980 to 2000, Mexico underwent significant changes in economic and electoral policy, shifting towards free market policies and adding, in 1986, another 100 seats to the Chamber of Deputies, with 200 of the 500 seats being distributed among the smaller parties on the basis of proportional representation. This laid the basis for increasingly democratic and plural elections, which peaked with the midterm legislative elections of 1997, where the PRI lost the majority in the Chamber of Deputies and its two-thirds majority in the Senate, as well as the first election of the Mayor of Mexico City.<sup>6</sup>

Furthermore, in the 2000 election, opposition candidate Vicente Fox of the Alliance for Change (an alliance of the PAN and the Green Ecological Party of Mexico, or PVEM) was elected president, thus ending the PRI's 71 years of control of the presidency. At the beginning of Fox's mandate, there was no majoritarian bloc in either chamber; however, Fox's coalition was larger in the Chamber, and the parliamentary group of the

---

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

PRI in the Senate, which resulted in constant negotiation to pass legislation and constitutional amendments, which prevails to this day.<sup>7</sup>

Among the parties that opposed the PRI, the National Action Party (PAN) is very relevant to this study, as it held the presidency from 2000 to 2012. Founded in 1939 as a conservative reaction to the PRI, this party has always been the conservative party of the country, with inclinations that favor free enterprise and the Catholic Church.<sup>8</sup>

In 2006, PAN President Felipe Calderón made the battle against organized crime the centerpiece of his tenure, which has resulted in over 60,000 dead and over 20,000 disappeared; this has led to general discontent, even by those who initially supported his measures. This unpopularity brought an opportunity which was seized by the PRI and led them to regain the presidency with the election of Enrique Peña Nieto; this, however, has not stopped the constant negotiation and formation of a coalition between the PRI and the PAN.<sup>9</sup>

## 2. Constitutional Amendments as Political Weapons

### 2.1 Constitutional Structure of the Amendment Procedure

Constitutional amendments are regulated by Article 135 of the Constitution, which states:<sup>10</sup>

---

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Diana Villiers Negroponte, 'Mexican Coalition Politics in the Post-Election Period', (*Brookings*, 12 september 2012) <<http://www.brookings.edu/blogs/up-front/posts/2012/09/12-presidential-victory-mexico-negroponte>>

<sup>10</sup> Artículo 135. La presente Constitución puede ser adicionada o reformada. Para que las adiciones o reformas lleguen a ser parte de la misma, se requiere que el Congreso de la Unión, por el voto de las dos terceras partes de los individuos presentes, acuerden las reformas o adiciones, y que éstas sean aprobadas por la

**Article 135.** This Constitution can be added to or reformed. For additions or amendments to be a part of it, it is required that Congress, by the vote of two-thirds of attending individuals, agree on the amendments or additions and that these are approved by the majority of the State legislatures.

Congress or the Permanent Commission, in any case, will compute the votes of the State legislatures and the declaration of the approval of the additions and amendments.

The amendment procedure of the Mexican Constitution is rigid, as it requires a procedure that is more complicated than the one used to create and amend statutes; however, in practice, this rigidity has been illusory, as the Constitution has been amended 561 times since 1917 and 80% of the constitutional articles have been modified five times each. This constitution is one of the oldest in Latin America but also the most amended; in fact, it has been modified two times more than any other democratic constitution in the world.<sup>11</sup>

It is indeed a rarity that when it comes to the difficulty in amending, on a scale of 1 to 10, the average Latin American constitution is rated as a 4 and the Mexican as a 7, and yet the latter has been the most modified.<sup>12</sup> The reason for this has its basis in the structure of the political system: at first, the dominance of the PRI in Congress and the presidency and the loyalty of popular sectors allowed it to overcome the hurdles of the amendment procedure. As the PRI shifted towards a free market and the right in the 1980's, as well as lost power, it found a lot of common ground with the PAN and thus, by means of coalitions, they continued passing

---

mayoría de las legislaturas de los Estados. El Congreso de la Unión o la Comisión Permanente en su caso, harán el cómputo de los votos de las Legislaturas y la declaración de haber sido aprobadas las adiciones o reformas  
<[http://www.diputados.gob.mx/LeyesBiblio/pdf/1\\_100715.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/1_100715.pdf)>

<sup>11</sup> Viridiana Ríos, 'Rarezas Constitucionales' [Constitutional Rarities] (*Nexos*, 1 february 2014) <<http://www.nexos.com.mx/?p=18391>>

<sup>12</sup> *Ibid.*

amendments, albeit in a more indirect form. The examples that will be provided prove this shift in tactics.

As to the nature of constitutional amendments, it is important to make a brief note on the existing academic positions, as they have informed the opinions of judges in deciding if the review of amendments is in fact tenable. First of all, there has been a lot of hairsplitting about the organ that creates them, as some hold the position that there is a constituent power (comprised of the constitutional assembly that creates the Supreme Law) and constituted powers (those of the three branches) and that constitutional amendments are made by an amending or reforming constituent.

Carpizo's position summarizes that of the mainstream: he states that there is a difference between the constituent and the constituted, as the former are the creators of the constitutional order (and thus have unlimited power) and the latter emanate from them (and thus are limited). After this, he enumerates the constituted powers as such: the constitutional tribunal,<sup>13</sup> the executive, legislative and judiciary branch, and autonomous constitutional organs.<sup>14</sup>

He then establishes a hierarchy between the constituted being the amending organ and the constitutional tribunal primary and the other secondary organs. He then foresees three possibilities:<sup>15</sup>

- a) The constitutional tribunal is of higher importance than the constitutional amender.

---

<sup>13</sup> In Mexico, the Supreme Court is both the highest court of law and a constitutional tribunal.

<sup>14</sup> Jorge Carpizo, 'El tribunal constitucional y el control de la reforma constitucional' ("The constitutional tribunal and the review of constitutional amendments") [2009] *Boletín Mexicano de Derecho Comparado*, nueva serie, año XLII, num. 125, mayo-agosto.  
<<http://www.juridicas.unam.mx/publica/librev/rev/boletin/cont/125/art/art6.pdf>>

<sup>15</sup> *Ibid.*

- b) The constitutional tribunal is of lesser importance.
- c) There is no hierarchical relation, but rather each has specific competences that the Constitution explicitly states.

