

One Case, Four Hypotheses and One Sincere Worry (On the Subject of Constitutional Justice in Mexico)

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Introductory Note

In *The Constitution in Conflict*, Robert A. Burt conducts a broad and thorough study of the judgments of the Supreme Court of the United States, a study that has no parallel in Mexico. That was the first thing that came to my mind while reading the book and trying to connect its observations with the Mexican constitutional experience. To some extent this essay is the product of those reflections. What is paradoxical, though, is that although the essay was triggered by Burt's text it is unfaithful to his thesis. And not because it fails to find eminently reasonable its exhortations that judicial intervention should be:

“... A particular, limited and careful intervention circumscribed by great moral condemnation of the disrespect of majorities towards a vulnerable minority, always taking into account the principle of equality.”

This is a worthwhile thesis, and it has inspired many constitutional studies on the legitimacy of judicial action. However, it points in the opposite direction from theories that account for the existence of a jurisprudence worthy of analysis, like that of the U.S. Court. Those theories, the backbone of this work, are the antithesis of the following warning by Burt, and at the same time, the reason why his book exists:

“This is what judges should do, not great moral and philosophical interventions in an interpretive sense or surrendering to the will of majorities. After all, judges are lawyers, not philosophers. They are lawyers whose function is to unravel complex cases in simple, analytical statements and to take into account the consequences of their decisions. The decision must be historically, psychologically, and philosophically informed.”

I. An Interesting Discussion

In February 2007, an intense debate took at a plenary session of the Supreme Court of Mexico (SCJ). The justices discussed whether it was appropriate to grant a legal remedy (juicio de amparo) to 11 soldiers who had been discharged from the military for carrying the HIV virus. The core of the dispute was whether an article of the Law of the Social Security Institute for the Mexican Armed Forces - Art. 266 - was unconstitutional.

That article provided that one of the possible reasons for discharging a military officer was, precisely, contracting the virus. The (ex-)military complainants who had appealed to the courts argued that the article was discriminatory. Clearly, neither the underlying issue nor the stakes of the decision were of minor importance. But what I would like to point out here is not the substantive core of the issue but a procedural question that required a response from the justices before they could reach the final decision.

The specific point in dispute was whether judges could and should take into account, as a probative element on which to ground the decision, an opinion issued by the Mexican Academy of Sciences (AMC) providing scientific information on the risks and consequences of carrying the HIV virus. Scientists' opinions had been requested by one of

the justices (Justice Cossío) but, according to some of his colleagues, could not be taken into consideration because the current Law of Amparo established that at the review stage of trials of this kind, the Court could only assess evidence presented by the parties before the first authority (the trial court judge) that had heard the case (Article 91, II). In other words, the case file was “closed” by the time it reached the Supreme Court and accordingly, justices could only review the information already therein contained.

Obedying the law literally and scrupulously, then, meant that the doctors’ opinion had to be ignored (even if it provided valuable information for the applicants, the former officers). On the other hand, a rights-protecting (“garantista”) interpretation of this and other laws could allow for the conclusion that the relevant article of the Law of Amparo might close the case for the involved parties but not for Court justices. Given that the scientific information contributed information useful for resolving the case, the opinion of the Mexican Academy of Sciences could and should be taken into account.

One of the justices with a long career on the bench, Mariano Azuela, took the first position, while the only justice at the time who came from the academy, Jose Ramón Cossío, took the second. It is worth discussing the crux of their arguments. In the plenary session of the Court during which discussion of the question began,¹ Justice Azuela warned:

“Are we going to afford greater protection (un amparo mayor) because other problems are examined? Isn’t it a merely *academic* change that is being proposed (if scientific opinions are accepted as evidence)?”²

¹ Session of February 26, 2007.

² Emphasis added.

Days later, when the issue was voted on,³ Justice Azuela again elaborated on his concerns:

“ . . . We have been very loose in applying this concept . . . what I find odd is this, the paradoxical situation in which in a case of fundamental rights case we forget one of the basic rules and basic principles of rights protection (amparo) . . . ”

As can be inferred, his concern lay in the risks, for the task of a judge, of sacrificing the strict application of the law – in this case for a particular procedural exception - in the interests of a theoretical and largely bookish conception of constitutional justice. His reference to the academic leanings of the opposing position is symptomatic and interesting. Some months later, in an article aimed at an academic audience, Justice Cossío explained the core of the opposing position he had defended and eventually adopted:

“It would be absurd if, in cases in which review of the particular statute at issue and the relevant constitutional provision cannot be undertaken without a thorough understanding of technical issues, the judges were not allowed to obtain such information. To suggest that in showing interest in such relevant information, the Supreme Court is *delegating* the decision of a norm’s constitutionality to specialists is to misunderstand the nature of law and the characteristics of the judicial role.”⁴

Needless to say, Justice Cossío had, in effect, privileged the usefulness of accessing and weighing the information provided by the Mexican Academy of Sciences over the procedural factors that prevented its consideration. The debate was long and heated and in the end, the Court held in favor of the officers. Beyond that result, however, what interests me is to note that the discrepancy between the two judges suggests very different, very distant rationales and legal conceptions.

