

JUDICIAL REVIEW SEEN FROM A MEXICAN PERSPECTIVE

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THE SPANISH TRADITION AND THE AMERICAN INFLUENCE ON MEXICO

Historically Mexico practiced a mixture of the Spanish “audiencia” and Supreme Tribunal, with the novel constitutional juridical trend represented by the “Judicial Review” of the United States of America. If to the foregoing we add the cultural peculiarities of Mexico, its confusing and troubled history and the influence of other judicial trends on our constituents, particularly the French influence, we will begin to understand the reason for the complex development of Mexico’s legal system and judicial branch of government.

First I would like to make perfectly clear that the frequently repeated assertion found in text books on constitutional law, both by Mexicans and foreigners, that the Mexican constituents of 1825 copied the badly translated copy of the United States Constitution that Stephen F. Austin brought to Mexico when he requested permission to colonize Coahuila-Texas, is erroneous. In 1824 Mexico already had a rich constitutional tradition that could serve as a basis for drawing up the new constitution, among the constituents were men who had taken part in the Congress that drew up the Constitution of Cádiz of 1812 and others who had participated in the writing of the Constitution of Apatzingan of 1814 and they obviously had parliamentary experience in constitutional matters.

Furthermore, Mexico’s founding fathers did not copy the American Constitution as anyone who has read the two documents can readily observe. A comparison between the 1787 Constitution of Philadelphia and that of Mexico of 1824, demonstrates that there are important differences between them. The founding fathers adopted the lockean notion of popular sovereignty perhaps wary of parliamentary power, while in Mexico the members of the Constituent Congress of 1824, as well as that of 1814, considered that

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sovereignty is exercised essentially by the legislative power, in the manner of the French National Assemblies.

The two documents also differ as to who are citizens: the Mexican Federal Constitution of 1824 considered citizens every person born or naturalized in Mexico, while the American Constitution did not define the nature and prerogatives of citizens until the XIV Amendment, without recognizing, even then, the Native Americans, the Indians, as citizens.

Another point: the Philadelphia Constitution tolerated and accepted slavery, while it had been totally abolished in Mexico since the time of Hidalgo, on December 6, 1810.

These and other differences that could be listed take second place when faced with the main issue: the Mexican judicial system provided for in the Constitution of 1824 and the legislation in force at that time cannot be traced to the system conceived by the founding fathers at Philadelphia for the emerging nation of the American Continent.

From the consummation of Independence in 1821 and until the second half of the nineteenth century, the laws existing in Mexico were applied with the following priority:

1. The Laws and decrees of the Mexican Congress.
2. The Decrees and laws of the Spanish Courts in force prior to Independence.
3. The Royal Provisions of Spain called "Novisimas."
4. The Spanish New Digest Laws.
5. The Digest Laws.
6. The Spanish Laws on Royal Jurisdictions and Judgment.
7. The Statutes and Municipal Jurisdictions of each city "Insofar as they are not contrary to God or reason."
8. The "Partidas"; laws given by the Spanish King, Alfonso X "The Wise." As of 1824, when a Federal system similar to that of the United States of America was adopted, these were, so to speak, federal laws applicable in the entire territory.

It must be pointed out that among the Spanish Laws of importance both to Mexico and the rest of Hispanic America, is the Constitution of Cádiz of 1812 and the liberal laws given by the "Cortes" (Congress) during the War against France in the Napoleonic Period.

Spain and its colonies were ruled by the Constitution of Cádiz when Mexico achieved its independence in 1821. It provided for the creation of a Supreme Court, which basically was a Court for polit-

ical pleas of top public officials' liabilities, following the Hispanic tradition of the so-called "impeachment proceedings," but lacking the powers to revise the constitutionality of the laws since they could only advise concerning the "prudence" of issuing them.

In the colonies, the old Royal Tribunal became, according to the Constitution of Cádiz, a "Territorial Tribunal" involved strictly in imparting justice in agreement with the principle of separation of powers. The Mexican deputy, José Simón de Uría of Guadalajara (New Galicia), said in the Courts of Cadiz, that "one of the main purposes of the constitution is to ensure for the Nation an honest, prompt, effective and impartial administration of justice."