A more pragmatic minority opinion, but one that has been increasingly adopted as of late is that there is only a special procedure, rather than an organ created every time the Constitution is reformed. This can be summarized by Cisneros Ramos:<sup>16</sup>

Firstly, we disagree with the denomination that maestro Tena Ramirez makes of Permanent Constituent Power, for our Constitution does not properly establish a distinct organ or one different from the existing legislative organs- but it does determine a special procedure, lengthy and complicated, by demanding the vote of two-thirds of Congress and the vote of the majority of the State legislatures for the amendment or reform to proceed, which we allow ourselves to call constitutional reform procedure.

## 2.2 The Usage of the Amendment as a Weapon: Three Examples

In his book, “The Organizational Weapon. A Study of Bolshevik Strategy and Tactics”, Phillip Selznick defined organizational weapons in the following manner:<sup>17</sup>

We shall speak of organizations and organizational practices as weapons when they are used by a power-seeking elite in a manner unrestrained by the constitutional order of the arena within which the contest takes place.

---

<sup>16</sup> Carlos Francisco Cisneros Ramos, ‘The title of the article cannot be found’ [1967] *Revista de la Facultad de Derecho y Ciencias Sociales de la UANL*, t. I, Sep-Nov.

<sup>17</sup> Phillip Selznick, *The Organizational Weapon. A Study of Bolshevik Strategies and Tactics* (1st ed., RAND Corporation, McGraw Hill, New York, 1952) 2.

In the case of Mexico, amendments should be considered as weapons when a majority uses them to turn the constitutional order against others by making an improper use of its rules. The examples that follow will show how the amending process has been used to diminish labor rights, to pass measures that were declared unconstitutional because they violated rights, or that create unfair advantages by means of bylaws. What makes constitutional amendment so appealing (and effective) is that from a strict legal positivist point of view, there is no illegality, as the procedure was followed. However, if we have a notion of legality that goes more along the lines of natural law, in which rights progression and political fair play ought to be respected, there is a problem with using the amendment procedure in the way I have indicated. Let's see the ways in which this weapon has been used for more than 85 years.

### 2.2.1 Direct Approach: A Single Instance Amendment

The first example is related to Article 123, which establishes the rights of workers; the Mexican Constitution of 1917 was the first in the world to establish social rights and this article is its staple, and its original intent was to create a general framework applicable to all workers, without exception.<sup>18</sup> This came as a response to the great social inequity that workers and rural journeymen endured during the regime of Porfirio Díaz. In 1960, during the presidency of Adolfo Lopez Mateos and with the backing of union leader Fidel Velazquez,<sup>19</sup> the article was divided into

---

<sup>18</sup> Claudia Gamboa Montejano, Miriam Gutierrez Sanchez, 'El artículo 123 Constitucional. Estudio de antecedentes, derecho comparado y de las iniciativas presentadas' (Constitutional article 125. Study of background, comparative law and proposals) [2008] Centre de Documentation, Information y Análisis, Cámara de Diputados. <<http://www.diputados.gob.mx/sedia/sia/spi/SPI-ISS-13-08.pdf>>

<sup>19</sup> Nestor de Buen, 'Derechos del Trabajador de Confianza (The rights of trustworthy workers) [2000] Camara de Diputados, UNAM, <<http://biblio.juridicas.unam.mx/libros/1/77/tc.pdf>>

Sections A and B, where the former was reserved for all workers and the latter made a regime of exception for federal state workers.

Section B of Article 123, specifically No. XII and XIV, affects State workers' rights in two aspects: First, it creates a special system of labor tribunals for State workers and sends conflicts of the workers of the Federal Judiciary Branch to its administrative organ, the Adjudication Council. Second, it creates a diminution of rights for State workers who are credited as "trustworthy" (*de confianza*). The content of the articles is as follows:<sup>20</sup>

**XII.** Individual, collective and inter-union conflicts will be submitted before a Federal Tribunal of Arbitration and Conciliation integrated according to what the secondary law states. The conflicts between the Federal Judiciary and its employees will be solved by the Federal Adjudication Council; those that arise between the Supreme Court of Justice and its employees will be solved by the latter.

**XIV.** The law will determine the posts that will be considered trustworthy. The people that carry them out will enjoy measures for salary protection and will benefit from Social Security.

In Mexican labor law, there is a distinction between a regular worker and one who is considered by their supervisor as *de confianza*; it centers on the fact that the latter holds a special relation with the supervisor, regarding the functions they perform. They are those who have a greater degree of

---

<sup>20</sup> XII. Los conflictos individuales, colectivos o intersindicales serán sometidos a un Tribunal Federal de Conciliación y Arbitraje integrado según lo prevenido en la ley reglamentaria.

Los conflictos entre el Poder Judicial de la Federación y sus servidores serán resueltos por el Consejo de la Judicatura Federal; los que se susciten entre la Suprema Corte de Justicia y sus empleados serán resueltos por esta última.

XIV. La ley determinará los cargos que serán considerados de confianza. Las personas que los desempeñen disfrutarán de las medidas de protección al salario y gozarán de los beneficios de la seguridad social.

<[http://www.diputados.gob.mx/LeyesBiblio/pdf/1\\_100715.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/1_100715.pdf)>

responsibility, due to the work they carry out and in some ways they bear their supervisor's interests.<sup>21</sup>

At first glance, it would seem that No. XIV of Article 123 B entrenches some basic rights for trustworthy workers; however, when this is put together with Article 8 of the Federal State Worker's Law, it is in fact the contrary. That article states:<sup>22</sup>

**Article 8.** Trustworthy workers referred to in Article 5, as well as members of the Army (except civil personnel of the Department of National Defense and the Navy); militarized personnel; members of the Mexican Foreign Service; penitentiary personnel and those that render their services by means of civil contract or the payment of honorary fees are exempt under the regime established in this Law.

This means that trustworthy workers are excluded from every right in the labor regime established in Article 123 B, except for salary protection and social security; this also means that they are not entitled to a severance package (be it from a justified or unjustified firing), which strips them of stability in the workplace.

These amendments directly violate the progression and equality principles, which are found in Article 1 of the Constitution.<sup>23</sup>

---

<sup>21</sup> Ibid.

<sup>22</sup> Artículo 8°. Trabajador es la persona física que presta a otra, física o moral, un trabajo personal subordinado. Para los efectos de esta disposición, se entiende por trabajo toda actividad humana, intelectual o material, independientemente del grado de preparación técnica requerido por cada profesión u oficio.