³ Session of March 1, 2007.

⁴ Cossío, J. R., “Militares con VIH: contra la discriminación” in *Nexos*, 354, June 2007, pp. 26-27.

To use academic categories, we can say that Justice Cossío leaned toward what some authors – Sánchez, Magaloni and Magar – refer to as “legal interpretativism,” while Justice Azuela stood firm in his “judicial legalism.”⁵ Judges like Cossío “believe that courts ought to expand their jurisdiction by overturning precedent that limits the role of the judiciary . . . and take into account the political, social and economic consequences of their rulings.”⁶ Judges like Azuela, however, “give primary weight to a limited interpretation of both the courts’ jurisdiction and the rules for standing and are skeptical of the ability of judges to base their decisions on non-juridical reasoning.”⁷ These thinkers – whom, following Karina Ansolabehere, we can call “legalists”⁸ – favor literal interpretations of the constitution and laws while the former, who can also be called “guarantists” – are inclined toward broader interpretations.⁹

II. Classifying to Clarify.

Behind the trend toward “judicial legalism” or “legal interpretativism” are very conceptions of the rule of law. Josep Aguiló Regla – through a different methodological approach to the empirical study of Sanchez, Magaloni and Magar –proposes two sets of variables that encapsulate both models of the judicial mentality.

⁵ See, Sánchez, A., B. Magaloni, E. Magar, “Legalist vs. Interpretativist: The Supreme Court and the Democratic Transition in Mexico”, Stanford Public and Law Working Paper, 1499490.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499490##

⁶ Ibid., p. 4.

⁷ Ibid.

⁸ Ansolabehere, K, “Legalistas, legalistas moderados y garantistas moderados: ideología legal de maestros, jueces, abogados, ministerios públicos y diputados,” *Revista Mexicana de Sociología*, 70, No. 2, April-June 2008, pp. 331-359.

⁹ Sánchez, A., B. Magaloni, E. Magar, “Legalist vs. Interpretativist: The Supreme Court and the Democratic Transition in Mexico”, p. 33.

The first model consists of the following components: a) emphasis on the rule of law; b) attachment to the legislative rule of law; c) emphasis on formal legal reasoning; d) adoption of a rule-based model of interpretation [subsumption]; e) defense of a judicial ethos according to which legal reasoning must close off moral reasoning; f) fear of a loss of value neutrality [impartiality being equivalent to neutrality]; g) fear of subjectivity [only the law is objective]; h) judicial restraint and a fear of the imposition of moral relativism; i) fear of *chiaroscuro* [that is, of a gradual loss of certainty].¹⁰

The second view, on the other hand, combines the following elements: a) emphasis on protecting rights; b) attachment to the constitutional rule of law; c) emphasis on substantive legal reasoning; d) adoption of a model of interpretation that is rule-based [subsumption] but also principles-based [balancing]; e) an applied judicial ethos [legal reasoning is a case in which general practical reasoning and moral reasoning coincide]; f) recognition that applying the law involves making assessments, so that impartiality is not to be confused with neutrality; g) use of rationality as intersubjectivity; h) avoids confusing submission to the law and self-restraint with the moral irresponsibility of the judge; i) avoids confusing a “non-arbitrary” judge with a “ritualistic” one.¹¹

The classification scheme is ambitious and inevitably schematic, but I think it is useful. In fact, it is not difficult to situate Justice Azuela’s arguments in the first model and those of Justice Cossío in the second.

¹⁰ See, Aguiló J., “Ética Judicial y estado de Derecho” en García Pascual, C., *El Buen Jurista. Deontología del Derecho*, Tirant lo Blanc, México, 2013, p. 82.

¹¹ Ibid.

III. Some Pertinent Questions.

The debate between Azuela and Cossío and the classification proposed by Aguiló raise some questions. I can think of at least the following: a) Is there a significant difference between the work of an “ordinary” trial court and that of a constitutional court?; b) Is it necessary to apply a different decision-making framework in each case?; c) If so, are these frameworks incompatible?; d) Does it make sense to distinguish between academic judges and technical judges?; e) Does each of the two models of the rule of law – legislative and constitutional, respectively – require a specific kind of judge?; f) Can judges who operated in authoritarian systems continue to serve in democratic and constitutional contexts?

IV. Approaching and Delineating the Scope of the Question.

In these next pages, I offer some theoretical premises for answering these questions. I avail myself of some quotations from authors who have studied these issues to show that there is a tendency to distinguish between constitutional justice and ordinary justice that goes beyond the technical and jurisdictional questions.