A Cádiz law of the same year, 1812, regulated the functions of the tribunals and also the appeal or proceeding of nullity, equivalent to the Cassation Law of France. Thus, when Mexico became independent in 1821, the Court that was in fact functioning in Mexico was the Tribunal ("Audiencia") with the functions of a court of appeals and of cassation in the French style, for criminal and civil cases of the old territory of New Spain.

It is worth remembering that cassation or nullity presupposes accepting the most radical idea of the separation of powers; the law is the law and not just what the judges consider it should be. Cassation implies omnipotence of the law as a manifestation of the supreme will of the popular assemblies. On the contrary, judicial review confers on the Tribunals not only the task of interpreting the Law, but that of judging concerning its validity and its congruence with a higher law, supposedly subtracted from the volatile oscillation of the parliamentary majorities.

In 1824 Mexico adopted the American federal republican system, mainly as regards its political aspect, because insofar as the jurisdictional system was concerned in the session of January 2nd of that year the Mexican Constituent Lorenzo de Zavala—who advocated the Philadelphia model—asked if the (Federal) Constitutional Act repealed the Spanish Constitution, because if that were the case it was necessary to add many things, to which deputy Herrera replied that "The Spanish Constitution must be understood as repealed only in as far as it is contrary to the Pact. . . ."

ORIGINS OF MEXICO'S SUPREME COURT AND ITS
INTERPRETATION OF JUDICIAL REVIEW UP TO THE MIDDLE OF
THE NINETEENTH CENTURY

The Supreme Court was created by the Federal Constitution of October 1824, three years after the consummation of Mexico's Independence. It was the result of a mixture of the influences of the colonial, the Spanish, the French and the American systems.

At that time there were three main political trends: the one favoring a monarchy headed by a Mexican; the partisans of a European Monarch; and those preferring a Republic.

First, a monarch was tried, and with the fall of Agustín de Iturbide—in 1823—it became necessary to try the political system of a Federal Republic, since several provinces which made up the Mexican nation of that time had seceded and they had to be reunited in a pact. The Constitution of the United States came to be the model that best solved the political problem facing Mexico in that crucial year; but the Mexican signatories of the Constitution also adopted substantial parts of the Constitutions of Spain and Columbia.

We must mention some other antecedents that influenced the juridical development of those first years: the draft of the Constitution of 1812 drawn up by Ignacio López Rayón, Article 31 which stated: "Each person shall be respected in his home as in a sacred asylum, and the famous Law of Corpus Habeas of England shall be administered. . . ."; and the fact that the works of Thomas Paine, with the text of the articles of the Confederation of American Colonies which had been recently become independent and that of some constitutions of the confederated states circulated in Mexico. Likewise, it is a fact that many Mexican rebels who fought against Spain took temporary refuge in the United States of America; Fray Servando Teresa de Mier published an "Instructional Memorandum" in Philadelphia in 1821, in which he admiringly explained the federal republican system.

More significant was Vicente Rocafuerte's book, published in 1822 in Philadelphia, called "Necessary Ideas for Every Independent People Who Want to Be Free": in which he set forth arguments in favor of the federal republic and translated the United States Constitution of 1787. On returning to Mexico, in the city of Puebla, Rocafuerte published a booklet called "Brief Outline of the Mexican Revolution" in 1823, in which he again commented and translated the Constitution of the United States.

With this background, it is understandable that the draft of the Constitutional Act of the Mexican Federation of December 28, 1823 mentions the "Supreme Court of Justice" for the first time. Several of the signees objected to the name. Teresa de Mier said the word "Court" was not Spanish, but deputy Crescencio Rejon said that it was in the dictionary; that it meant the same as Tribunal and that it was the name used by "Our Sister Republics."

Since then, the name became a part of the legal tradition of Mexico. Only during short periods of the nineteenth century, as during the empire of Maximilian of Hapsburg, following the European model, a different denomination was used: that of "Supreme Tribunal."

