

Whispers of Change (Vol. II)

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Mexico's prolonged refusal to eliminate mandatory preventive detention from its legal system has slowly but steadily contributed to the rising tension between the Mexican Supreme Court, the Mexican State, and the Inter-American Court of Human Rights. Following both Courts' recent decisions on the case of *García Rodríguez y Alpízar Ortíz v. México* (both have recently decided cases concerning virtually the same set of facts with notoriously varying outcomes), the discussion heats as it now relates to one of the most relevant inquiries of modern constitutional study: judicial review of constitutional provisions and amendments.

As we previously referred, [there has been a recent and intense debate](#) on the power of Mexico's Supreme Court to scrutinize the constitutionality of constitutional provisions and amendments, and more specifically, when ascertaining their coherence not only vis-à-vis the Constitution but also with the international human rights system – and chiefly, with the American Convention on Human Rights, that since a momentous constitutional amendment on human rights in 2011, elevated them onto a constitutional level. However, the Court ultimately decided against such stance.¹⁾

While the Mexican Supreme Court dividedly shied away from affirming its power to perform a judicial review of constitutional provisions and amendments, the Inter-American Court of Human Rights has sentenced Mexico to revise its Constitution and demanded the judicial branch to align its decisions to the Inter-American System of Human Rights. The ball is now on the side of the Mexican Supreme Court.

The *Basic Structure Doctrine*, the *Constitutionality Block* and constitutional change

It is difficult to address contemporary constitutional change without assessing the impact of a consequential decision of India's Supreme Court in 1973²⁾ that created what has come to be known as *the Basic Structure Doctrine*³⁾. In a nutshell, the theory's main premise refers to a core, fundamental framework of the constitution comprised of distinctive features and principles that altogether define its identity, and therefore, imply what has been described as implicit unamendability.⁴⁾

The *Basic Structure Doctrine* has become a deeply influential blueprint in piloting processes of constitutional change over the last decades and is one of the central inquiries to ascertain the scope of constitutional courts when scrutinizing the consistency (coherence) of constitutional provisions and amendments with its basic structure.

In that sense, it is almost intuitive to have the urge to compare the notions set forth by the Indian Supreme Court *vis á vis* the Mexican Supreme Court's concept of "constitutionality block" which, seems to be heading to a defining moment.

The Mexican Supreme Court decision of 2011 which introduced the "constitutionality block", constitutes a hierarchical upgrade that implies the possibility that any decision from the Inter-American Court of Human Rights that may expand the protection of human rights even in collision with other constitutional provisions, should prevail and therefore, be duly implemented by Mexican Courts and law enforcement agencies, including the remedial adaptation of domestic provisions – at all levels – to the American Convention. This was the theory. In practice, recent events demonstrate an interesting interplay to make this effective:

In the case [Tzompaxtle Tecpile v. México](#) regarding the application of mandatory preventive detention – decided just last November – the Inter-American Court limited its decision to declare the inconsistency of mandatory preventive detention with the American Convention and ordered the State in broad general terms to implement all necessary measures to adapt its national legislation not only to the Convention but to the standards set forth by this decision and the rest of the applicable jurisprudence of the Court,

"217. [With] regard to the figure of preventive detention, this Court orders the State, as it has done in other cases, to adapt its legal system so that it is compatible with the American Convention."

An apparent unnoticeable detail with transcendent implications for the internalization of this decision in Mexico is that in the *Tzompaxtle Tecpile* case, the Inter-American Court purposively declined to make an explicit declaration on the incompatibility of Article 19 of Mexico's Constitution with the Convention, and therefore, also abstained to order specific changes at a constitutional level to comply with the obligation of adopting all necessary measures at the domestic level to make the contents of the Convention effective.

With this decision as background, last April 12, the Inter-American Court issued its decision for a very similar case – [García Rodríguez y Alpízar Ortiz v. México](#), also pertaining to the practice of mandatory preventive detention and its corresponding violations to Articles 7 and 8 of the American Convention. The crux of the matter, in this case, was to determine whether the Inter-American Court would not only rule against the legality of mandatory preventive detention – as it did in the *Tzompaxtle* case, but also if it would order the implementation of a series of normative changes, especially at a constitutional level, to make it consistent with the Inter-American system.

In this decision, the Inter-American Court took quite a different direction than in *Tzompaxtle*: As expected, the Court found Mexico responsible for the violation of the rights to personal liberty, to a fair trial and presumption of innocence, to personal integrity, and judicial protection, all enshrined in the American Convention on Human Rights, by the application of mandatory preventive detention.