<sup>23</sup> Artículo 1o. En los Estados Unidos Mexicanos todas las personas gozarán de los derechos humanos reconocidos en esta Constitución y en los tratados internacionales de los que el Estado Mexicano sea parte, así como de las garantías para su protección, cuyo ejercicio no podrá restringirse ni suspenderse, salvo en los casos y bajo las condiciones que esta Constitución establece.

...

Todas las autoridades, en el ámbito de sus competencias, tienen la obligación de promover, respetar, proteger y garantizar los derechos humanos de conformidad

**Article 1.** In the Mexican United States all persons will enjoy the human rights recognized in this Constitution and in international treaties of which the Mexican State is part, as well as the means of its protection, the exercise of **which cannot be restricted or suspended, save for in the cases and under the conditions that this Constitution establishes.**

[...]

All the authorities, within their purview, have the obligation to promote, respect, protect and guarantee all human rights according to the principles of universality, interdependence, indivisibility **and progression.**

This first principle consists of the fact that rights and their protection can only increase and not diminish, and thus there is a progression in rights. This principle can be extracted not only by its mention, which was the product of an amendment made in 2011, but also by the fact that the underlined expression of the first article subsists from the original text of the Constitution and can only be limited by the contents of Article 29, which pertains to a state of emergency.

Furthermore, the equality principle forbids discrimination made by any criteria which entail a violation of human dignity and the diminution of rights. If there is a diminution of the rights of trustworthy workers, then a discrimination on the basis of labor division takes place. The text continues:<sup>24</sup>

---

con los principios de universalidad, interdependencia, indivisibilidad y progresividad. En consecuencia, el Estado deberá prevenir, investigar, sancionar y reparar las violaciones a los derechos humanos, en los términos que establezca la ley.

<[http://www.diputados.gob.mx/LeyesBiblio/pdf/1\\_100715.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/1_100715.pdf)>

<sup>24</sup> ...

Queda prohibida toda discriminación motivada por origen étnico o nacional, el género, la edad, las discapacidades, la condición social, las condiciones de salud, la religión, las opiniones, las preferencias sexuales, el estado civil o cualquier otra que atente contra la dignidad humana y tenga por objeto anular o menoscabar los derechos y libertades de las personas.

[...] **All discrimination** on the basis of ethnic or national origin, gender, age, disability, social condition, health, religion, opinion, sexual preferences, marital status or any other **that goes against human dignity and has as a purpose to annul or diminish the rights and liberties of persons is forbidden.**

In the case that I have analyzed, there was a direct amendment made by the president, the PRI and Fidel Velázquez as the head of the unions during that time. In the glory days of the PRI, a time of unrestricted presidential power backed by all sorts of political interests, these amendments were common; however, as the PRI waned and the PAN and PRD acquired more power, the following type of weaponized amendment became more common.

### 2.2.2 Indirect Approach #1: Use of Necessary Amendments as Leverage. The Criminal Reform of 2008

Unlike the prior amendment, which entailed a full-frontal political assault that changed the structure of labor law until the moment of the crafting of this study, this example takes an indirect approach: in June of 2008, President Felipe Calderón passed a package of 10 amendments- of which 7 dealt with criminal law- dubbed collectively as the Constitutional Amendment of Security and Justice, which switched the criminal process from a mixed-inquisitorial model to an adversarial one, establishing a period of 8 years for their implementation.<sup>25</sup>

The affected articles were: 16, 17, 18, 19, 20, 21, and 22; No. XXI and XXIII of Article 73; and No. VII of 115 and No. XIII of 123, Section B. Many of these changes were necessary and aimed towards an increase of

---

<[http://www.diputados.gob.mx/LeyesBiblio/pdf/1\\_100715.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/1_100715.pdf)>

<sup>25</sup> Consejo de la Judicatura Federal, *El Nuevo Sistema de Justicia Penal Acusatorio, desde la Perspectiva Constitucional [The New Accusatory Criminal System from the Constitutional Perspective]*, <<http://www.cjf.gob.mx/reformas/documentos/ElnuevosistemadeJusticiaPenalAcusatorio.pdf>>

transparency and efficiency in the criminal process. Article 20 established the principles of the criminal process, the rights of victims and the accused (chiefly among them the presumption of innocence) and a set of procedures aimed towards the restitution of damage, the protection of the victim's identity, safety, personal data and some checks on the actions of the prosecution.

However, among these much-needed changes were two which were contrary to the spirit of the reform. The first was located in Article 16, in which house arrest was constitutionalized, despite the fact that previously it was declared unconstitutional by the Supreme Court; the second was the reinforcement of preventive prison, a cautionary method that has the purpose of preventing a suspect from fleeing justice and which must serve only as a last resort.

Preventive prison is a measure that encroaches upon the presumption of innocence and generates great cost to the State: the arbitrary application of preventive prison had as a consequence that by 2010, there was an average of 90,000 persons imprisoned without trial, which represented 42% of the country's prison population and an expense of 9,750 million pesos per year, which was roughly 62% of the federal budget assigned to public safety.<sup>26</sup> The text of Article 19 states:<sup>27</sup>

---

<sup>26</sup> Instituto de Investigación de Justicia Procesal Penal, 'Presunción de Inocencia', *¿Cuanto cuesta la prisión sin condena? (How much does prison without trial costs?)* <<http://www.presunciondeinocencia.org.mx/biblioteca-acervo/81-praesent-commodo-velit-in-neque-rhonus-porttitor-3>>

<sup>27</sup> Artículo 19. ...

El Ministerio Público sólo podrá solicitar al juez la prisión preventiva cuando otras medidas cautelares no sean suficientes para garantizar la comparecencia del imputado en el juicio, el desarrollo de la investigación, la protección de la víctima, de los testigos o de la comunidad, así como cuando el imputado esté siendo procesado o haya sido sentenciado previamente por la comisión de un delito doloso. El juez ordenará la prisión preventiva, oficiosamente, en los casos de delincuencia organizada, homicidio doloso, violación, secuestro, trata de personas, delitos cometidos con medios violentos como armas y explosivos, así como delitos graves que determine la ley en contra de la seguridad de la nación, el libre desarrollo de la personalidad y de la salud.

Article 19. [...]

