# PART SECOND

# CONSTITUTIONAL FRAMEWORK ENERGY LAW

# THE ENERGY REFORM AND THE TRANSFORMATION OF PUBLIC LAW

Jaime CÁRDENAS*

SUMMARY: I. *Introduction.* II. *The constitutional energy reform and its legal implications*. III. *Secondary energy reforms and their implications*. IV. *Conclusions.* V. *Bibliography.*

## I. INTRODUCTION

Traditionally, public law has been viewed as contrasting with private law —from a dualistic standpoint— as the part of the legal system that makes it possible to regulate relations of subordination and superordination between the State and individuals, and where relations among State bodies may be one of subordination, superordination, or coordination. In contrast, private law has dealt with relations between individuals, of their rights in rem, inheritance, obligations, contracts, and agreements. Criticism aside, this distinction is longstanding and was advanced by authors like Rudolf von Jhering and Georg Jellinek, among many others. A distinctive feature of public law is that relations within the parties are not defined by the principle of autonomy of will, which is inherent to private law, but rather by the "*principio de imperio*" [meaning that in its relationship with individuals, the State does not have an equal position, but one that is differentiated and hierarchically superior] —mandatory mandates from the authority to individuals or other authorities, essentially through the law—.

Public law was born alongside the modern State, which started in the Renaissance. Throughout the evolution of each stage of the State —absolute, liberal, welfare, constitutional, neoliberal, or military police— the characteristics of public law are modified.[1] Thus, the hallmarks of the ab-

* Researcher at the UNAM Institute for Legal Research.

[1] Cárdenas Gracia, Jaime, *Del Estado absoluto al Estado neoliberal*, Mexico, UNAM, 2017, pp. 21-35.

solute State —16th, 17th, and 18th centuries— are the absence of widespread human rights, as well as the non-existence of the principle of the division of powers and the principle of legality, as we now know it. In the 19th century liberal State, a product of economic changes that clamored for free market without State intervention, we find the following features: 1) human rights declarations; 2) division of powers; 3) principle of legality; 4) control of administrative proceedings through the principle of legality, and 5) the existence of independent judges. These legal categories, in turn, implied the presence of others, such as the existence of some representative authorities elected by citizens through political parties and the census vote, in addition to the principle of autonomy of will that allowed subjects or citizens, as the case may be, to carry out any legal actions deemed necessary and not prohibited by law.

The welfare State of the 20th century is based on precise legal categories: 1) constitutional and legal recognition of economic, social, cultural and, later, environmental rights, as well as other generations of rights, although with inadequate institutional guarantees; 2) growth of State public administration, bureaucracy and public spending to fulfil the recognized Economic, Social, Cultural and Environmental rights (ESCER); 3) the principle of legality tinged by regulatory administrative provisions with a delegation of powers granted by law and in favor of public administration; 4) the dawn of understanding the constitution as a regulatory framework, not just a conceptual or semantic one; 5) strengthening the control of constitutionality and constitutional judges; 6) new perceptions of legal science and legal validity; 7) greater weight given to human rights treaties in domestic law; 8) a pluralist democratic system 9) discussion on a constitution's capacity for transforming or reconciling the socio-economic system, and 10) the attainment of the Welfare State through tax and budgetary legislation.

In the constitutional State —a legal fiction, in my point of view, but very powerful in our time and which has been theoretically developed without any economic or political justification—, we find these characteristics:

1. Connections are found in different degrees, depending on the author or school of thought, between law and morality.
2. Human rights are the foundation and ultimate goal of the State and the law.
3. Constitutions express conflicting legal and political principles, none of which prevails *a priori* but in the application of concrete cases.
4. There is a perception that law is made up of a myriad of regulatory materials, mainly rules, principles, and values.

5. It is oriented towards a regulatory constitution, i.e., a fusion of what should be and of what actually is.
6. Law not only consists of a regulatory normative structure, but also of an argumentative, contextual, and procedural one.
7. Legality and the rest of the legal sources are tightly bound to convention and constitutionality.
8. Norms that are not rules cannot be interpreted by traditional methods. 9. The principle of proportionality and other forms of argumentation must be used to decide on conflicts between opposing principles.
9. The legal system is interpreted according to the constitution to maximize fundamental rights.
10. Legal certainty becomes more demanding and difficult; it mainly relies on the quality of the argumentation.
11. The constitution is directly applicable by all authorities and is unbending. There are principles that cannot be reformed using constitutional review proceedings.
12. A constitutional judge is the guarantor of the constitutional State and lacks original democratic legitimacy: he strives to make up for it through the argumentative quality of his rulings.
13. There is an unsuccessful attempt to globalize constitutionalism because the constitutional State does not have an economic or political theory that gives it any foundation.
14. Constitutional democracy does not originate in majority rule, but in the respect and guarantee of human rights. Majorities are but a "fragment" of popular sovereignty.
15. It is a State that is neither neutral nor supportive. Its ideology is one of conflicting principles and values which are contained in the constitution and human rights treaties.

However, these are not always met, mainly those that express economic social cultural environmental rights.