That document, of December 28, 1823 (Article 23) states "That every inhabitant of the territory of the Mexican Federation has the right to prompt administration of justice in order to protect his life, person, honor, liberty and properties. . . ." and "[no one] may be molested in his life and even in his properties and rights without judicial intervention. . . ."

That is, since its beginnings, the Supreme Court of Mexico has had the fundamental task of protecting human rights. It has tried to fulfill this task throughout its turbulent history

The convention of 1824 which drew up the first Federal Constitution of Mexico, basis of the later two: that of 1857 and the present one of 1917 when it created the Supreme Court as a constitutional tribunal in charge of enforcing the Constitution and fundamental human rights, also gave it the power of an "Audiencia" that is, of a court of appeals and nullity within the limits of the federal District and of the federal territories of that period, Alta and Baja California, New Mexico, Colima and Tlaxcala.

The same Constitution of 1824 created the Circuit Courts and the District Courts, in the manner of the United States, but which, with the Supreme Court, were understood as if forming the three Spanish instances existing for every case. The Supreme Court was made up of eleven justices appointed for life, designated by the legislatures of the State. They had to be educated in the science of law. Hispano-Americans residing in Mexico for more than five years could be justices, as was the case of the Dominican Jacobo de Villaurrutia.

Once the Supreme Court of Mexico had been created, it began to work in 1825. Until middle of the nineteenth century, of the

three branches of government, the judicial was the most stable and solid. Because they were appointed for life and were required to have vast legal knowledge of the old Spanish laws and the new Republican ones—as well as a solid academy background, the justices were highly respected.

Unquestionably, many of the first justices had read the Philadelphia Constitution and especially Hamilton, regardless of which they did not dare consider that Mexico's Supreme Court had a power unregulated by law. The case of *Marbury v. Madison* appears to have been unknown in Mexico during the first years of the nineteenth century.

In 1836 Mexico tried a new Constitution—central and not federal—of the European type, similar to that given by Napoleon in 1777 (that of the VIII year), that created a special body with a political nature empowered to declare the unconstitutionality of laws. This body was a fourth power, in addition to the three classical ones, called “Supreme Conserving Power,” modeled after the “Senát Conservator” of the Abate Sieyes of France.

Under that Constitution, the law of March 13, 1840 was declared unconstitutional, which shows that during the first half of the nineteenth century, a type of “Judicial Review” was already beginning to be accepted in Mexico, but applying European juridical notions and not those of Justice Marshall. When the Federal government was reinstated in 1846 and the 1824 Constitution was dusted off again and became enforceable, there was a favorable atmosphere toward the judicial branch being able to examine the unconstitutionality of laws (Judicial Review). On the one hand, there was the before mentioned experience of the Supreme Conserving Power provided for in a constitution with a French influence and on the other hand, the book “Democracy in America” by Alexis de Tocqueville, had already been widely circulated and appears to have reached Mexico in 1837. It should be noted that the Spanish translation of Sánchez de Bustamante was reprinted in Mexico in 1855, the year in which the convention that drew up the 1857 Magna Carta was convened. Furthermore, although to a lesser degree, the classic work “The Federalist” circulated in fragmentary form. This influence strengthened the idea of implementing judicial review in Mexico and of expressly giving the Supreme Court the power to declare unconstitutional laws null and void, but referred to concrete cases.

However the procedure used by the American courts was not

clear in Mexican legal circles. Obedience to the constitution above the ordinary laws of the Congress was stipulated in the text of the Philadelphia Constitution. But the Mexican justices considered a clear, precise text necessary, that would empower the courts to declare laws null and void.

This explains why the judicial review in Mexico was the creation of politicians and legislators and not of the judges. What most impressed the Mexican politicians and jurists of the nineteenth century, who hoped to incorporate it into law, was de Tocqueville's central idea concerning the American judicial review and its diffused and incidental form stated in the following terms: "When the judge attacks a law in an obscure debate and concerning its particular application, he in part hides the importance of the attack from the public view. The purpose of his decision is only to defend a particular interest, but the law only feels wounded by chance. . . . Only gradually and under the repeated effects of jurisprudence does it succumb. . . ." This idea of de Tocqueville influenced the politicians of the period, particularly the so-called liberals, disillusioned with European trends.