The public prosecutor may only ask the judge to remand when other precautionary measures are not sufficient to ensure the appearance of the accused at trial; the development of the prosecution; the protection of victims, witnesses or the community; and when the accused is being tried or has previously been convicted of committing a criminal offense. The judge will order preventive prison automatically in cases of organized crime, homicide, rape, kidnapping, trafficking, crimes committed with violent means such as arms and explosives, and **grave crimes defined by law against the security of the nation, the free development of personality and health.**

Although most of the article seems to make sense, the vagueness of the bolded portion gives judges and prosecutors a lot of leeway for implementing preventive prison, and thus gives way to the problem at hand, especially at a time when corruption is rampant and drug-related crimes and violence are on the rise at an intolerable pace.

As mentioned previously, house arrest had been declared unconstitutional by the Full Chamber of the Supreme Court. I will state the corresponding judicial precedent, which has now been rendered null by the amendment:<sup>28</sup>

---

<[http://www.diputados.gob.mx/LeyesBiblio/pdf/1\\_100715.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/1_100715.pdf)>

<sup>28</sup> Any federal sentence can be found by means of the following search engine provided by the Supreme Court: <<http://sjf.scjn.gob.mx/sjfsist/Paginas/tesis.aspx>>. Furthermore, let it be noted that sentences can be of two types: 1) a jurisprudential thesis, when it is consolidated after solving five cases in the same manner and without interruption, and 2) an isolated thesis, when there is an isolated sentence(s). The Supreme Court solves cases in three configurations: 1) Full Chamber for constitutional cases, cases of utmost relevance and conflicts between judicial chambers; 2) First Chamber, which solves criminal and civil cases; 3) Second Chamber, which solves labor and administrative cases.

HOUSE ARREST. ARTICLE 122 BIS OF THE CODE OF CRIMINAL PROCEDURES OF THE STATE OF CHIHUAHUA WHICH STATES THAT IT VIOLATES THE RIGHT OF PERSONAL FREEDOM ESTABLISHED IN ARTICLES 16, 18, 19, 20 AND 21 OF THE FEDERAL CONSTITUTION. The Constitution of the Mexican United States exceptionally allows impact upon the personal freedom of the governed through the execution of the following conditions and periods: ... As noted, in any action by the authority that results in the deprivation of personal liberty, short deadlines are provided, marked even in hours, for the governed to be made readily available to the trial judge, and this determines your situation as legal. However, Article 122a of the Code of Criminal Procedure of the State of Chihuahua, in establishing the legal concept of house arrest, which although has the double purpose of facilitating the integration of the preliminary investigation and the impossible-to-avoid compliance of the eventual arrest warrant issued, violates the right of personal liberty established in Articles 16, 18, 19, 20 and 21 of the Political Constitution of the Mexican United States. Although the investigation has yet to show data leading to the establishment of the probable illicit responsibility of a person, there is a deprivation of personal liberty ordered up to thirty days; without purpose such detention is justified, without being given the details of the crime being charged, nor the opportunity to offer evidence to absolve responsibility.

The amends made to article 16 after this sentence was passed, state the terms of house arrest in the following manner:<sup>29</sup>

---

<sup>29</sup>Artículo 16...

La autoridad judicial, a petición del Ministerio Público y tratándose de delitos de delincuencia organizada, podrá decretar el arraigo de una persona, con las modalidades de lugar y tiempo que la ley señale, sin que pueda exceder de cuarenta días, siempre que sea necesario para el éxito de la investigación, la protección de personas o bienes jurídicos, o cuando exista riesgo fundado de que el inculpado se sustraiga a la acción de la justicia. Este plazo podrá prorrogarse, siempre y cuando el Ministerio Público acredite que subsisten las causas que le dieron origen. En todo caso, la duración total del arraigo no podrá exceder los ochenta días.

Article 16. [...]

The judicial authority, at the request of prosecutors and where offenses involve organized crime, may order the house arrest of a person, with the modalities of time and place indicated by law, **but may not exceed forty days**, whenever necessary to the success of the prosecution, the protection of persons or property, or if there is a reason that the accused may escape the course of justice. This period may be extended as long as the prosecution proves that the causes that gave rise to it remain. In any event, **the total duration of detention may not exceed eighty days**.

By being added to Article 16, house arrest came back with a vengeance: to the usual 30 days, there was an extension of the term to 40 to 80 days. This brings forth several concerns, such as the encroachment upon the presumption of innocence, as well as the misuse of the instrument, as 40 to 80 days allow for the healing of many injuries that could be brought forth by an unlawful interrogation.

Using criminal reform as leverage, house arrest and preventive prison were added to Articles 16 and 19 respectively and thus, we find ourselves before indirect usage of a constitutional amendment as a weapon to pass prosecutorial instruments, that have led to great abuses and expenses on behalf of the State. This is one of many examples of a tactic that became common during Calderón's presidency<sup>30</sup> and which persists in Peña Nieto's, with some improvements, which will be shown in the next example.

---

<sup>30</sup> During his tenure, Calderón approved 110 constitutional amendments, 1/5 of the overall constitutional changes since 1917. See <<http://www.nexos.com.mx/?p=18391>>.

### 2.2.3 Indirect Approach #2: Use of Bylaws in Constitutional Amendments

#### *Historical Background*

In the original text of the Constitution of 1917, Article 27 established the dominion of the Nation over all minerals- among them petroleum and all hydrocarbons- and gave the president the power to allow private companies to extract them by means of a concession or grant. In December of 1938, President Lazaro Cardenas amended the Constitution to suppress all grants, as the exploitation of hydrocarbons was an exclusive right of the State, although grants in statutes, contracts and concessions were allowed.

Furthermore, he expropriated the assets of foreign companies operating on national soil and created *Petróleos Mexicanos* (hereafter PEMEX), a State-owned oil and hydrocarbon exploitation company, which in due time developed into one of the largest oil companies in the world and gave the government a third of its revenue by means of taxation. In 1960, the Constitution was amended anew to prohibit the celebration of contracts and amendments; in 1983, there were amendments to Articles 25, 26, 27 and 28 to establish that the exclusive functions exercised by the State in the areas of oil and hydrocarbons do not constitute a monopoly.

On December 20<sup>th</sup> of 2013, President Enrique Peña Nieto promulgated a controversial reform on energy by means of the modification of the fourth, sixth and eighth paragraphs of Article 25, the sixth paragraph of Article 27, the fourth and sixth paragraphs of Article 28, as well as the addition of a seventh paragraph to Article 27 and an eighth to Article 29 of the Mexican Constitution.