In an unprecedented decision for Mexico, the Court ordered for the first time to amend its Constitution to harmonize mandatory preventive detention with the Inter-American standards of protection,

“301. [With] regard to the figure of mandatory/automatic preventive detention, *this Court orders the State, as it has done in other cases, to adapt its legal system, including its constitutional provisions, so that it is compatible with the American Convention.* For such purposes, the State must take into consideration what is indicated in paragraphs 154 to 163, and 184 of this Judgment, which establishes the requirements that measures of this nature must meet in order for them to be compatible with said treaty.”

In contrast to its decision in *Tzompaxtle Tecpile*, the Inter-American Court declared in unequivocal terms that the constitutional provisions regulating mandatory preventive detention were unconventional, and therefore, should be corrected to adapt the Constitution to the Convention.

This shouldn't be a problem from a monist perspective (that considers domestic and international law as parts of the same legal system) based upon the momentous constitutional amendment of 2011 on human rights that introduced the so-called “constitutional block”.

However, there is still a strong reluctance among some members of Mexico's Supreme Court and of the other branches of government to acknowledge the paramount implications of that amendment and the creation since then of an integral system of domestic and international authoritative sources for the protection of human rights that are equally binding and constitute higher law.

The new paradigm of constitutionality pertaining to the protection of human rights inaugurated in 2011 should have sufficed – in our view – for Mexico's Supreme Court to test the compatibility of any constitutional provision with the American Convention. However, the Court has been reluctant to do such scrutiny on the grounds of the familiar formalist argument that since it is a constituted power, it is out of its limits to change the terms established by the constituent power. In simple terms, for the Mexican Court, the Constitution establishes the framework through which the rest of the legal system is evaluated (scrutinized), but the Constitution itself is not an object of evaluation (scrutiny).

With this argument, the Court has also refused to establish hierarchies within the constitutional text. Although there are mechanisms to judicially review legal amendments, constitutional provisions cannot be contrasted with each other, even if they are contradictory.

Moreover, in a landmark case [[Contradicción de Tesis 293/2011](#)], the Court ruled that if a clash arises between rights guaranteed in the ACHR and a restriction on human rights envisaged in the constitutional text, the Constitution must prevail every time. This ruling dynamites the entire “constitutional block” logic and allowed

the Court to uphold restrictions on human rights, such as mandatory preventive detention, simply because they are enshrined in the Constitution.

In a broad outline the prevailing domestic jurisprudence suggests that once a restriction becomes embedded in the constitutional text, the Supreme Court cannot evaluate its compatibility with the rest of the constitutional provisions nor contrast it with the American Convention on Human Rights.

An unprecedented decision inaugurating a new episode in Mexican constitutionalism

The Inter-American Court directly confronted this constitutional line of interpretation in *García Rodríguez and Alpizar Ortíz*, arguing that its reasoning prevents individuals from effectively challenging human rights restrictions inserted in the constitutional text, such as mandatory preventive detention. This statement is transcendental. The Court is not only addressing a problem of constitutional design dissonant with the ACHR, but it is also assessing a problem of constitutional interpretation that underlies domestic jurisprudence.

The unprecedented decision aims at utterly changing the attitudes of the Supreme Court, Congress, and other relevant actors towards the constitutional block: It reaffirms that the Constitution, the American Convention, and all other treaties on international human rights comprise a multi-source and multi-text system that should be internally coherent, consistent, compatible, and harmonic. To do so, the role of national courts turns instrumental. Harmonizing the content of the Constitution with the Inter-American system of human rights protection is not only the task of the political bodies, but the Judiciary must also assume an active and leading role in invalidating constitutional amendments that contradict the fundamental features of the “constitutional block”.

What the Inter-American Court just did in the case of Mexico was to entrench the notion that even constitutional norms are subject to scrutiny and – if needed – to adaptation in case they are contrary to the system comprised in the constitutional block, and ultimately with what conforms the core of the Constitution as a system.

In our view, this consequential decision inaugurates a new episode in Mexico’s long quest to discover the basic structure of its Constitution. And it has been shown that when protecting human rights, not only our Supreme Court, but the Inter-American Court have a say.

References

- The Mexican Supreme Court’s decision was not unanimous as four of the eleven justices took a progressive stance looking to unenforce Article 19 of the Constitution.
- Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
- Yaniv Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*, New York, Oxford University Press, at 42-70.

- *Id.*, at 44.