The strategy I have adopted has been to review relevant literature to highlight a few (more or less) categorical assumptions by experts. In so doing, I have avoided the temptation to pontificate myself, and have left it to them to provide the materials for analysis. As we will see, these materials consist of axioms that complement the second model proposed by

Aguiló and which sketch out a profile of “guarantist” judges, to use Ansolabehere’s terminology.

With these principles as a guide, towards the end of the text I will problematize the current situation in Mexico where, as will be explained, a trend towards the decentralization of constitutional review is being witnessed. My reflections in the concluding paragraphs are based on some constitutional and institutional changes in the administration of justice and only on very few empirical references to culture or judicial behavior. The reason is that socio-legal studies of judges’ behavior in Mexico are few in number, and those that exist focus on the Supreme Court and the Electoral Tribunal.¹²

V. Four Hypotheses for Examining the Topic

Hypothesis No. 1: “The lower court (ordinary) judge cannot be a judge of constitutionality.”

Consider the following idea from Louis Favoreu, which I have found cited more than once in articles on these topics:

“Constitutional courts, unlike ordinary courts, are not composed of career judges who have ascended to their posts as a result of regular, progressive promotions. The appointment of constitutional court judges does not follow

¹² See, Ríos-Figueroa, “Sociolegal Studies in Mexico,” *Annual Review of Law and Social Science*, Vol. 8 (2012), pp. 307-321. Available at: http://works.bepress.com/julio_rios/11

traditional criteria, [and] judges tend to have very similar backgrounds, their main common feature being the large proportion of university professors.”¹³

Along these lines, Otto Bachof declared in 1959:

“The task, laden with responsibility, of normative constitutional interpretation and protection of value systems requires a special application of these questions, and demands individuals with considerable expertise in problems of law and constitutional practice, experience that no lower court judge has, or can have. . . .”¹⁴

In the background of these statements two plot lines unfold: a) it is assumed that modern constitutional orders are substantively different from those belonging to the so-called “legal” or “legislative” rule of law (I will return to this point below); and b) as a corollary, it is assumed that the new model requires (constitutional) judges with particular characteristics that ordinary, lower judges cannot meet, not least because they are used to operating according to the logic of strict legal foundations and applications.

This last argument carries with it a pejorative assessment of ordinary courts, which are often described as legalistic and labeled as traditional, and extols the mission of constitutional judges. At the same time, it implies and presupposes a particular conception of the latter, one which, according to Favoreu, finds particularly fertile soil in university classrooms.

¹³ Cited in Fernández de Cevallos, D., “El juez constitucional como elemento de transformación democrática” in XXXXXX, pp. 67-68. The author cites a webpage that could not be opened.

¹⁴ Cited in Fernández de Cevallos, D., “El juez constitucional como elemento de transformación democrática” in XXXXXX, pp. 67-68. The author cites a webpage that could not be opened.

Hypothesis No. 2: “The constitutional rule of law is different from the legislative rule of law.”

Already implied in the previous hypothesis, this thesis has been vigorously defended by Luigi Ferrajoli. For this author, the constitutional order of the second half of the twentieth century¹⁵ was substantially different from those prevailing during what Ferrajoli himself calls the legislative or classical positivist paradigms. The incorporation of fundamental rights in constitutional charters, along with the subjection of the legislature to these norms, denotes a change of paradigm carrying with it not only a legal transformation, but also a political shift from different forms of autocracies (absolutist in varying degrees) to constitutional democracies. The basic thesis – which is supported with empirical data – is that legal orders underwent a structural change and that this change has implications for all legal actors. In particular, according to this theoretical model:

“Judging is no longer the subjection of the judge to the law, but now also consists in a critical analysis of [the law’s] contents in order to verify its constitutionality.”¹⁶

This structural change demands a new type of constitutional judge. At least, that is what Perfecto Andrés Ibañez – Spanish Supreme Court Judge, eminent jurist, and devoted Ferrajolian – believes:

¹⁵ Ferrajoli is thinking primarily of Europe, but the thesis applies to practically all Latin American countries in the last decade of that century. I distinguish between Latin American constitutions approved or reformed in the decade of the ‘90s and the so-called “New Latin American Constitutionalism.” See, Salazar, P., *Política y Derecho. Derechos y Garantías. Cinco ensayos latinoamericanos.*, Fontamara, México 2013.

¹⁶ Ferrajoli, L., *Diritti fondamentali*, Laterza, Roma-Bari, 2001, p. 36.