Within them a series of modifications took place: the contracting prohibition of 1960 was repealed, and basic petrochemicals were reclassified as a strategic area that do not form part of the State monopoly, thus allowing the direct participation of private companies under the framework that statutory law establishes. PEMEX was restructured into two divisions: a) Exploration and Production, and b) Industrial Transformation.

A market for the generation of electric industry was created, but the state remains in control of the national electric system and retains exclusivity in transmitting and distributing energy as an indispensable public service; broad-scale renewable energy was added to the model. The Federal Electricity Commission was given more freedom in its operation and logistics and transformed alongside PEMEX into what is called a *State Productive Enterprise*. The latter is a type of decentralized organ, by means of which the federal government has the exploitation of strategic areas under its command.

The National Hydrocarbons Commission and the Energy Regulation Commission, once organs with technical autonomy, are now decentralized organs of the Energy Department, albeit with their own legal personality and technical and administrative autonomy. The National Agency of Industrial Security and Environmental Protection in the Hydrocarbon Sector was created with the same terms under the National Resources and Environment Department.

Three organisms were created: The National Center for the Control of Natural Gas, the National Center for the Control of Energy and the Mexican Petroleum Fund. The latter was charged with receiving all incomes that come to the State out of the assignments and contracts specified in Article 27 of the Constitution.

#### *The Nature of Transitory Norms*

Before proceeding any further, it is necessary to make a clarification of what a transitory norm is and its structure. In its simplest definition, a norm is the meaning of an act of will that results in a command, an empowerment, a permit, or the derogation of another norm. The contents of a norm can be expressed by the following formula: If A is, then B ought to be, and the Ought is the content of the act of will.<sup>31</sup>

---

<sup>31</sup> Hans Kelsen, *General Theory of Norms* (Michael Hartney tr, Oxford University Press, New York, 1990).

Taking into account the formula stated by Kelsen- *If A is, then B ought to be*- a legal norm has two elements: hypothesis and consequence. The former are the possible cases or circumstances that if fulfilled, must produce a legal consequence; the latter is a mere idea and does not have effects by itself, and entails the specific legal situations that are to happen when the conditions stated by the norm are met and are to be determined by the legal norm, along with the subjects involved.<sup>32</sup>

A regular norm has a legal hypothesis that is abstract, and thus it persists into the future as long as it exists and a situation can fulfill the hypothesis. A transitory norm is one where the hypothesis is a concrete fact, one that has taken place or one that will imminently do so; ergo, it is destined for a specific duration, which may not be set beforehand, but rather the norm ceases to exist the moment in which its object is accomplished by means of the passage of time. This can be understood as transitivity.

Transitory norms have as their hypothesis the implementation of a norm into an existing normative order. Once this is so, the transitory norm loses effectivity and ceases to exist- as it lacks a purpose - despite continuing to be incorporated into the constitutional text. The transitory norms that are incorporated into a constitution possess the same supremacy as this body of norms, for there is a principle of the unity of a constitution, which establishes that “the constitutional norm cannot be interpreted in isolation, but rather it must be considered within the whole body”.<sup>33</sup>

Arteaga Nava makes the following commentaries on the nature of the transitory constitutional norm:<sup>34</sup>

---

<sup>32</sup> Rafael Rojina Villegas, *Introducción al estudio del derecho (Introduction to the Study of the Law)*, (2nd ed., Porrúa, México, 1967) 159, 171.

<sup>33</sup> Vladimiro Naranjo Mesa, *Teoría constitucional e instituciones políticas (Constitutional theory and political institutions)* (10th ed, Bogotá, Temis, 2006) 428.

<sup>34</sup> Elisur Arteaga Nava, *Derecho constitucional (Constitutional law)*, (2nd ed, Oxford, México, 1999) 240.

Regarding transitory constitutional norms, it can be said that, in general, they are secondary principles that rise to constitutional status by the mere fact of being added to the Constitution. They are rules of a secondary nature; they exist because there is a main text; they cease to be the moment the latter disappears. It cannot be expected to give them independent validity. There is no autonomous transitory law that exists by itself and is applicable to all kinds of Constitutions.

### *Weaponized Constitutional Transitory Norms*

The constitutional amendment of oil and energy has 21 transitory norms that oversee its implementation. However, not all of them are purely transitory, as many of them create regulations and thus act more as statutes.

In the first paragraph of the fourth transitory norm, a timeframe is established to adapt it to the existing normative order. The second paragraph, which establishes the modalities of the considerations of productive enterprises is different, for despite delegating to statutes, it establishes a minimum of modalities, which exceed what is stipulated by the general norm and which result in a regulatory device, not a transitory one.<sup>35</sup>

---

<sup>35</sup> Fourth...

La ley establecerá las modalidades de las contraprestaciones que pagará el Estado a sus empresas productivas o a los particulares por virtud de las actividades de exploración y extracción del petróleo y de los demás hidrocarburos que hagan por cuenta de la Nación. Entre otras modalidades de contraprestaciones, deberán regularse las siguientes: I) en efectivo, para los contratos de servicios; II) con un porcentaje de la utilidad, para los contratos de utilidad compartida; III) con un porcentaje de la producción obtenida, para los contratos de producción compartida; IV) con la transmisión onerosa de los hidrocarburos una vez que hayan sido extraídos del subsuelo, para los contratos de licencia, o V) cualquier combinación de las anteriores. La Nación escogerá la modalidad de contraprestación atendiendo siempre a maximizar los ingresos para lograr el mayor beneficio para el desarrollo de largo plazo. Asimismo, la ley establecerá las contraprestaciones y contribuciones a cargo de las empresas productivas del Estado o los particulares y regulará los

Fourth. [...]

The law will establish the modalities of the considerations that the State will pay their productive enterprises or private enterprises by virtue of the exploration and extraction of oil and other hydrocarbons that they make on behalf of the nation. Among other forms of consideration, they shall be regulated as follows: I) in cash for service contracts; II) with a percentage of income, for profit-sharing contracts; III) with a percentage of the production obtained, for production-sharing contracts; IV) with the onerous transmission of hydrocarbons once they have been extracted from the subsoil to the license agreements; or V) any combination of the above. The Nation will choose the mode of consideration, always attending to the maximization of revenue to achieve the greatest benefit for long-term development. The law will also establish the considerations and contributions by the productive enterprises of the State or private enterprises and will regulate the cases in which payment is required in favor of the Nation for products extracted that are transferred to them.