This explains why in 1841 Manuel Crescencio Rejon was able to create the "amparo" suit, not at the national level, but only for the State of Yucatan, whereby human rights or guarantees were protected and the courts of that State were able to pass on the unconstitutionality of the laws of the State. Later, in 1847, the liberal jurist Mariano Otero, while being a member of Congress, proposed Article 25 of the constitutional text of the Amendments Act, which amended the Constitution of 1824, in the following terms: "The Courts of the Federation shall protect any inhabitant of the Republic in the exercise and conservation of the rights granted him in this Constitution and the constitutional law against all attacks of the legislative and executive powers, whether of the federation or of the States, said courts being limited to provide their protection in the particular case the process is concerned with, without making a general declaration regarding the motivating law." To date, this formula known as the "Otero Formula" continues being the backbone of "amparo" proceedings, as the confrontation of different branches of government are thereby avoided, since the decision does not create a general, abstract situation, benefitting even those who did not ask for protection from the federal courts.

With this dissimilar background, we can understand why a well-known Mexican author says that "The legal transplant of judicial

review of the constitutionality of acts of authority and specifically of the constitutionality of the laws, forged in the juridical tradition of common law or of Anglo-American law, into a hispanic background of more than three centuries, belonging to the Roman-Canonical system, produced an institution different from the American model while a specific procedural instrument was established developed in special ordainments that deviate from the United States judicial review which, as has been profoundly asserted by the distinguished writer of treatises, J.A.C. Grant, is applied through numerous procedural instruments, and therefore constitutes a principle and not a particular route.”

I could not end this brief sketch of “amparo” without mentioning another institution that influenced it, although not directly; habeas corpus, that was developed in the United States due to the influence of the English law of 1697.

The expression “amparo” is originally Spanish. It was used during the period when Mexico was a colony of Spain, and in the nineteenth century it was used constantly as an “interdicto posesorio” that is, an order to protect the right of possession over a given property or land. Because of this, although the transplantation of judicial review from the United States and the Hispanic tradition inherited from the colonial period produced a hybrid institution, the name of that institution is “castilian, evocative and legendary” as accurately put forth by the well known Mexican constitutionalist, Dr. Felipe Tena Ramírez.

It was from 1847 on that the “amparo” suit consolidated and obtained the popular prestige it has maintained to date; and it has been an integral part of the Mexican Constitution of 1857 and 1917, the last one presently in force. It has four main characteristics:

- a) It was created as an autonomous legal proceeding.
- b) Only Federal Courts can hear this proceeding or case.
- c) The proceeding guarantees people in the enjoyment and satisfaction of their rights and of the guarantees provided for in the Federal Constitution against authorities of all classes: federal, state, municipal, and against acts of the executive, legislative and judiciary, and
- d) The decision of the court granting the “amparo” and protection of the Federation in favor of the complainant or aggrieved party does not have general effects, but rather only benefits the one filing for “amparo,” whom it removes from

the influence of the law.

“Amparo” proceedings’ primary function is the protection of rights of freedom and property, similar to that of habeas corpus and the judicial review of the United States; because of the Spanish and French influence, it also fulfills functions of federal cassation; because of the American influence, it can be used to declare the unconstitutionality of laws, both federal and local, and it maintains the monopoly of this function since in Mexico the diffused control of the American model was never accepted. On the other hand, it fulfills functions similar to those of the French contentious-administrative system when it hears acts or resolutions of the federal or state administrations.

THE CONSTITUTION OF 1857

The amparo suit achieved its definite constitutional form when it became part of the fundamental of law in 1857; following the interval occupied by Maximilian’s transient empire, it left the realm of legal theory for the concrete realities of the courtroom. Because of the importance of this achievement of the constituent convention of 1856-1857, the recommendations of its drafting committee are very revealing.

Amparo is referred to as perhaps the most important reform recommended to the convention. The drafting committee confined its remarks, however, to applying the action to the maintenance of the federal system. The arguments were based upon the success of judicial review in the United States and the dismal history of failure of the political systems of constitutional defense in Mexico.