The neoliberal State (from the 1980s to our times) subjects the nation-State and public law to the economic, political, and legal demands of neoliberal globalization. We believe that the most important points of its internal order are: 1) unlimited national and transnational *de facto* powers and sufficient legal controls; 2) fundamental rights without full guarantees for their fulfillment, mainly in terms of economic, social, cultural and environmental rights; 3) weak democratization and transparency of transnational corporations; 4) the supremacy of international treaties, mainly those re-

lated to trade, investment and property, over national constitutions; 5) weak mechanisms of constitutional procedural law that do not sufficiently protect fundamental social and collective rights; 6) anti-corruption instruments compatible with the interests of large transnational corporations; 7) diminished participative, deliberative, and community democracy, and with it, the promotion of an electoral democracy that manipulates citizens' political rights; 8) handing over the assets of nations —their natural resources— and their exploitation to foreign interests; 9) inadequate defense of national sovereignty, and 10) implementation of the globalizing neoliberal economic model to bend the law and the national State to its advantage.

The constitutional and legal energy reform of 2013 and 2014 was enacted within the context of the neoliberal State. What was the previous legal paradigm like and how did it change? The structural energy reform entailed the definitive substitution of the development model implemented in Mexico after the 1938 oil expropriation.

For decades, first hydrocarbons and then electricity represented not only the main sources of tax revenue for the country, but also the sectors on which the rest of national industry and economy revolved, were nourished, were developed, and were strengthened. Hydrocarbons and electricity were also the main instruments underpinning national sovereignty. The energy sector was the economic basis on which Mexico proclaimed its sovereignty in the international arena and which for decades allowed the country to show itself, albeit only rhetorically, as a country outside the imperial grip of the United States.

In the above legal model, the Mexican State had almost complete control and administration of energy exploitation. In successive reforms, the constitution prohibited concessions (1940) and contracts (1960) and established exclusivity in the exploitation of energy through the concept of strategic area in 1983, prohibiting transnational and national private sector participation in the control and management of the core elements of the industry (individuals took on a secondary role through service contracts, and from the 1990s onwards they gradually gained influence in the industry —turnkey contracts and multiple service contracts) until the 2013 energy reform, which foreshadowed the last stage of the process in which the private sector recovered what it had lost in 1938. The 2013 energy reform changed the paradigm: The State abdicated its former exclusive powers to exploit the energy resources of both this and future generations of Mexicans.

The 2013 constitutional energy reform allowed all kinds of contracts, concessions, or licenses, and morphed the meaning of strategic area. It no longer entails the principle that only the State can, exclusively and directly,

exploit energy resources; it now implies that the energy sector is an important economic area where, according to transitory Article 8 of the 2013 constitutional energy reform, exploitation by the private or public sector is preferable to any other economic activity of the State itself, of individuals, of the social sector and even of indigenous peoples. The State will share the exploitation and profits with private, mainly transnational companies. In short, we are giving away a high percentage of the oil income that corresponds to the nation.

## II. The constitutional energy reform and its legal implications

On December 13, 2013, the Chamber of Deputies approved the reform on energy matters to Articles 25, 27 and 28 of the Mexican constitution, in addition to 21 transitory articles. The head of the Federal Executive Branch enacted and published the reform in the Federal Official Gazette on December 20 that same year.[2]

The reform modified the fourth paragraph of Article 25 of the Constitution, and the sixth and eighth paragraphs of Article 25 of that precept were amended to include the criterion of sustainability in State economic activities.

The amendments to Article 25 contain[3] the following innovations: 1) productive State enterprises were created to serve the so-called "strategic areas of the State", a category that until that moment had not existed in Mexican statutory law; 2) the concept of strategic area of the State is watered down, given that previously, in the fourth paragraphs of Articles 25 and 28 of the Constitution, strategic implied the State's exclusive power to plan, manage, exploit, and control the resources or activities and now the State can carry out even core activities —planning, control, transmission and distribution of electric energy— and the exploration and extraction of hydrocarbons through private individuals (mainly foreigners) by means of different types

[2] Bartlett Díaz, Manuel (coord.), *Estrategia urgente en defensa de la nación. Política energética para que México sea potencia económica en el siglo XXI*, Mexico, Talleres Gráficos del Partido del Trabajo, 2013; Cárdenas Gracia, Jaime, *Crítica a la reforma constitucional energética de 2013*, Mexico, UNAM, 2014; Grunstein, Miriam, *De la caverna al mercado. Una vuelta al mundo de las negociaciones petroleras*, Mexico, Centro de Investigación para el Desarrollo, 2010, and Instituto Mexicano para la Competitividad, *Nos cambiaron el mapa: México ante la revolución energética del siglo XXI*, Mexico, 2013.

[3] *Constitución Política de los Estados Unidos Mexicanos*, Cámara de Diputados, 2018, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/1_270818.pdf.*

of contracts and licenses; 3) productive State enterprises have special legal status based on the constitution, laws and best corporate practices, and 4) secondary legislation defines the constitutive rules for productive State enterprises and the activities that comprise strategic areas.

The intent of the sixth paragraph of Article 27 of the Constitution[4] was transformed to: 1) establish that no concessions will be granted for radioactive minerals; 2) exclude hydrocarbons from the sixth paragraph of Article 27 of the Constitution for it to only regulate the electrical industry; 3) stipulate that no concessions will be granted in the planning, control, transmission and distribution of electric energy for public service, but that these activities will be subject to contracts and other types of legal instruments with individuals, and 4) indicate that in all other activities in the electrical industry, with the exception of those mentioned above, there may be both concessions and contracts.

