

Can the Mexican Supreme Court Save Constitutional Democracy?

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The last week of the legislative term in Mexico was just another showcase of the clear government's disdain for democratic institutions and the rule of law. At the end of April, MORENA, the party in government, used its legislative majorities to hastily pass a series of laws in violation of different procedural rules, including quorum rules. The [reports](#) and footage of the sessions in the two chambers made it abundantly clear that the legislators didn't know what they were voting on. In fact, in a gross display of how centralized decision-making is in Mexico, immediately after meeting with President López Obrador, MORENA Senators headed to the Senate's alternate venue¹⁾ to pass 20 pieces of legislation in just a few hours. Just days before, the same pieces of legislation had been [proposed, voted and passed on the same day by MORENA representatives](#) in the Chamber of Deputies without observing the normal course of the legislative process (e.g., publication in the legislative gazette, legislative committee assessment, and reports) – even without letting MORENA members assess them.²⁾

In terms of substance, the adopted legislation is widely varied and, thus, hard to thoroughly assess. The subject matter of the different laws passed includes, among other things, mining, the public health system, further delegation of public administration functions to the military, and deep changes to the government agency in charge of the promotion, support, and development of science and technology (CONACYT).

The practical implication of not observing the normal course of the legislative process is that the opposition was effectively excluded from participating in it—e.g., the opposition didn't have access to the legislative proposals, the Senators from the opposition weren't present when the pieces of legislation were passed and it's not clear whether there was quorum to hold the session in the Senate. As such, the opposition is likely to bring a case before the Supreme Court on the grounds of violations of the constitutional principles of deliberative democracy and “due legislative process”.

The episode described above isn't uncommon in Mexico's legislative politics. The quality of the political-constitutional discourse is in great need of improvement to prevent such episodes from happening. It seems that the Supreme Court is the only institution that could contribute (and has been trying to contribute) to repair it. However, in the current political environment, Supreme Court interventions in political processes are becoming increasingly dangerous to the extent that its survival is at stake.

Of course, from a purely descriptive perspective, one could argue that party discipline and cohesion are not alien to constitutional democracy. After all, party systems are part and parcel of a contemporary democratic state. In ideal circumstances, a party voting en bloc to pass legislation addressing public needs wouldn't be problematic. Yet, from a normative perspective, this episode illustrates the scope, limits and fragility of fundamental tenets such as democratic deliberation and the separation of powers, which are fundamental to a functioning constitutional democracy. On paper, the Mexican constitution protects the principles of democratic deliberation and the separation of powers, yet in practice, legislative and constitutional decision-making are highly centralized and anything but deliberative. As I argue [here](#) and [here](#), this is a long-standing problem that goes beyond party lines and is also present when it comes to formal constitutional change. In order to repair it, the quality of political-constitutional discourse would need to improve dramatically. The question is how?

Can the Supreme Court help to improve the quality of political-constitutional discourse?

It seems that the Supreme Court is the only institution that could help improve the political-constitutional discourse by setting clear standards and rules regarding “due legislative processes”. Historically, the Supreme Court has been largely deferential in terms of violations to procedural rules in the legislative process. For a long time, legislative provisions would never be struck down due to violations of procedural rules only. As the political system became more plural (from the mid-90s onwards) and political minorities began to bring claims regarding their rights within the legislative body, the original deferential approach to procedural violations began to change. Accordingly, a tension between the deferential approach (i.e., the convalidation of most procedural violations) and the rights of political minorities emerged, and the result was a judicial doctrine according to which the former would generally prevail. However, the doctrine seems to be evolving towards a protective approach in terms of political minorities' rights.