The structure of the second paragraph of the fourth transitory norm shows that there is no clear-cut division between a general norm put in the transitory section and a norm that truly is transitory. There can be the case that general norms can be stealthily put within transitory norms, be it that they are put in the transitory section or that they are fused within a transitory norm.

In the tenth transitory norm, a duty is given to Congress to make the changes that establish the attributes of the dependencies and organs of the Federal Administration in the area of energy and oil; however, this is in reality a statute in disguise, for they are established beforehand. In the last two paragraphs, it is established that the law must contain sanctioning

---

casos en que se les impondrá el pago a favor de la Nación por los productos extraídos que se les transfieran.

<<http://cdn.reformaenergetica.gob.mx/decreto-reforma-energetica.pdf>>

mechanisms within the energy organs and also their coordination with the Federal Administration.<sup>36</sup>

**Tenth.** Within the period laid down in the fourth transitional hereof, Congress will make the necessary adjustments to the legal framework in order to establish the following attributions of the dependencies and organs of the Federal Administration:

- a) To the Secretary of the branch in Energy: establishing, conducting and coordinating energy policy...
- b) To the National Hydrocarbons Commission...
- c) To the Energy Regulatory Commission...
- d) To the Secretary of the Treasury...

The law establishes the acts or omissions that give rise to the imposition of sanctions, the procedure for this, as well as the responsibilities of each department or agency to impose and execute them. The foregoing is without detriment to the powers that such authorities are granted by law in these matters.

The law shall define the mechanisms for ensuring coordination between regulators on energy and the Federal Government, so that

---

<sup>36</sup> Décimo. Dentro del plazo previsto en el transitorio cuarto del presente Decreto, el Congreso de la Unión realizará las adecuaciones que resulten necesarias al marco jurídico a fin de establecer, entre otras, las siguientes atribuciones de las dependencias y órganos de la Administración Pública Federal:

- a) A la Secretaría del ramo en materia de Energía: ...
- b) A la Comisión Nacional de Hidrocarburos: ...
- c) A la Comisión Reguladora de Energía: ...
- d) A la Secretaría del ramo en materia de Hacienda ...

La ley establecerá los actos u omisiones que den lugar a la imposición de sanciones, el procedimiento para ello, así como las atribuciones de cada dependencia u órgano para imponerlas y ejecutarlas. Lo anterior, sin perjuicio de las demás facultades que a dichas autoridades les otorguen las leyes, en estas materias.

La ley definirá los mecanismos para garantizar la coordinación entre los órganos reguladores en materia de energía y la Administración Pública Federal, para que, en el ámbito de sus respectivas competencias, emitan sus actos y resoluciones de conformidad con las políticas públicas del Ejecutivo Federal.

<<http://cdn.reformaenergetica.gob.mx/decreto-reforma-energetica.pdf>>

within their respective powers, they issue their acts and resolutions under the public policy of the Federal Government.

Lastly, there are norms like the thirteenth transitory, which establishes the election of the commissioners of the National Hydrocarbons Commission and the Energy Regulatory Commission, which is openly regulatory and the contents of which are not at all a transitory norm.<sup>37</sup>

**Thirteenth.** Within one hundred and twenty calendar days following the entry into force of this Decree, Congress will make the adjustments to the legal frame, in order to establish that the commissioners of the National Hydrocarbons Commission and the Energy Regulatory Commission may only be removed from their

---

<sup>37</sup> Décimo Tercero. En el plazo de ciento veinte días naturales siguientes a la entrada en vigor del presente Decreto, el Congreso de la Unión realizará las adecuaciones al marco jurídico, a fin de establecer que los comisionados de la Comisión Nacional de Hidrocarburos y de la Comisión Reguladora de Energía sólo podrán ser removidos de su encargo por las causas graves que se establezcan al efecto; que podrán ser designados, nuevamente, por única ocasión para cubrir un segundo período, y que su renovación se llevará a cabo de forma escalonada, a fin de asegurar el debido ejercicio de sus atribuciones.

Los actuales comisionados concluirán los periodos para los que fueron nombrados, sujetándose a lo dispuesto en el párrafo anterior. Para nombrar a los comisionados de la Comisión Nacional de Hidrocarburos y de la Comisión Reguladora de Energía, el Presidente de la República someterá una terna a consideración del Senado, el cual, previa comparecencia de las personas propuestas, designará al comisionado que deberá cubrir la vacante. La designación se hará por el voto de las dos terceras partes de los miembros del Senado presentes, dentro del improrrogable plazo de treinta días. Si el Senado no resolviere dentro de dicho plazo, ocupará el cargo de comisionado la persona que, dentro de dicha terna, designe el Presidente de la República.

En caso de que la Cámara de Senadores rechace la totalidad de la terna propuesta, el Presidente de la República, someterá una nueva, en los términos del párrafo anterior. Si esta segunda terna fuera rechazada, ocupará el cargo la persona que dentro de dicha terna designe el Presidente de la República.

Se nombrarán dos nuevos comisionados por cada Comisión, de manera escalonada, en los términos de los dos párrafos anteriores.

<<http://cdn.reformaenergetica.gob.mx/decreto-reforma-energetica.pdf>>

duties for serious causes that will be established to that effect; they may be appointed again one time to cover a second term, and its renewal will take place in stages, to ensure the proper exercise of its powers.

The current commissioners will conclude the periods for which they were appointed, subject to the provisions of the preceding paragraph. To appoint the commissioners of the National Hydrocarbons Commission and Energy Regulatory Commission, the President of the Republic shall submit a shortlist for consideration by the Senate, which, following a hearing of the persons proposed, will appoint the commissioner who shall fill the vacancy. The appointment will be made by the vote of two-thirds of the Senate members present, within the undelayable time limit of thirty days. If the Senate fails to decide within that period, the person who will serve as commissioner will be appointed from within the shortlist by the President.

Should the Senate reject the entire list proposed, the President of the Republic will submit a new one, under the terms of the previous paragraph. If this second triad is rejected, the person within the shortlist that is appointed by the President will serve as the new commissioner.

Two new commissioners are appointed by each Commission, in stages, in terms of the previous two paragraphs.