A new seventh paragraph was added to Article 27 of the Constitution[5] and the subsequent paragraphs of this precept were moved down. The seventh paragraph of Article 27 of the Constitution groups together hydrocarbon regulation, the objectives of which are: 1) to rhetorically prohibit concessions for hydrocarbons since they are allowed in transitory Article Four under the concept of licenses; 2) to indicate that the objective of the new hydrocarbon system is for the State to obtain revenues that will contribute to the development of the nation; 3) to point out that activities for the exploration and extraction of oil and other hydrocarbons will be carried out by assigning said activities to productive State enterprises or through contracts with these enterprises or with individuals; and 4) to rhetorically stress that hydrocarbons are the property of the Nation and that it should be so indicated in assignments and contracts.

The new seventh paragraph to Article 27 of the Constitution[6] cannot be understood without its transitory articles, especially transitory Article 4 of the constitutional energy reform, which establishes the system of contracts and licenses in the hydrocarbon industry, as well as the system of considerations in favor of private companies.

As for the fourth paragraph of Article 28 of the Constitution,[7] we can say that it aims: 1) to reduce the strategic areas that were once exclusive to the State, such as the entire production chain of the electric and hydrocarbon industries, while retaining a few activities in those industries, and 2) to state

4 *Ibidem*, p. 28.

5 *Idem.*

6 *Idem.*

7 *Ibidem*, p. 34.

that the electric and hydrocarbon industry activities that are kept as strategic represent a prevarication in the language because strategic must now be understood in accordance with the new sixth and seventh paragraphs of Article 27 of the Constitution, which imply that private individuals may carry out activities in the electric and hydrocarbon industries through concessions, contracts and licenses; that is, the electric and hydrocarbon industries are no longer exclusive functions of the State as they were before.

The new sixth paragraph of Article 28 of the Constitution creates the Mexican Petroleum Fund for Stabilization and Development and outlines the main characteristics of its legal design: a) forming a public trust; b) having the Bank of Mexico as the trust institution, and c) receiving the revenue from the assignments and contracts for hydrocarbon exploration and extraction, with the exception of taxes.

This constitutional amendment should be understood in light of the provisions of the fourteenth and fifteenth transitory articles of the constitutional energy reform[8] which specify the legal characteristics of the Fund, its legal nature, its objectives, and the type of revenue that it will receive and cannot be taxes because the latter will continue to be managed and used by the Ministry of Finance and Public Credit. In other words, the Fund may receive rights and other types of contributions which are not taxes and which derive from assignments, contracts, and licenses from Pemex as a productive State enterprise and from private companies.

The new eighth paragraph of Article 28 of the Constitution[9] is designed to highlight the importance of the "coordinating regulatory bodies in energy matters called the National Hydrocarbons Commission and the Energy Regulatory Commission". Both agencies already existed in secondary legislation. There were at least two reasons to include these bodies in the Constitution: 1) to strengthen their authority, as occurs in the sixth, tenth, twelfth and thirteenth transitory articles of the constitutional energy reform, and 2) to respond to the fact that the PAN's legislative initiative sought to transform both agencies into autonomous constitutional bodies, which means that the PAN was seeking to give the regulatory agencies greater weight and powers in the matter.

The legal nature of these agencies is also new in Mexican law. With the reform, they are considered "coordinated regulatory bodies in energy mat-

[8] Secretaría de Gobernación, "Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía", *Diario Oficial de la Federación*, December 20, 2013, available at: *http://dof.gob.mx/nota_detalle.php?codigo=5327463&fecha=20/12/2013*.

[9] *Constitución Política de los…*, *op. cit.*, p. 35.

ters" although, as established in transitory articles and secondary law, their dependence on the Executive Branch is indisputable.

How did the government justify the 2013 energy reform? The explanatory statement of President Enrique Peña Nieto's initiative defended the constitutional energy reform by pointing out that:

1. The participation of individuals is called for because Pemex and the Federal Electricity Commission need investments to grow their respective industries;
2. In the case of oil, hydrocarbons, and petrochemicals, it was argued that technology is needed because Mexico does not have the appropriate type;
3. It states that the initiative was inspired by the reforms proposed by General Lázaro Cárdenas and approved later on, which did not prohibit the participation of individuals through contracts or even through concessions in these industries;
4. It is noted that the Cardenist reforms established that compensation for contracts could be in cash or a percentage of the products obtained;
5. It mentions that the prohibition of oil industry contracts dates from the constitutional reform of January 20, 1960;
6. It was pointed out that the reform that incorporated the concept of strategic areas dates from February 3, 1983, and has nothing to do with Cardenism;
7. The model proposed in Enrique Peña's initiative included two structures: a) exploration and extractions contracts —production and shared utility contracts— entered into with the Federal Executive, and b) permits for individuals to intervene along the entire industrial chain, for example, in refining, distribution, storage, first-hand sales, etc.;
8. The policy for hydrocarbon exploration and extraction activities would be dictated exclusively by the Federal Executive, which would enter into contracts with State agencies and companies, as well as with social and private sectors;
9. It proposed removing basic petrochemicals as a strategic area of the State;
10. It stated that the law shall determine the conditions under which contracts may be entered into and permits may be granted to individuals, as well as the regulation to which they shall be subject;
11. It proposed a more flexible and moderate tax regime;

