Democratic Backsliding and the Supreme Court in Mexico

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22.02.2023 doi: 10.17176/20230223-031713-0

Democratic backsliding is the state-led debilitation or elimination of the political institutions sustaining an existing democracy. The antinomies coined to understand this phenomenon – autocratic legalism as in Hungary under Victor Órban, abusive constitutionalism in Hugo Chávez's Venezuela, or illiberal constitutionalism in Jair Bolsonaro's Brazil – reflect the disturbing fact that a legitimately elected government may gradually dismantle the institutions and norms that allowed its access to power. Mexico under current President López Obrador is in this club, especially now that his government has launched a decisive blow to the institution in charge of organizing elections and counting the votes. Whether or not he will succeed is now under review at the Supreme Court.

The protracted transition to democracy in Mexico involved a series of electoral reforms since 1977 that gradually expanded access to the elected branches of government and empowered an autonomous institution to organize elections and to count the votes. In the year 2000, the long governing Revolutionary Institutional Party (PRI) lost the presidential election for the first time in more than seven decades. For close to twenty years, electoral competition produced alternation of political parties in the executive branch, at both federal and state levels, and no single-party majorities in congress. Electoral competition activated checks and balances delineated in the Mexican Constitution, notably the Supreme Court and federalism.

Democratic backsliding begins at the ballot box, as Levitsky and Way put it, and the turning point in Mexico was the election of 2018, which the charismatic leader Andrés Manuel López Obrador and his party MoReNa (Movement of National Regeneration), won by a landslide. Legitimate demands for inclusion, social and economic, and a generalized discontent with political corruption are behind López Obrador's electoral victory. The distribution of votes in favor of MoReNa cut across traditional cleavages of economic class, geography, and ideology. López Obrador captured well the social demand for more and better government and ran an effective campaign that brought on board many new supporters beyond his traditional base of left leaning and less affluent voters in the southern states of the country.

However, soon after the election López Obrador launched an ambiguous project of "transformation," embracing a polarizing rhetoric that distinguishes "the People," who support his project from the "corrupt elites" who oppose it. Every single weekday for the past four years, for an average of two hours during his "morning conferences," President López Obrador has lashed out at the "oligarchy" that includes not only traditional political parties and politicians but also autonomous institutions, civil society organizations, universities, mass media, and even the middle-class that he has dubbed "aspirational and vulgar money-seekers." Crucially, López Obrador considers the Armed Forces as "the People in uniform" and has lavishly empowered them to support his political project.

Consistent with the practices of abusive constitutionalism, the government has pushed its prerogatives to the limit and beyond in many of its main policies and infrastructure projects. This activity has prompted several legal challenges before the Supreme Court, which predictably became the focus of threats and encroachments by López Obrador. Fortified by a supportive legislature, López Obrador's government forced the resignation of one Justice and rushed the appointment of two Justices whose partisan affiliation and personal connections to one of the administra-

tion's main contractors were highly questionable. In addition, several legislative initiatives threaten judicial independence by increasing the number of justices and packing the court. All this, plus the daily doses of the President's hostility towards judges and the judiciary, send a chilling message.

The Supreme Court has weathered the storm with more shame than glory. The Court has a longstanding legitimacy deficit, as reflected in the rather low average of 26% of the people who declared having 'much' or 'some' confidence in the judiciary between 1994 and 2018 (and in no year has this percentage exceeded 40%) according to Latinobarometer. This crisis of legitimacy of the judiciary was compounded in 2018 by scandals of nepotism and corruption and has provided fertile grounds for López Obrador's hostility and encroachments upon the judiciary.

In this precarious situation, the Supreme Court has opted for a two-pronged strategy. On the one hand, in the bulk of ordinary cases the Supreme Court and the federal judiciary have continued the slow but clear movement towards a more progressive jurisprudence that started in 2010. On the other hand, in most politically sensitive cases the Court has maximized deference to the government. The former Chief Justice not only made public his ideological proximity to López Obrador by breaking protocol and norms, he also shrewdly maneuvered the Court's docket and voting dynamics to avoid outcomes unfavorable to the government. This is clear in cases that are directly related to the main policies and infrastructure projects of the government, including the role of the armed forces in internal security and in an increasing list of formerly civilian tasks, the role of constitutional autonomous organs, and state energy policy.

The Supreme Court's two-pronged strategy is no longer viable, as the time of reckoning has arrived. López Obrador's government has pushed through a comprehensive electoral reform, one that in contrast with all the previous reforms since 1977 neither improves representation nor strengthens the electoral institute. On the contrary, the reform favors the incumbents by lowering restrictions on the use of public funds for campaigning. More importantly, it severely undermines the capacity of the electoral institute to organize the election and count the votes. Disguised under a rhetoric of austerity and corruption control, the reform would lead to the dismissal of more than 80% of the civil servants in the electoral institute and would eliminate several offices in charge of the complex process of organizing and overseeing the elections across the country, among other crippling measures. This electoral reform will negatively affect the right to vote and the legitimacy of the general election of 2024.

The Supreme Court will have to decide whether the reform stands or not. The recent appointment of the first female Chief Justice in the history of the Court has led to a noticeable change in the Court's relationship with the executive branch. The Chief Justice in Mexico is elected by her peers for a period of four years, and on January 2, 2023 the majority in the Court voted for a career judge with a good reputation as a jurist and respected within the judiciary. The new Chief Justice has come out strongly in defense of judicial independence and the integrity of judges, stressing the supremacy of the Constitution.

Very problematic cases for the Court, and for democracy in Mexico, are looming on the horizon. It is unusual for the gradual erosion of democracy to reach the Rubicon, the proverbial limit beyond which everything changes. The regressive electoral reform promoted by the government of López Obrador is that limit. Once the lawsuits reach the Court, it will have until June 1, 2023 to make a decision (after that date the legal framework to run the 2024 general election cannot be altered).

The Supreme Court will have the rare opportunity to draw a bright line to maintain the institution that has made electoral democracy possible in Mexico, a line that could then serve as a coordinating mechanism for the organized civil society and citizens in general to rally around. If it does not, or if citizens do not hold the line, the consequences in terms of further democratic erosion are likely to be deep and accelerating.

This article has first been published on https://constitutionalconversations.substack.com and is reposted here with kind permission.

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SUGGESTED CITATION

Ríos-Figueiroa, Julio: Democratic Backsliding and the Supreme Court in Mexico, Verfassungsblog, 22.02.2023, doi: 10.17176/20230223-031713-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20230223-031713-0.