In these cases, weaponized constitutional transitory norms are those in which a general norm is put instead of a specific norm that will cease its existence once its purpose is fulfilled; this means that despite being in the transitory section of the Constitution, they are in reality another part of it and thus they can be put there in order to pass statutory regulations of the main body of the text, and like it, they possess supremacy and thus cannot be declared unconstitutional by judges, or be repelled in any other way but by means of another constitutional amendment.

### 2.3 Some Uses of Constitutional Amendments as Political Weapons

Let us now derive some lessons from the examples that were provided to examine the nature of a constitutional amendment, and what purpose it serves when it is used to favor a particular political interest:

- **Constitutionalization of the Unconstitutional.** First and foremost, it can serve to legalize policies or instruments that have been considered contrary to the Constitution by adding them to the latter; this was the case with house arrest and preventive prison, the former being declared unconstitutional by means of properly integrated jurisprudence of the Supreme Court.
- **Deconstitutionalization of Existing Articles and Policies.** It can also serve to remove unwanted or obtrusive policies and instruments from the Constitution, as was the case with the oil and energy reforms to the Constitution, which at the same time subverted the changes made by President Cárdenas as the PRI shifted towards free market measures.
- **Preemption of Courts and Review.** Because of the supreme hierarchy that they have within a legal system, courts are doubtful when approaching a request to review constitutional amendments, as they serve as guardians of the Supreme Law, and because Mexican judges tend not to be as proactive in the advancement of policy, or in the political struggles, as a review of an amendment would entail. This reticence protects the policy from possible political opponents who witnessed their interests frustrated by the legislative process and might seek vindication from the courts. This will be seen in fuller detail in the following topic.
- **Creation of Privileges and Advantages.** Constitutional amendments can be used to create a privileged position for a political elite. For example, the creation of Section B of Article 123 made firing governmental employees inexpensive and allowed the creation of bureaucratic courts that are more akin to the interests of the government.

- **Policy Entrenchment.** The hierarchy of the Constitution within the legal system and the lack of review by courts make it almost impossible for political minorities to revert the changes made in the short or medium term (if ever) as a significant level of political force is required to do so. This creates a policy entrenchment that favors political majorities such as the older PRI or the coalitions made by the PRI and the PAN in light of common interests.

## 2.4 A History of the Constitutional Review of Amendments

In this section, a history of the attempts to trump constitutional amendments by means of courts, along with the Supreme Court's ambivalence and policy responses to this process will be given. However, before doing so, it is necessary to give some background on the nature of constitutional review in Mexico. There are three instruments of relevance for the possible review of constitutional amendments: the *amparo* suit (*juicio de amparo*), unconstitutionality action (*acción de inconstitucionalidad*) and constitutional controversy (*controversia constitucional*).

The *amparo* suit is the country's more beloved constitutional review instrument and dates back to the 1840's. It consists of an individual right protection suit that can declare almost any act of authority unconstitutional. Since 1936 it had a statute, which stated, among other things, that the effects of the *amparo* sentence- even when it was about general norms- could only take place among the parties in litigation and some other signaled authorities. This also meant that policy could be implemented and despite being repealed individually, it could endure in the long term.

The constitutional controversy was established along with the *amparo* suit in the Constitution of 1917. However, unlike the latter, it did not have a statute until 1994 and up to that moment it was ruled by the Civil Procedure Code as supplemental legislation. This also meant that its usage

was severely limited: there were only 24 instances in this period.<sup>38</sup> It is a suit made by a government organ listed in Article 105 of the Constitution which is affected in its purview by the actions of another- that is, it is a conflict of powers suit.

In 1994, President Ernesto Zedillo amended the Constitution and its accompanying statutes and made significant changes to the structure of the Supreme Court and the instruments of constitutional review. He changed the configuration of the Court from 21 to 11 and shortened the duration of the charge from a life appointment to 15 years. He also instituted the unconstitutionality action in Article 105, Section II and created a statute that regulated it and constitutional controversies.

Lastly, the unconstitutionality action is an abstract (meaning it does not require an injury) and is made by a legislative minority or a political party in electoral matters against a statute which they deem unconstitutional. All of this meant that to start, the review of amendments was limited: before 2012 an *amparo* would entail only the lack of application of its contents to the individual that litigated it and won. Unconstitutionality actions and constitutional controversies would only have general effects if they were voted for by more than eight Justices, which was very unlikely, as cases of this sort are very divisive.

Attempts to counter constitutional amendments have usually been disregarded by judges, especially during the glory times of the PRI, where the tendencies of the Supreme Court were akin to the policies of the president. The first precedent I could find was the *amparo* suit made by Ramón Sánchez Medel and Vicente Aguinaco Alemán on December 14, 1982, on behalf of their clients, against the nationalization of banks, which

---

<sup>38</sup> Suprema Corte de Justicia de la Nación, *Índice de Controversias Constitucionales resueltas de 1917 a 1994* (List of Constitutional Controversies solved from 1917 to 1994)

<[https://www.scjn.gob.mx/pleno/paginas/ControvConsti1917\\_1994.aspx](https://www.scjn.gob.mx/pleno/paginas/ControvConsti1917_1994.aspx)>

was at first admitted under No. 410/82,<sup>39</sup> but was later dismissed at the circuit tribunal level, by the First Tribunal in Administrative Matters of the First Circuit, leaving the following isolated precedent: “CONSTITUTION, REFORMS TO THE. AMPARO INADMISSIBLE. BANKS AND CREDIT”.<sup>40</sup>

In 1998 the Full Chamber established the first precedent in favor of the viability of the *amparo* suit against constitutional amendments. This was a very noted precedent called Amparo Camacho, after Manuel Camacho Solís, who tried to fight off an amendment made against the election of a former Chief of the Department of the Federal District of Mexico to the new position of Chief of Government of Mexico City.<sup>41</sup>

This isolated precedent was interrupted by the only fully integrated jurisprudential precedent on the matter, made by constitutional controversy 82/2001.<sup>42</sup> New attempts did not come until June of 2008, when the Supreme Court was hard at work saying “No,” as it stated during three isolated precedents by solving Cases 168 and 168/2007.<sup>43</sup>

---

<sup>39</sup> Ramón Sánchez Medel, *El fraude a la Constitución el único amparo en México contra una reforma demolitoria de la Constitución* (The Fraud on the Constitution and the Only Amparo in Mexico Against a Demolatory Constitution Amendment) (Porrúa, México, 1988) 93.