12. It established that the reform would increase oil production from 2.5 million barrels a day to 3 million in 2018 and 3.5 in 2025, and
13. For the electric sector, it said that the intentions of the proposal are: to respond to the fundamental imperative of lowering the costs of electric service in the interest of the general public; to organize the electricity system on technical and economic principles; to propose the development of the sector based on the joint participation of the Federal Electricity Commission and individuals; and to strengthen State powers to regulate development in the sector and place interconnection duties, rates, universal service and electrification obligations on the participants.

Peña Nieto's presidential initiative was based on a misrepresentation and distortion of Mexico's energy history. An energy reform was necessary, but it needed one that was different from the one published in the Federal Official Gazette on December 20, 2013. Without changing any of the fundamental political decisions provided for in the Constitution, the reform Mexico needed meant taking into account the following considerations:

1. To guarantee the principles in force in the Constitution before the December 2013 reform and keep hydrocarbons and electricity out of international free trade;
2. To defend national energy sovereignty and refrain from issuing exploration and extraction contracts for crude oil, and only allow service contracts;
3. To maintain total State control over the hydrocarbon and electricity industry;
4. Not to allow utility or production sharing contracts or licenses because these forms of contracting or authorization imply sharing oil revenues with foreign interests;
5. To rigorously fight corruption in Pemex and CFE, in both the contract area and the union;
6. To make Pemex and CFE Boards of Directors operations transparent;
7. To reduce oil exports abroad and grow the national petrochemical industry;
8. To build the refineries Mexico requires;
9. To promote national scientific and technological development in the field of energy;
10. To develop renewable energies using national resources;
11. To get society involved in Mexico's energy policy;

12. To make the energy industry the driving force behind national development;
13. To implement a tax reform that taxes large Mexican companies that are currently protected by tax privileges, credits, and write-offs;
14. To reform Article 28 of the Constitution so that part of the Bank of Mexico's reserves is allocated to national development and building infrastructure;
15. To reduce Pemex's tax burden, prior to a tax reform that levies taxes on large companies in the country, and to seek domestic sources to finance the national energy industry;
16. Not to use oil revenues to cover the government's current expenses but to underpin the growth of infrastructure, public works, national industry, and the domestic market;
17. To establish a national energy strategy that is publicly debated and directed towards ensuring Mexico's energy sovereignty;
18. To develop this strategy within the framework of sustainable development policies;
19. To exploit hydrocarbons while taking care of the environment holistically, and,
20. To maximize the recovery of hydrocarbons, including natural gas, on a mandatory basis.[10]

These and other nationwide measures could be carried out without having to hand over the country's energy wealth to foreigners. The federal government and the 2013 Permanent Legislature never explored the different nationalist, socially responsible and democratic alternatives to the constitutional one imposed by Enrique Peña Nieto and his allies through the Pact for Mexico.

## III. Secondary energy reforms and their implications[11]

The secondary energy reform contained the following provisions: The Hydrocarbons Law, the Electrical Industry Law, the Geothermal Energy Law;

[10] Jiménez Espriú, Javier, *Análisis a la reforma energética 2013*, México, Innova, 2013, pp. 26-30.

[11] I refer to these issues in more depth in: Cárdenas Gracia, Jaime, "La nueva legislación secundaria en materia energética de 2014", *Boletín Mexicano de Derecho Comparado*, México, vol. 48, No. 143, May-August 2015.

the Mexican Petroleum Law, the Federal Electricity Commission Law, the Law on the National Agency for Industrial Security and the Environmental Protection for the Oil & Gas Industry, and the Law of the Coordinated Regulatory Energy Agencies. Likewise, the following provisions were amended and supplemented: The Foreign Investment Law, the Mining Law, the National Waters Law, the Public-Private Associations Law, the Organic Law of the Federal Public Administration, the Federal Law on Parastatal Entities, the Law of Acquisitions, Leasing and Public Sector Services, and the Law on Public Works and Related Services.

In addition to the above, the Hydrocarbons Revenue Law and the Law of the Mexican Oil Stabilization and Development Fund were issued. The Federal Law of Rights, the Fiscal Coordination Law, the Federal Budget and Fiscal Responsibility Law, and the General Public Debt Law were also amended and expanded.[12]

The main misgivings raised by the energy reform were not, nor have been, explained to society.[13] The Mexican public has no answers about the consequences the reform will have on the environment and human health. Citizens are skeptical as to whether the sector's new regulatory agencies will be able to deal with the power of large global oil and electricity companies capable of destabilizing governments around the world. Much of society believes that corruption in the energy sector will increase, not only because of the role of labor unions, but also because of the million-dollar contracts that the government will sign with global energy companies. There are fears that the constitutional energy reform will mean more taxes and more foreign debt, going against the best interest of Mexicans. It is also not clear for society whether the alleged benefits of the reform will go to national development and not to the current expenditure of the three levels of government. And, in general, we are still not sure why Mexicans have to share oil revenue[14]

[12] *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.dof.gob.mx/index.php%3Fyear%3D2014%26month%3D08%26day%3D11.*

[13] Specifically, there are doubts about the privatizing consequences of the reform. The *Diccionario de la Real Academia Española* defines "privatize" as "To transfer a public company or activity to the private sector". Castaño Guillén defines privatization as follows: "We understand privatization as the economic, political and social process of restructuring that, through the legal transformation of the ownership of a company, *a sector or an economic activity from public to private opens new spaces of private enrichment and profit*". Castaño Guillén, Julián, *La dirección de los resultados en las empresas privatizadas*, Tesis Universidad de Extremadura, 2006.