“The existence of multiple tribunals in new . . . normative environments more open to the interplay of principles and the use of judicial discretion, brought with it the opening of an unprecedented new space for the development and exercise of a certain cultural autonomy on the part of judges, which also translated into . . . a different relationship between the judge and the law and greater visibility of what Ferrajoli called the judge’s “power of discretion” (el poder de disposición) in the act of applying said law . . .”¹⁷

The core of the argument can be summarized as follows: changes to the structure of legal orders require judges capable of operating with a constitution of principles, one capable of many controversial interpretations.¹⁸ The lower court judge schooled in the premises of positivism, legalism and formalism, is not capable of performing this task. It is also what Ronald Dworkin also argued when asked if judges had to be philosophers:

“Judges must understand that the convenient shortcuts we have just considered (intuitionism and pragmatism, as well as formalism) are illusions, which means judges have to choose between competing principles that are available to explain the constitutional concepts, and also have to be ready to present and defend the choices they make.”¹⁹

What is clear is that not every judge can take on this delicate and complex task. The risk, at least according to Francisco Laporta, is that “judges (act) on the basis of an open moral reasoning, which makes them feel, however, as if they were applying the law.”²⁰ The

¹⁷ Ibañez, P. A., “Ética de la independencia judicial,” in *El Buen Jurista. Deontología del Derecho*, Tirant lo Blanch, México 2013, p. 33.

¹⁸ See, Ferreres Comella Víctor, *Justicia constitucional y democracia*. Madrid, Centro de Estudios políticos y constitucionales, 2007.

¹⁹ Dworkin, R., “¿Deben nuestros jueces ser filósofos?, ¿Pueden ser filósofos?” in *Estudios de Derecho*, No. 144, Diciembre de 2007, p.

²⁰ Francisco Laporta, “Imperio de la ley y constitucionalismo. Un diálogo entre Manuel Atienza y Francisco Laporta,” in *El cronista*, No. 0, Madrid, October 2008, cit., p. 49.

problem, then, is that lower court judges are not prepared for this task because “moral reasoning is simply vulgar.”²¹

If the above is true, we are witnessing a historic change of legal models that requires a change in judicial work that cannot be performed by just any judge or through traditional methods of legal interpretation and application.

Hypothesis No. 3: “There are judges of law as well as judges of rights.”

Another way of looking at the question leads us down the path of judges’ ideology and legal culture. That is the path sketched out by the following reflections by Luis González Plascencia:

“The current context is culturally, economically, socially, politically and legally different from any other period in history and therefore presents special conditions for legal practice in general and the work of courts in particular. [Therefore, we require not only a judge trained] in the law but in rights[,] . . . sensitive to social circumstances . . . , with an elevated notion of justice that, always grounded in the law, is consistent with fidelity to procedural truth and the safeguarding of constitutional values.”²²

The first part of the argument – which the author develops with in Mexico in mind – is extremely fragile because it is difficult to maintain the existence of “contexts” totally different from the previous historical moment. Sociologists and historians are well aware

²¹ Ibidem. Perhaps aware of this, Ronald Dworkin asks himself if judges can or should be philosophers (to which he responds in the affirmative). See, Dworkin, R., “¿Deben nuestros jueces ser filósofos? ¿Pueden ser filósofos?”, en *Isonomía*, No. 32, April 2010, pp. 7-29.

²² González Plascencia, L., “La formación de los juzgadores federales en México”, revista **XXXXXX** del IJF, México, pp. 153-154, 163. Emphasis is mine.

that, as radical as social transformation may be, there always exists a continuum between one phase and another. But the quote is still useful because in the second part of his argument, the author introduces a theme not present in the previous hypotheses. The argument suggests that judges should have an ideological commitment to the human rights agenda.

This line of argument goes beyond arguing that, given the paradigm shift (from the “legal state” to the “constitutional state”) and the peculiarities of new legal orders, judges who know both legal doctrine and legal theory are necessary.²³ Nor does it merely state that interpreting constitutional principles requires knowledge of normative ethics or even meta-ethics and that judges “must be aware of the task they perform and the political, economic and social effects that their decisions may have.”²⁴

In fact, the ideological argument goes further because it demands that constitutional judges be committed to the cause of rights, a commitment which, at least according to Jorge Malem, was not required under the paradigm of the “legislative state”:

“From a technical point of view, then, it would not be true that to be a good judge it is necessary above all to be a good person irrespective of one’s mastery of the law; in fact, it would be enough to be sufficiently familiar with the legal techniques for identifying the legal rules governing the case to be decided . . . without it being necessary to be a paragon of ethical and social virtues. A bad person actually could, in this sense, make a good judge.”²⁵

²³ See, Malem, J., *El error judicial y la formación de los jueces*, Gedisa, Barcelona, 2008.

²⁴ Malem, J., *El error judicial y la formación de los jueces*, Fundación Coloquio Jurídico Europeo, Madrid, 2009, p. 114.

²⁵ Malem, J., “¿Pueden las malas personas ser buenos jueces?” in XXXXXX, IIJ-UNAM, XXX, p. 145.

From the paradigm of the constitutional state, however, the view looks different. Malem himself – in a nice article that asks precisely whether bad people can be good judges – concludes that in the constitutional state, judges must be committed to what he calls a particular “critical morality,” that is, a morality pertaining to a liberalism of rights and corresponding precisely to the paradigm of a human rights-oriented constitutionalism.