<sup>40</sup> Recourse of complaint 4/83. Secretary of Interior and other authorities (Amparo Suit 410/82 promoted by Carlos Abedrop Dávila and others). January 13 1983. Decision by unanimity. Writer of the opinion: Fernando Lanz Cárdenas. Clerk: Martha Elba Hurtado Ferrer.

<sup>41</sup> Reforma Constitucional, Amparo contra su proceso de creación. Procede por violación a derechos políticos asociados con garantías individuales. <<http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/193/193250.pdf>>

<sup>42</sup> Procedimiento de reformas y adiciones a la constitución federal. No es susceptible de control jurisdiccional. <<http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/1000/1000492.pdf>>

<sup>43</sup> Acción de inconstitucionalidad. No es la vía idónea para ejercer el control de la constitucionalidad del procedimiento de reforma a la constitución política de los estados unidos mexicanos o respecto del contenido de las reformas relativas. <<http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/167/167591.pdf>>; Acción de inconstitucionalidad. Al no ser la vía para impugnar reformas a la constitución política de los estados unidos mexicanos, la suprema corte de justicia de la nación

Despite this, the Court seemed to reconsider, as no more than two months later, two isolated precedents came to be with an *amparo* suit made by the Business Center of Jalisco to combat constitutional amendments which forbade political parties and private citizens from hiring publicity during the time of a campaign.<sup>44</sup>

The following constitutional history can be summarized as follows: whenever the Supreme Court has stated the admissibility of constitutional review against an amendment, it has done so on the grounds of the protection of individual rights - of which political rights are not accounted for as such, for they are in a different chapter than the one where the former are - and it has stated so on the grounds of procedure, not substance (that is, only when the procedure that amended the Constitution has a vice that will not permit it to be completely integrated). Furthermore, the reformer of the Constitution and the amending process are limited and thus reviewable.

On the other hand, whenever the Supreme Court has decided the inadmissibility of review, it has done so by means of the argument that the reformer of the Constitution and the ensuing procedure are unlimited, or by arguing a lack of jurisdiction, the unsuitability of the instrument (unconstitutionality action) or by stating that the Constitution is not a law for the effect of its review.

---

no tiene competencia para conocer de ella. <<http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/167/167599.pdf>>; Acción de inconstitucionalidad. La constitución política de los estados unidos mexicanos no puede considerarse como ley ni conferírsele un ámbito federal o local y, menos aún, clasificarse en una materia en concreto, para la procedencia de dicha vía. <<http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/167/167595.pdf>>

<sup>44</sup> Procedimiento de reformas a la constitución política de los estados unidos mexicanos. No es manifiesta ni indudable la improcedencia del juicio de amparo promovido en su contra. <<http://sjf.scjn.gob.mx/SJFSist/Documentos/Tesis/165/165708.pdf>>; Poder reformador de la constitución. El procedimiento reformatorio relativo emanado de este órgano con facultades limitadas, es susceptible de control constitucional. <<http://sjf.scjn.gob.mx/sjfsist/Documentos/Tesis/165/165713.pdf>>

In 2012, after many years of debates, failed proposals and attempts, the 1936 Amparo Law was abrogated and in its stead, a new statute was created. With it came a renewal of the procedure, providing many necessary solutions. Among other things, it gave general effects to the *amparo*, made it possible for collective suits to exist and removed expiration limits from its litigation, for the benefit of citizens. However, much like Calderón with his indirect tactic of passing house arrest and preventive prison, President Peña Nieto hid under this very necessary statute a small provision, which declared inadmissible any *amparo* that attempts to declare amendments to the Constitution unconstitutional.<sup>45</sup>

**Article 61.** The amparo suit is inadmissible:

I. Against additions or amendments to the Political Constitution of the Mexican United States;

This means that the *amparo* suit is no longer an instrument of review of the amendments to the Constitution. Taking into consideration all of the cited precedents that allow the possibility of declaring an amendment unconstitutional on the grounds of *amparo*, and that the Court has excused itself systematically from seeing actions and controversies in this subject, it can be said that constitutional amendments are ironclad.

It would require massive popular discontent and political pressure to make the Court change its mind, and even if this were to happen, unconstitutionality actions and constitutional controversies are severely limited in their scope, as they can only defend the purview of organs and not individual or collective rights. Review is also hindered by the fact that if the amendment procedure is followed to the letter, there is no formal argument against amendments, even when there might be a moral one.

---

<sup>45</sup> Martha Rodríguez, 'En qué consiste la Reforma a la Ley de Amparo' (What does the reform to the Amparo Law consist), (Canal Judicial, 3 June 2011) <<https://canaljudicial.wordpress.com/2011/06/03/en-que-consiste-la-reforma-a-la-ley-de-amparo/>>

This comprises an effective and appealing political weapon that makes political structures severely unequal.

### 3. Conclusions

Complete political domination can overcome almost any amendment limitation; this explains how a constitution that has a great deal of obstacles for amending itself has been modified more than 500 times. It also explains how a rigid procedure for amending the constitution was turned from a limitation, into a weapon that was used to diminish rights and to attack the policy agenda of the opposition. This also means that by design, amendment procedures presuppose the existence of a democracy, and their usage in the ways that were shown in this study entail the existence of either an oligarchy or a dictatorship.

From my observations, I can also show that there is a direct correlation between political strength and resources and the direction of the approach: more resources will lead to a more brute-strength approach, and less capacity will lead to more indirect measures, like using needed amendments as leverage or creating statutes through transitory norms. The amendment procedure has the following uses for the political elites that wield it in its benefit: 1) constitutionalization of the unconstitutional; 2) deconstitutionalization of existing policies; 3) preemption of courts and review; 4) creation of privileges and advantages; and 5) policy entrenchment.

Judges can act as gatekeepers for the review of amendments by allowing or not allowing the admission of lawsuits, when they have declared the admissibility of review, they tend to rely on formal aspects that entail vices in the legislative procedure, rather than making a substantive analysis. A formal vice extends to the whole amendment and thus it is riskier to strike down, due to the delicateness of the political agreements reached and the difficulty of reaching them again in case the changes are struck down. This is not necessarily the case with substantive unconstitutionality.

Constitutional review processes are not designed to address the problem of constitutional amendments: General constitutional review procedures are difficult to implement, and thus, in a jurisdiction where this problem has been endemic, there might be a need to create a specialized procedure as a measure to counteract abusive uses of the amendment procedure.