[14] 20th century Mexican history was linked to the struggle for the nationalization of energy companies; history is now going in the opposite direction. To understand the historical

coming from a resource that belongs to Mexicans with others who are non-nationals.[15]

In the legal sphere, the energy reform is part of the new and currently dominant legal model, which can be called neoliberal.[16] From our perspective, the hegemony of the neoliberal model in legal matters has meant, among other things, the following:

1. The dismantling of the unsatisfactory Welfare State that existed before the implementation of the model, *i. e.*, the constitutional and legal reform advocated that aims to lower the level of protection of Mexicans' economic, social, and cultural rights;[17]
2. The protection of private property over social and public property as is the case with the constitutional energy reform and is contained in the eighth transitory article;
3. The existence of a formal electoral democracy without quality or substance, which does not encourage participative and deliberative democracy, which defines the winners through the power of the media and money, and which prevents transcendent issues like constitutional reforms or trade agreements from being approved by Mexicans by means of a referendum;
4. A copy of Anglo-Saxon justice systems like the implementation of the accusatory criminal system and thereby the introduction of oral trials in Mexico;

process of the 20th century in terms of oil nationalization, see: Bassols Batalla, Narciso, *Las etapas de la nacionalización petrolera*, Mexico, Miguel Ángel Porrúa, 2006.

15 Cuarón, Alfonso, "10 Preguntas del ciudadano Alfonso Cuarón al presidente Enrique Peña Nieto", *La Jornada*, México, April 28, 2014, p. 9.

16 Jalife-Rahme, Alfredo, *Muerte de Pemex y suicidio de México*, México, Grupo Editor Orfila Valentini, 2014. This author points out that the fundamental intention of the 2013 constitutional energy reform is to safeguard the geostrategic interests of the USA and to benefit the large private oil companies of the world.

17 Lorenzo Meyer holds that the result of the neoliberal project in Mexico has been one of dismantling the State and returning to the old, historical tendencies toward social inequality. However, the extremists of the simple "laissez-faire" have not met, not by a long shot, the equivalent of their privatizing creed, which did take place in the United States: economic growth. Gerardo Esquivel's calculations of the real Mexican GNP growth between 1994 —the year in which the neoliberal crown jewel, NAFTA, took effect— and 2009 show an annual average increase of less than one percentage point (0.89%). Thus, North American neoconservatives were copied here in terms of the concentration of wealth in a few hands -those mentioned in Forbes- and in the weakening of the social protection network, but without fulfilling, however, the promise of increased employment. See: Meyer, Lorenzo, *Nuestra tragedia persistente. La democracia autoritaria en México*, México, Random House Mondadori, 2013, pp. 415 y 416.

5. Criminal populism that consists of raising the number of crimes and increasing the punishment in order to try to guarantee security that is not provided by the economic, political, and social model;
6. Many reforms on foreign investment, industrial and intellectual property legislation to protect foreign investment, such as the 1992 Mining Law or the 2013 constitutional reform on telecommunications that allows 100% foreign investment in these sectors;
7. Concentration of many constitutional and legal powers in federal branches, mainly in the executive branch, so that the external sector can negotiate more easily with the Mexican State;
8. Loss of legislative and jurisdictional sovereignty to the executive branch and supranational bodies, such as international agreements that are not ratified by the Senate or international arbitration bodies that resolve Mexico's main economic issues;
9. International agreements that do not pass the test of representation —such as the Merida Initiative or the SPP— that strip the country's public authorities (the Senate in this case) of their substance, and
10. The privatization of public law and the loss of state and nation outlooks to give way to a top-down imposed globalization that constitutes a genuine revolution by the world's rich for the world's rich.[18]
11. We will analyze the legal energy provisions, stressing the issues that are important in our opinion.

## 1. *The Hydrocarbons Law*

The new Hydrocarbons Law is, from my point of view, the most important one in the secondary energy reform package because it regulates the system of contracts, licenses, and permits that will authorize transnational oil and gas companies to explore and extract hydrocarbons in Mexico.[19]

The law contains secondary provisions that are openly unconstitutional, even with the constitutional reforms of December 2013.[20]

---

[18] Tello, Carlos and Ibarra, Jorge, *La Revolución de los ricos*, México, UNAM, 2012, pp. 45-103.

[19] To understand the types of oil contracts, see: Johnston, Daniel, *International Petroleum Fiscal Systems and Production Sharing Contracts*, Oklahoma, Penn Well Publishing Company, 1994, and Johnston, Daniel, *International Exploration Economics, Risk and Contract Analysis*, Oklahoma, Penn Well, 2003.