Therefore, in the contexts in which this paradigm is valid, “bad people” (those who turn away from or fight the principles underlying this particular morality) cannot make good judges. The thesis is full of philosophical implications because it means that there must be an alignment between a certain axiological agenda, positive legal norms, and the personal convictions of the judge. I will not stop to analyze this aspect of the hypothesis but I thought it relevant to mention it.

Hypothesis No. 4: “Judges in authoritarian systems cannot be judges in a democracy.”

The last hypothesis has a close connection with the previous one, but it highlights a commitment to rights constitutionalism from a political and historical perspective. The key question lies in determining whether judges operating in authoritarian political contexts – and who, therefore, executed the legal rules under which said regimes operated – can be judges of constitutionalism in democratic times. This question applies particularly to lower courts but we can assume that, in authoritarian contexts, there were no real judges of constitutionality. Accordingly, the question can be split into two questions: a) whether

lower court judges under authoritarianism can continue to operate in democratic contexts;

b) whether those judges can aspire to become constitutional judges.

Jorge Malem takes up the core of the dilemma with Spain in mind:

“Or is it possible that judging is a sector of state institutions and practices immune or indifferent to contextual characteristics and political time? Could a system proven so efficient at mass producing and reproducing the sort of judge who, culturally and politically predisposed to subordination, executed with such ease the judicial policies of the Franco dictatorship and other dictatorships—could that system be functional in a constitutional democracy?”²⁶

The same argument, now thinking of Latin America, has been raised by Ana Laura

Magaloni:

“Judges and lawyers tend to repeat learned behaviors and to reproduce ways of thinking and interpreting legal rules even if the context in which they operate changes. The resistance to change of the institutions of the judiciary is enormous. This explains why late twentieth-century democracies – including Mexico – have found it enormously difficult to ensure that changes to the political regime are accompanied by changes of the same magnitude in the legal sphere. While it is true that democratic transitions have resulted in the creation and reform of a number of legal norms and institutions – starting with the Constitution – the legal profession, which is responsible for operationalizing these standards, has been formed in the shadow of authoritarianism. Its ways of understanding the law, of conceptualizing the judicial function, and of conducting legal reasoning, are bound up with what worked in the old regime.”²⁷

²⁶ Malem, J., *El error judicial y la formación de los jueces*, Fundación Coloquio Jurídico Europeo, Madrid, 2009, p. 129.

²⁷ Magaloni, A., “Inercia del pasado”, *Reforma*, 5 de octubre de 2013 (

On this view, then, beyond technical-juridical considerations are cultural and ideological considerations favoring the replacement of holdovers from authoritarian regimes with new judges committed to democracy.

VI. Is the constitutional justice model relevant?

The topic of different traditions of constitutional justice – American and Continental – is already a classic in the contemporary debate and has a deep connection to the present case. Hence it is necessary to touch on it briefly before examining the current situation in Mexico through the lens of our four hypotheses. As Roberto Saba has observed, it is true that:

“... The expectations each tradition has about the judicial function, about the role and responsibilities of legislators, about the role that should be played by the legal academy and even about the proper place of citizens themselves, are very different.”²⁸

What interests us here is the different view of the role of the judiciary that characterizes each model. We often hear that the continental model aspires to have judges who are expert in the law, technically sound and politically neutral, while the American model is committed to virtuous judges who are skilled in law but also tap into other sources of knowledge – even moral – at the moment of deciding. This hard-and-fast distinction is an oversimplification, but it allows us to align the different judicial profiles – according to each model of constitutional justice – with the classifications proposed, following Josep Aguiló, at the start of the essay and to examine them in light of the reconstructed

²⁸ Saba, R., “Constituciones y códigos: Un matrimonio difícil,” **nimio**.

hypotheses. The first corresponds to the “legalistic” judge; the second to the “guarantist” judge.

However, a careful look reveals that the difference between the two models lies not in the profile of the judge each prefers so much as in the task with which judges are entrusted. Put differently, the profile depends on the function. This is the thesis implicit in the following claim by Mauro Cappelletti:

“Judges in continental Europe are usually “career” magistrates unfit to conduct judicial review of laws, a task which, as we shall see, is inevitably creative and goes far beyond their traditional role as “mere interpreters” and “loyal servants” of the law. The very act of interpreting constitutional norms and especially the core of these norms in a declaration of fundamental rights or “Bill of Rights,” is often very different from interpreting ordinary laws. It requires an approach that meshes poorly with the traditional “weakness and timidity” of the judge in the continental model.”²⁹

The difference is not in the model of constitutional justice adopted but rather in the task entrusted to judges. Because in the (North) American context the work of constitutional review is performed by all judges (a decentralized model of review), it can be assumed that their profile is different from that of the lower court judge in continental Europe (where the model of concentrated constitutional review predominates).