For instance, in August 2022, the Supreme Court unanimously decided to strike down (in abstract review) a set of amendments to the statute on telecommunications – *Ley Federal de Telecomunicaciones y Radiodifusión*– (Acción de Inconstitucionalidad 150/2017) exclusively on the grounds of violations of procedural rules of the legislative process. That is to say, the court did not engage in a constitutionality assessment regarding the substance of the challenged provisions. Moreover, just this week, in a 9-2 decision, the [Supreme Court struck down one of two parts of what has come to be known as “Plan B”](#) (i.e., the modification and adoption of a total of 6 pieces of legislation through which the government is, [among other things, seeking to undermine the electoral watchdog](#)) on the grounds of violations of procedural rules of the legislative process only. In the view of the Court, such violations amounted to a breach of the constitutional principles of deliberative democracy and due legislative process. The Supreme Court is set to adjudicate the second part of the “Plan B” in the coming weeks, which will almost certainly suffer the same fate as the first part since the laws in question were passed in the same

legislative process that the Court determined violated the principles of deliberative democracy and due legislative process.

In light of these court decisions, the reader could reasonably assume that, if constitutionally challenged, this will also be the fate of the 20 pieces of legislation passed in gross violation of the legislative process last April. In light of [Rosalind Dixon's model of responsive judicial review](#), one could also even conclude that this is a case that could illustrate how courts in fact have the power to protect and enhance democracy. Though reasonable, this would be a mistaken assumption and conclusion. The Supreme Court, I am afraid, is far from being in a good position to create the right incentives for legislators to refrain from violating legislative procedure rules and improve the quality of the political-constitutional discourse in the legislative body. Instead, as a result of this week's decision, at the time of writing the Supreme Court and the judiciary is being subject to a new wave of attacks of an unprecedented scale.

The existential threat against the Supreme Court

As I argue [here](#), attacking the judiciary has become a regular feature in President López Obrador's daily press conferences –which, at the same time, has already translated into worrying forms of protest against the judiciary, in particular [against Chief Justice Norma Piña](#). Unsurprisingly, this week's decision translated into a new wave of attacks against the Supreme Court and the judiciary. But this time around is different: the attack is an existential threat.

A day after the decision of the Court on the “Plan B” was handed down, President López Obrador announced a clear objective for the general election in 2024 in his daily press conference: get a qualified majority in Congress to amend the constitution to overhaul the judiciary and replace all sitting Justices and judges for popularly elected ones. The idea found resonance in the members of his party in [Congress](#) as well as [governors](#), who have publicly endorsed it. In a matter of hours, abolishing the court as it exists today became an electoral promise. Legislators, governors, and MORENA sympathizers are openly calling for votes to amass the required qualified majority in Congress in order to be able to amend the Constitution to fulfill such a promise (MORENA controls more than half of state legislatures already).

Unfortunately, things will only get worse for the Supreme Court as it is set to adjudicate the second part of the “Plan B” in the coming weeks, which as noted above will most certainly be struck down exclusively on the grounds of violations of legislative procedure rules. In this context, while the Supreme Court could strike down the 20 pieces of legislation that were illegally adopted last April if they were to be challenged, the cost of doing so could be too high as such a decision will certainly further escalate the current attacks and threats. At this stage, the Supreme Court has little room for maneuvering to avoid an immediate escalation of attacks, i.e. it is constitutionally required to adjudicate on the second part of the “Plan B” in the next two months (before the general election process officially starts). If the 20 pieces of legislation passed last month are challenged before the Supreme Court, an eventual

declaration of unconstitutionality will certainly give the government more ammunition to justify the need to abolish it. Only time will tell whether the Supreme Court will make it through the storm.

References

- The legislative session couldn't take place in the regular venue because things turned confrontational in the Senate as MORENA Senators refused to follow through with the political agreement to fill a vacancy at the federal agency for transparency and access to information –Instituto Nacional de Acceso a la Información (INAI)–which has been blocking for over a year. The moment when it was clear that MORENA wouldn't follow through with the agreement, the opposition decided to occupy the Senate's floor to prevent the session from taking place.
- Two of the 20 legislative measures were in fact constitutional amendments. The constitutional amendments proposals, however, were not presented and voted on the same day as the rest of the legislative measures in the Chamber of Deputies. In this post, I will refer to the total 20 pieces of legislation even though the passage of the constitutional amendment would require a separate discussion as to how would they be impacted should the Supreme Court determines the legislative process unconstitutional in whole or in part.