[20] Rathbone, John Paul, "Peña Nieto Pledges Transformational Reform of Pemex", *Financial Times*, London, June 17, 2013. "Los cambios constitucionales (serían) necesarios para darle certeza a los inversionistas privados".

In general terms, I shall mention some of its unconstitutional aspects:

The law does not respect the current principles of the Constitution, including the one indicating that the State holds economic stewardship; the one stating that Nation retains the original, direct, inalienable and non-prescriptible ownership of natural resources (hydrocarbons); the one establishing that hydrocarbons in the subsoil are, under any circumstances, property of the nation; the one specifying that individuals can intervene in the strategic area of hydrocarbons, but without presiding over the hydrocarbon industry, or controlling and administrating productive State enterprises; the one stating that the modalities of property and intervention of individuals in strategic areas are dictated by the State and must respond to national development objectives; the one determining that hydrocarbon exploration and extraction activities are matters of social interest and public policy; in other words, that they are not or should not be subject to the market; the one alluding to the fact that upon leaving the subsoil, hydrocarbons belong to the nation because private participation in the industry is for the State to obtain income and thus contribute to the long-term development of the nation and not for private individuals to obtain benefits in the first place; and the one stating that hydrocarbons are resources for national development and, therefore, cannot be deemed simple commodities.[21]

Exploration and production contracts contravene the intent of the seventh paragraph of the new Article 27 of the Constitution.

> That the State obtains revenues in order to contribute to the long-term development of the nation, while oil revenues will be shared with oil companies and the revenues for said development are to be shared with foreign economic interests.[22]

Article 14 allows alliances or partnerships between productive State enterprises to be regulated by private law. Such an enterprise must be guided by the principles of public law because it belongs to the State. It is true that Mexican administrative law has allowed private companies to be part of the State —Article 46 of the Organic Law of Federal Public Administration or Article 28 of the Federal Law on Parastatal Bodies—, but never with such prominence as in the 2013 energy reform. Now these companies are allowed to run a strategic area of the State.

---

[21] Criticism of the constitutional energy reform can be found in: Cárdenas Gracia, Jaime Fernando, *Crítica a la reforma constitucional en materia energética de 2013*, UNAM, 2014.

[22] Jiménez Espriú, Javier, *Análisis a la reforma energética 2013*, México, Innova, 2013, p. 27.

Article 17 of the law allows foreign private companies to participate in cross-border sites, thereby violating the principle of eminent domain. Only Pemex should be entitled to such exploitation by the Mexican State.[23]

The permits referred to in Article 48 and subsequent articles of the law violate Article 134 of the Constitution, as this administrative law mechanism is used to avoid tendering. Such permits will invite corruption because they will be granted discretionally.[24]

The easements provided for in Article 100 and subsequent articles of the Hydrocarbons Law are the legal way to affect private, social, and indigenous community property for a non-public purpose and basically for private benefit —that of transnational companies—.

The fiscal terms in the exploration and extraction contracts alluded to in various legal provisions violate Article 31, Section IV, of the Constitution because there is a principle of reservation of law regarding tax issues:

> Any contribution must be provided for by law. In the specific case of tax considerations that companies will pay to the State will depend on the autonomy of the will of the parties and not on the law. Moreover, the contributions must be general, proportional, and equitable. Negotiation between the parties breaches the principles of taxation provided for in the Constitution.[25]

Articles 119 to 122 of the law do not establish the binding nature of the result of consultations with native peoples, and the consultation procedure diverges from ILO Convention 169 and the precedents of the Inter-American Court of Human Rights —for instance, an independent entity will not conduct the consultation or procedure for free, prior and informed consent. The law does not sufficiently foresee that native peoples should receive a percentage of the economic benefits that Pemex or private companies obtain through the exploitation of subsoil resources within the territories of these communities.[26]

---

[23] Becerra Ramírez, Manuel, "Aspectos legales de los yacimientos transfronterizos de petróleo y gas", in Almazán González, José Antonio (coord.), *Exclusividad de la nación en materia de petróleo*, México, Grupo Parlamentario del PRD en la LX Legislatura de la Cámara de Diputados del Congreso de la Unión, 2008, pp. 39-52.

[24] According to Mexican administrative legislation, a permit is an administrative act by which an obstacle or impediment that the law has established for an individual to exercise a right is lifted or removed. See Hernández Espíndola, Olga, "Permiso administrativo", *Enciclopedia Jurídica Mexicana*, México, Porrúa-UNAM, Instituto de Investigaciones Jurídicas, 2008, t. V, pp. 532-535.

[25] *Constitución Política de los…*, *op. cit.*, p. 41.

[26] In the Inter-American Court of Human Rights Judgment of June 27, 2012, of the Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, the Court outlined the scope

Regarding transparency, the law is *sui generis*. Article 32 refers to geological information, which must be considered of national security and so reserved under the terms of Article 6, paragraph A, Base I of the Constitution.[27] However, this information is made available to assignees and contractors for commercial use.