²⁹ Cappelletti, M., *Cours constitutionnelles*, XXXX, p. 463 (Cited in Monroy Cabra, M., “Necesidad e importancia de los tribunales constitucionales en un Estado social de Dreceho”, *Anuario de Derecho Constitucional Latinoamericano*, IIJ-UNAM, 2004, p. 30.)

At any rate, in all cases – and this is what matters for the purposes of this text – constitutional judges are called upon to be more than just legal technicians and so must comply with the aforementioned hypotheses.

VII. The Great Mexican Mess

Studies of the Mexican judiciary tend to focus on the Supreme Court of Justice or, at most, the Federal Electoral Tribunal. This is a result of the fact that, since 1994 and up to very recently, Mexico had adopted a model of concentrated constitutional control. In fact, only since 2007 has the Supreme Court had to share the power to review the constitutionality of laws with the Electoral Tribunal.³⁰ Therefore until very recently, it only made sense to ask whether Supreme Court justices and judges from the Electoral Tribunal acted according to the hypotheses reconstructed in this work and therefore whether they were “legalistic” or “guarantist,” to use Ansolabehere’s terminology. This is Julio Rios Figueroa’s claim:

“In part as a response to the shortcomings of political science work on the Supreme Court, legal scholars have begun to produce systematic jurisprudential lines on specific topics as sexual and reproductive freedom (Madrazo and Vela 2011), criminal due process rights (Magaloni and Ibarra 2008), taxing capacity of the state and the just imposition of fiscal burdens (Elizondo and Perez de Acha 2006), and whether the court uses a gender perspective when deciding certain civil matters (Pou 2010). Of course, legal scholars are carrying out this novel (for Mexico) work because of the increasing importance of Supreme Court jurisprudence for policies and

³⁰ Issues like constitutional controversies and motions of unconstitutionality can only be heard by the Supreme Court and, while amparo motions have always been heard by lower court judges, the Supreme Court’s interpretations of the Constitution have always been binding on all judges. As for the Electoral Tribunal, its history is interesting because it was the Court itself that had denied it the power to perform constitutional review, so these powers had to be granted to it by constitutional reform. I will not discuss the Electoral Tribunal here, but for an analysis of the topic, permit me to cite to my own work, *Garantismo espurio* (Fundación Coloquio Jurídico Europeo, Madrid, 2009).

politics. In addition to the specialized knowledge on each topic, perhaps the central lesson of these studies is that the Supreme Court is building quite slowly, and in disparate and not always consistent ways, its understanding on how and when fundamental rights should be protected. An underlying, and not always explicit, explanation for the unsteady jurisprudential construction is the traditional legal training, and socially conservative ideology of some of the Justices.”

Along these lines, after an empirical analysis of the most important decisions of the Mexican Supreme Court (SCJ) from 1994 to 2007, the aforementioned study by Sanchez, Magar and Magaloni concludes:

“. . . The majority of the time, especially in cases of constitutional controversies, a “legalistic bloc” has dominated the Court.”³¹

Similarly, points out Julio Rios, making reference to this study:

“One central lesson from political science that works on the Mexican Supreme Court is that, since 1994, it has become an effective and quite neutral arbiter of political conflicts, though its record on protecting fundamental rights has been much less successful.”

It has been several years since this study was completed and, quite apart from the empirical evidence supporting it, I think it is fair to say that things have changed only slightly. In recent years there have been five newly appointed Supreme Court judges³² (out of the eleven that make it up) and gradually, a “liberal” bloc (as constitutional judges themselves call it) of five justices has consolidated against a “conservative” bloc with six members.

³¹ Sánchez, A., B. Magaloni, E. Magar, op. cit, p. 6.

³² Arturo Zaldívar and Luis María Aguilar entered in 2009, José María Pardo Rebolledo in 2011 and Alfredo Gutiérrez Ortiz Mena and Alberto Gelasio Pérez Dayán in 2012.

Two of the new ministers aligned themselves with the first group while the three others reinforced the conservative bloc.

One interesting fact is that the distinction between the two groups does not necessarily correspond to the cultural or ideological agenda of the constitutional justices.³³ That is, it does not necessarily revolve around the last two hypotheses analyzed here. What distinguishes the justices is, above all, their conception of the rule of law and the way in which they approach the judicial role. The debate between Azuela (who left the Court in 2009) and Cossío provides a good illustration of this divide. In fact, it should be noted that the six judges in the “conservative” bloc either came from the judiciary branch or had prior relevant experience within it.³⁴

These differences between Supreme Court justices have acquired unprecedented relevance in recent years for the reasons already discussed – the Court is starting to play an unprecedented and increasing political role – but above all because in the last five years, the floodgates of decentralized constitutional review have been opened. The path by which these reforms were made possible will be covered in a moment, but even now we can see that the result of the “dispute over the law” being waged within the Supreme Court will have a decisive impact on the notions of law and justice of the (new) constitutional judges

³³ For example, selecting an exemplary topic like the termination of pregnancy, at least one of the conservative justices (Franco) has voted to decriminalize it; on the other hand, it appears likely that at least one of the liberals (Gutiérrez Ortiz Mena) would vote against it.