With the establishment of amparo in the constitution of 1857, political devices of constitutional defense were finally abandoned. The actual implementation of amparo, however, was delayed by the Three Year’s War, the French intervention, and during 1864-1867, the empire of Maximilian.

Without examining the important period of 1857 to 1912, we will go on to that of the Constitution in force from 1917, which was 70 years old on February 5, 1987.

“Amparo” which for Rejón, Otero and its other creators, already had the primary function of safekeeper of human rights, has evolved until it constitutes a complex multifaceted legal proceeding.

Since the Amendments Act of 1840, the Supreme Court has insisted on the defense of “Freedom, liberty, property and equality,” not only as concerns acts of the federal authorities, but also against

acts of the state authorities. This is why it has been said, and justifiably so, that in our country, the federal judiciary developed historically with the main purpose of bringing justice to the people and protecting human rights, before that of interpreting the laws or maintaining particular principles of legal techniques. This assertion is still valid for every federal judge.

Thus we can speak of an historical continuity that began in the last century. Since 1847, the organization of federal justice has been closely tied to the “amparo” suit and its evolution. For this reason, by expanding the sphere of action of “amparo” and making an examination of the legality of every possible act of authority, the federal judiciary has also had to vary its structure in order to be able to meet an increasingly larger and more diversified work load. For example, the lawsuits against acts of the public administration and the examination of legality in all judicial matters and in labor and agrarian disputes, have acquired ever greater importance.

Furthermore, Mexico’s Supreme Court has three different functions that in other countries are performed by three different judicial bodies, such as the Constitutional Court, the Court of Cassation and the Administrative Contentious Court of the Court of State Counsel.

Within this general framework of evolution, we must note the enormous importance of the amendments related to the creation of the Collegiate Circuit Court, published in the “Official Gazette” of February 19, 1951, which were inspired by the proposed drafts of 1944 and 1945 and in the amendment carried out in the United States in 1891, whereby the Federal Circuit Courts of Appeals were created with the purpose of freeing the Supreme Court of that country from a large number of cases. The Circuit Courts in Mexico became new organs in the structure of the Federal Judiciary together with the three that existed since the Constitution of October 1824.

Prior to 1951 the Court was entrusted with the impossible task of solving—as well as other important matters—the entirety of the direct “amparo” cases and the appeals for review that arrived from each state of the nation as well as the appeals for fiscal review against decisions of the Federal Tax Court. In order to deal with the backlog in the Supreme Court, there could only be three solutions:

The first would have consisted in restricting the legal basis for “amparo” proceedings, a solution contrary to the wishes of the con-

stituent of Queretaro and to the aim of Mexico's Federal Justice system, since its origins of widely protecting individual rights.

The second solution would have been to increase the number of chambers of the Supreme Court; but this measure was also contrary to the principle of the constituent of Queretaro, who considered that the Supreme Court should always function "en banc." Also the number of justices had reached twenty-one and it was not advisable to continue increasing it. Otero had already warned of the dangers of a large number of justices.

The third solution consisted in creating a new type of "Amparo" court; the Collegiate Circuit Court.

The work of the first Circuit Courts was fruitful, since in 1950 the Supreme Court had 37,881 cases pending resolution, and by 1955 this figure had dropped to 10,086. However, by 1965 the backlog had increased to 18,949 cases, which demanded an urgent solution to the problem. With this in mind, President Gustavo Diaz Ordaz petitioned the Supreme Court to propose the amendments that in its opinion were necessary to solve the problem, as no one better than the Court itself could know the answer.

The preliminary project of amendments was made in the Supreme Court and, with all due respect from the Executive, it was sent to Congress. This was the origin of the amendments to the Federal Constitution that were published in the "Official Gazette" of October 25, 1967 and that became effective on October 27, 1968.

The 1968 changes had qualitative assumptions, such as that of continuing with the tradition that the Supreme Court be the sole interpreter of the Constitution, but fundamentally quantitative points of view were used, such as those concerning the amount of the lawsuit or the nature of the sentence passed on alleged delinquents in order to determine the distribution of jurisdictions between the Supreme Court, the Circuit Courts and the District Courts.