The provisions that refer to national content, supposedly to favor national suppliers, run counter to Article 1106 of the North American Free Trade Agreement which restricts the possibilities of establishing such obligations to foreign investors. They are, therefore, purely rhetorical.[28]

In summary, the Hydrocarbons Law is a statute that violates the approved constitutional energy reform. It constitutes an act in which national sovereignty is lost.[29] It will not bring benefits of any kind to Mexico and will only yield advantages for transnational companies. Through this reform, we are helping ensure the energy security of the United States and not that of Mexico.[30]

---

of the right to consultation: it must be prior; it must be in good faith; it must have the aim of reaching an agreement; it must be appropriate and accessible; it must assess the environmental impact and the indigenous culture in question and, it must be an informed consultation that respects all other fundamental rights. *Cfr.* Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007, Series C No. 172, available at: *http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_esp.pdf*. The Case of the Saramaka People *v.* Suriname, issued on November 28, 2007, also recognizes the right to consultation and the principles of free, prior and informed consent.

27 *Constitución Política de los…*, *op. cit.*, p. 10.

28 Witker, Jorge and Hernández, Laura, *Régimen jurídico del comercio exterior de México*, 3a. ed., México, UNAM, 2008; Witker, Jorge (coord.), *El Tratado de Libre Comercio de América del Norte. Evaluación jurídica: diez años después*, México, UNAM, 2005; López Velarde Estrada, Rogelio, "Energía y petroquímica básica", in Witker, Jorge (coord.), *El Tratado de Libre Comercio de América del Norte. Análisis, diagnóstico y propuestas jurídicas*, México, UNAM, 1993, t. I, pp. 203-259, and Jiménez Vázquez, Raúl, "Consideraciones en torno al capítulo de compras gubernamentales del TLCAN y su eventual impacto en el derecho mexicano", in Witker, Jorge (coord.), *El Tratado de Libre Comercio de América del Norte. Análisis, diagnóstico y propuestas jurídicas*, México, UNAM, 1993, t. I, pp. 261-281.

29 Vargas Suárez, Rosío, "El contexto geopolítico y la iniciativa de reforma energética del PRIAN", and Saxe Fernández, John, "Flexibilización constitucional y el reingreso a México de las petroleras nacionalizadas por Lázaro Cárdenas" in Cárdenas Gracia, Jaime (coord.), *Reforma energética: análisis y consecuencias*, México, UNAM-Tirant lo Blanch, 2015, pp. 169-205.

30 Pascual, Carlos, *Written Testimony of Special Envoy and Coordinator for International Energy Affairs Carlos Pascual U.S. Department of State, Before the House Committee on Foreign Affairs, Subcommittee on the Western Hemisphere United States House of Representatives*, Energy and the Western Hemisphere, April 11, 2013. Kerry, John, "Oil, Mexico, and The Transboundary Agreement", *A Minority Staff Report. Prepared for the use of The Committee on Foreign Relations*, United States Senate, One Hundred Twelfth Congress, Second Session, Printed for the use of The Committee on Foreign Relations, Washington, D. C., December 21, 2012.

### 2. *Electrical Industry Law*

In terms of content, the Electrical Industry Law proposes dismantling the national electrical industry.[31] The tenth transitory article of the 2013 constitutional energy reform envisaged the legal partitioning of the electrical industry. The law goes even further and unconstitutionally establishes the operational separation of the electrical industry that until now has functioned as an integrated whole. The objectives of this disarticulation of the national electrical industry are: 1) the distribution of industry processes —generation, transmission, distribution and retailing— among the various private, mainly foreign, operators; 2) the increase in final prices in view of the participation of multiple operators in each stage in the electrical industry;[32] 3) the potential for conflict between the various operators involved in each process in the industry, and 4) shortages caused by the participation of multiple operators in the industry.

Constitutionally, the Electrical Industry Law contains the following general shortfalls:

Congress is stripped of its powers. Congress has the power to legislate on matters of contributions —Article 73 Section VII and XXIX.5 a) of the Constitution, to legislate on matters of trade —Article 73 Section IX of the Constitution, and to legislate on matters of electricity —Article 73 Section X of the Constitution. However, the Electrical Industry Law contains provisions that unconstitutionally grant the Ministry of Energy or the Energy Regulatory Commission these kinds of powers since these agencies and bodies, according to the law, can issue general and abstract regulations on energy, trade, and contributions.

The rights of local authorities are violated; it is an anti-federalist law. Article 7 of the law does not give any power to any municipal or state authorities. The law has a clear anti-federalist slant since in contravention of Article 115 of the Constitution, Article 39 of the Electrical Industry Law empowers carriers and distributors to perform work in public spaces —streets, roads, gardens, squares— without first obtaining municipal authorization.[33]

---

[31] Beder, Sharon, *Energía y poder. La lucha por el control de la electricidad en el mundo*, México, Fondo de Cultura Económica, 2005, pp. 15-24.

[32] Noceda, Miguel Ángel, "Las eléctricas disuaden al consumidor. El coste de las ofertas fijas anuales presentadas por las grandes compañías a la CNMC supera hasta en 100 euros anuales a la media de los últimos cuatro trimestres", *El País*, Madrid, April 26, 2014, p. 15.