³⁴ Margarita Luna Ramos, Pérez Dayán, Luis María Aguilar, Pardo Rebolledo had judicial careers, Sergio Valls had a predominantly political career but was previously a Judge on the Court of Justice of Mexico City as well as Counselor of the Judiciary, while Fernando Franco also had a political career but was President of the Electoral Tribunal from 1990 to 1996.

and accordingly – if the hypotheses discussed in this text are accurate – could define the success or failure of the Mexican constitutional state.

7.1. From concentrated to decentralized review of conven-constitutionality

In 2009, the Inter-American Court of Human Rights (IACtHR), in the case of *Radilla Pacheco v. Mexico*, found against Mexico, holding, inter alia, that all Mexican judges were required to perform “conventionality control” on the basis of the American Convention on Human Rights and the interpretations made by the Inter-American Court thereof. This ruling laid the foundation for the decentralization of judicial review in Mexico. In 2010, in response to the decision of the inter-American judges, a majority of Supreme Court justices rejected the IACtHR’s decision, arguing that IACtHR decisions only constituted “guiding principles” for Mexican judges. The Court majority also reiterated that judicial review in Mexico was of a centralized character.

However, in June 2011 an ambitious constitutional reform concerning human rights was adopted, along with an earlier reform in amparo proceedings (individual appeals to the Court). One of the key features of the reform, enshrined in Article 1 of the Constitution, lies in two specific sentences: “In the United States of Mexico all persons shall enjoy the rights recognized by the Constitution and international treaties to which the Mexican State is a party” and “norms governing human rights shall be interpreted in accordance with the Constitution and international treaties.” In light of these provisions, this decision of the IACtHR in the *Radilla* case gained renewed strength and meaning.

In fact, the reform led the Supreme Court to reconsider its position regarding the IACtHR's ruling and in October 2011, a new majority of justices – made up of those who had been in the minority in 2010, plus two justices who changed their position in light of the new constitutional framework – recognized the binding nature of IACtHR judgments (in cases to which the Mexican State was a party), holding that all Mexican judges had the obligation to perform *ex officio* conventionality control as the international court had ordered (Case No. 912/2010).³⁵ With that decision, the Mexican justices had finally opened the door for decentralized judicial review of statutes for accordance not only with the Constitution but also the American Convention.

However, as might be inferred from the existence of the two blocs within the Court, the debate was not closed, nor differences of opinion permanently resolved. Some conservative courts and justices continued to issue rulings contrary to the 2011 decision.³⁶ This provoked sharply divergent holdings and open jurisprudential contradictions.³⁷ The severity of the dispute was observed by Justice Cossío and by one of his secretaries, Raul Mejía:

³⁵ “339 In other words, the judiciary must exercise *ex officio* "constitutionality control" between domestic laws and the American Convention, clearly within the scope of their respective competences and relevant procedural regulations. In performing this task, the judiciary must take into account not only the treaty, but also the interpretation made by the Court thereof, the ultimate interpreter of the American Convention." Inter-American Court of Human Rights, *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C, No. 209.

³⁶ The tone of the debate was heated, to say the least. One justice, Luna Ramos, even claimed that the position of half of her peers that international treaties on human rights had constitutional status was “treason.” This statement was made in the city of Morelia, Michoacán during a conference on August 9, 2013. Some journalistic accounts of and commentaries on her comments can be found at: <http://www.quadratin.com.mx/principal/Traicion-a-la-patria-comparar-tratados-internacionales-con-Constitucion/> and at <http://m.eluniversal.com.mx/notas/articulistas/2013/08/66155.html>.

³⁷ The most significant were between two circuit courts and between the two Chambers of the Supreme Court. Both were discussed in September 2013.

“... a different understanding of and approach to cases depending on which court has previously reviewed the case submitted to it These are not minor differences and, magnified in the lower courts, may generate an image of interpretive disorder with potentially negative effects on specific cases and therefore on individuals. It is one thing for trial courts hearing concrete cases to disagree over how to resolve certain issues, disagreements which can ultimately be resolved on appeal as cases rise to courts of final interpretation. It is quite another thing when the latter are the ones who have a difference of opinion that causes lower courts to decide in inconsistent ways depending on the subject matter and the appeals court that reviews their decisions.”³⁸

In September of 2013, the Supreme Court had to consider these contradictory lower holdings concerning two specific issues – what is the place of international human rights norms in the Mexican legal system?, and what is the reach of IACtHR judgments? A majority of the Court decided that in essence, all human rights norms contained in international treaties signed by Mexico had the status of constitutional norms and that all judgments of the IACtHR (even in cases where Mexico was not a party) were binding on all national judges. The first decision was reached by a controversial compromise that managed to attract 10 votes,³⁹ while the second passed with a narrow majority of six votes to five.