The creation of the Collegiate Circuit Courts constituted a necessary step toward reducing the excessive volume of business entering the Supreme Court and, consequently, it speeded up the administration of justice and brought it closer to the people through the decentralization of the related organs. However, the system adopted as to the distribution of jurisdiction, which essentially continues to exist today, has serious deficiencies. In fact, a system where in many hypotheses the jurisdictions are distributed between bodies of

different hierarchies, not by reason of the nature of the suit but rather in attention to other motives, such as the quantity, is technically defective.

The passage of the years made the insufficiency of the measures adopted obvious as regards the organization and division of jurisdiction, in order to avoid the backlog in the chambers and in the Plenary Court. Since 1968 matters of an indeterminate value, within the jurisdiction of the circuit courts, could be resolved by the Administrative Chamber if in the Justice's opinion the case was of great importance for the nation's interest. Thus, the Second Chamber, by using its discretion, could hear certain cases. Starting from this possibility, novel in our law, but similar to American "certiorari," the power of the attraction was progressively expanded in favor of the first, third, and fourth chambers, as well as the plenary or full court, not only in order to attract cases of extreme importance, but also in order to be able to disencumber themselves from cases they considered to be unimportant.

It also became obvious that the Supreme Court was performing functions of a Court of Appeals or of Cassation, improper to its high dignity which derives from its function of being the exclusive and definitive interpreter of the mandates of the Constitution.

With his legal background (he is a well-known writer of Constitutional Law and was a professor of this subject for many years at the National University of Mexico), President Miguel de la Madrid knew of the inconveniences of the system adopted for distribution of jurisdictions between the different courts of the federal judiciary and sent a draft of amendments to the Mexican Political Constitution to Congress in order to give the Supreme Court exclusive jurisdiction over cases in which the constitutionality of laws, rules and international treaties were questioned, leaving other cases it presently hears to be solved by the Circuit Courts. The constitutional amendments were approved by the Constituent Assembly and became effective on January 15, 1988.

Some years ago Mexico celebrated the sesquicentennial of the Constitution of 1824 and in 1987 we celebrated the seventieth anniversary of the Magna Carta that presently governs us. These occasions gave us the opportunity to ponder the past with the aim of better understanding the legacy left us by those men of wisdom and insight which initiated the institutions that have given us peace and freedom. During 1987, the bicentennial of the constitution of Philadelphia was commemorated throughout the world and not only in

the United States. This document, that for over two centuries has governed the life of this country, has shown itself to be a flexible instrument capable of answering the challenges and profound changes that have occurred in the last eighty years of this turbulent century. This bicentennial of that constitution is also a proper occasion to reflect on similarities and differences of our unique historical and political legacies.

The differences between the constitutions and the judicial systems of both countries derive from our different colonial past and from the cultural, social and political heritage bequeathed to us by our ancestors.

A study of our constitutional history shows us that Mexico and the United States are united by much more than a common border of over 3,000 kilometers; we are united by something more consistent than a simple geographic accident; we have similar political and juridical institutions that in truth unite us, some of Mexico's with deep roots in institutions of the United States.

Those of us who have dedicated the better part of our lives to the study, practice, adjudication or administration of law, are well aware of several common values we share.

Let me review some of those common values we share. We share, among other things, a deep belief in what the fundamental doctrinal principles and basic institution of government should be. The doctrinal principles we hold in common are fundamental to our ways of life. The founding fathers of both our nations, those in the United States in 1787 and those in Mexico in 1824, placed faith in a system of government based on a written, rigid constitution and in the subordination of all legislation and public officials to written law. Both groups of founding fathers wanted to create governments that would limit the potential of the tyranny that our ancestors so definitively rejected and made them embark on wars of independence. In both our countries we have placed faith in popular representation of republican government.

Finally, both our countries share a deep faith in the ideal and in the triumph of justice; a profound faith in the institutions that have given us peace and freedom; but above all, our two countries have a deep faith in liberty, without which there can be neither freedom, nor justice, nor peace.