What interests us here is that, with this decision the distinction between constitutionality and conventionality was eliminated because since then, there has been only one parameter for considering the validity of the norms of the Mexican legal system (compliance with the

³⁸ Cossío, J. R., R. Mejía, “Derechos descafeinados” in *Nexos*, June 2013.

³⁹ The decision of the Supreme Court was also very controversial because it also held that when the Constitution establishes an explicit restriction on the exercise of a right the Court would hold to what the constitutional provision indicates. The point is relevant and interesting but is not the subject of this paper, and so I will not go into it. However, it was that point which prompted the Minister Cossío to refuse to join the majority.

constitution and human rights norms originating the Convention). Secondly, the power of judicial was extended to all judges,⁴⁰ capping off a trend that had already begun to be observed in Case No. 912/2010:

“While judges cannot make general statements about the invalidity of, nor expel from the legal order norms they consider contrary to the human rights contained in the Constitution and treaties (as happens in the direct lines of scrutiny set out in articles 103, 107 and 105 of the Constitution), judges are in fact required to stop applying these inferior norms and give preference to the contents of the Constitution and treaties in this field.”

From this point on, all Mexican judges are constitutional judges. Are these judges who fit the profile outlined by the hypotheses discussed in this essay? The question falls under its own weight. Unfortunately we do not have enough empirical studies to be able to answer it. One of the few studies aimed at measuring conceptions of law and the rights of judges was published by Karina Ansolabehere in 2008. In this essay, we have already referred to and employed her distinction between “legalist” or “guarantist” judges.⁴¹ The study did more than just analyze judges, which allowed the author to conclude the following:

“We observe that judges are moderate legalists. With greater interpretive freedom in applying the law, they adopt a less legalistic framework than those who are guarantors of the proper application of legal processes: government agencies and trial lawyers, who make *efficient* use of the law to defend their clients’ interests. . . .

⁴⁰ In fact, Article 1 of the Law of Amparo provides: “Article 1. The amparo proceeding seeks to resolve any dispute that may arise: . . . III. Under domestic laws, acts or omissions of an authority that violate recognized human rights and the guarantees provided for the protection of the individual under the Constitution of the United Mexican States and by international treaties to which the Mexican State is a party.”

⁴¹ Ansolabehere interviewed 10 judges in Mexico City as well as other legal professionals (public officials, attorneys, professors).

The median representative, median judge, the median teacher, the median lawyer and the median public agency are actors with legalistic ideas of law

With the sole exception of teachers, among whom ideas about the notion of *human rights* are closer to a legalistic model compared with the legal philosophy of the teachers as a group, the other groups exhibited slightly less legalistic ideas about human rights than might have been expected. We found three groups of moderate legalists: representatives, judges and lawyers. And two groups that we can characterize as plain legalists: teachers and government agencies.”⁴²

It is encouraging to note that – assuming that the results of the study are generalizable – judges are not the legal actors with the most legalistic views of law and rights, although I fear that the bulk of Mexican judges are far from satisfying the model of the constitutional judge outlined by Aguiló and the hypotheses developed in this essay. This suspicion is based upon the following: a) judges in Mexico have operated for decades under the logic of the legal rule of law, b) the concentrated model of constitutional review has inhibited lower court judges’ argumentative and interpretive capacities, c) even in the Supreme Court itself, a conservative tendency unfavorable to the rights agenda prevails, d) the vast majority of judges in Mexico (including the majority of Supreme Court justices) built their careers in the time of Mexican authoritarianism.

If all this is true, we are in trouble. Decentralized constitutional review in Mexico could become the nightmare that Sergio García Ramírez, Mexican jurist and former President of the IACtHR, encapsulated with a troubling metaphor: “it is a locomotive, powerful and impressive, designed to reach high speeds but for which there are no rails. . . .”

⁴² Ansolabehere, K, “Legalistas, legalistas moderados y garantistas moderados: ideología legal de maestros, jueces, abogados, ministerios públicos y diputados”, op. cit., p. 347, 351, 353.

The warning, as we can see, lies not in the field of theory. It does not raise the same concerns that motivated Burt in *The Constitution in Conflict*. It is simpler, more childish, even. It does not insist that judges should take on a power that breaks with the principle of equality and play a role that they shouldn't. It simply warns that Mexican judges are not equal to the task asked of them. The serious, the truly worrisome part, is that they are not at a time when, for better or for worse, institutional changes requiring them to do so are taking place. So if García Ramírez is right, in a few years, analyzing the future holdings of the current Mexican judges, someone in Mexico may have to write a book called *The Constitution in Crisis*.