[33] Cámara de Diputados, "Ley de la Industria Eléctrica", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LIElec_110814.*

Rhetoric of national content. Various provisions of the law contain regulations to guarantee the minimum percentages of national content to supposedly benefit national industry —for instance Article 11 Sections XXI and XXX of the law. These provisions contravene Articles 1106 and 1110 of the North American Free Trade Agreement (the former prohibits percentages of national content between NAFTA countries and the latter establishes safeguards for foreign investment). International treaties have a higher hierarchy than the law.[34]

Electric power transmission and distribution networks are privatized. Article 35 of the law allows individuals to contribute to works, expansions

*pdf.* On March 9, 2021, reforms to the Electricity Industry Law were published to increase the powers of the Federal Electricity Commission in the sector. The aforementioned legal amendment was challenged before the Supreme Court of Justice of the Nation. On April 7, 2022, the action of unconstitutionality 64/2021, promoted by the parliamentary minority of the Senate of the Republic against articles 3, section V; 3, section XII, 3, section XII bis; 3, section XIV; 4, section I; 4, section VI; 12, fraction I, 26, 35, 53, 108, fraction V; 108, section VI; 126, section II; fourth transient; and fifth transitory, reformed on March 9, 2021. None of the contested precepts was declared unconstitutional. In Mexico, for a legal norm to be declared unconstitutional, 8 votes of the 11 ministers that make up that Supreme Court are required.

[34] NAFTA estará en vigor hasta el 30 de junio de 2023. Durante el gobierno de Andrés Manuel López Obrador se aprobó un nuevo tratado en sustitución de NAFTA. En México lo conocemos como T-MEC. En el momento en el que se escribe esta nota, los gobiernos de Estados Unidos y Canadá han activado el mecanismo de consultas para reclamar de México la aprobación de la reforma de 9 de marzo de 2021 a la Ley de la Industria Eléctrica ya mencionada en la cita anterior. A juicio de esos gobiernos la modificación legal y las decisiones del gobierno de López Obrador en el ámbito eléctrico trastocan los principios que rigen las inversiones en los acuerdos de libre comercio y que son: trato nacional, trato de nación más favorecida y nivel mínimo de trato. La reforma a la Ley de la Industria Eléctrica de 9 de marzo de 2021 además de dar mayor peso a la Comisión Federal de Electricidad en la industria eléctrica busca eliminar el abuso que las empresas eléctricas privadas realizaron a través de los procedimientos de auto abasto y auto generación. Son relevantes los artículos reformados cuarto y quinto transitorio de la Ley de la Industria Eléctrica que señalan: "Cuarto transitorio. Los permisos de autoabastecimiento, con sus modificaciones respectivas, otorgados o tramitados al amparo de la Ley del Servicio Público de Energía Eléctrica, que continúen surtiendo sus efectos jurídicos, obtenidos en fraude a la ley, deberán ser revocados por la Comisión Reguladora de Energía mediante el procedimiento administrativo correspondiente. En su caso, los permisionarios podrán tramitar un permiso de generación, conforme a lo previsto en la Ley de la Industria Eléctrica; y, Quinto transitorio. Los Contratos de Compromiso de Capacidad de Generación de Energía Eléctrica y Compraventa de Energía Eléctrica suscritos con productores independientes de energía al amparo de la Ley del Servicio Público de Energía Eléctrica, deberán ser revisados a fin de garantizar su legalidad y el cumplimiento del requisito de rentabilidad para el Gobierno Federal establecido en los artículos 74, fracción IV, de la Constitución Política de los Estados Unidos Mexicanos, 32 de la Ley Federal de Presupuesto y Responsabilidad Hacendaria y 18 de la Ley Federal de Deuda Pública. En su caso, dichos contratos deberán ser renegociados o terminados en forma anticipada".

or the distribution of the electric power network. The network is privatized, and government control is limited, among other things, because businesspeople will receive income from the sale of the works under the terms of market rules.

Violation of due process. Article 41 of the Electrical Industry Law allows, in some cases, carriers and distributes to suspend electrical power service to the end users without any prior intervention by the authorities. This violates, *inter alia*, Articles 14, 16 and 17 of the Constitution. There is no guarantee of due process.

Legal easement for private purposes. Article 42 of the Electrical Industry Law allows legal easements to benefit carriers and distributors. Private, public, social, or indigenous property is subordinated to energy-related activities.

Consultation with native peoples is not binding. Article 117 of the Electrical Industry Law establishes the right to consultation, in the event of land occupation or easements affecting the lands of indigenous peoples, but without guaranteeing the principles of ILO Convention 169. The law does not establish that the consultation is binding, it does not acknowledge free, prior and informed consent, nor does it sufficiently indicate that native peoples will receive a substantial percentage of the benefits that companies derive from their businesses. It unconstitutionally allows individuals who will affect the lands of native peoples to participate in the consultation.

The law will imply surrendering the electrical industry to foreign capital: US and Spanish. The Mexican State will lose control of the industry. The prices of electricity will not decrease and, due to the multiple agents in the industry participating in the differentiated segments, there is a high probability of shortages affecting consumers and the Mexican people.

### 3. *The Geothermal Energy Law and reforms to the National Waters Law*

The preferential nature of geothermal energy exploitation has no constitutional basis. Article 4 of the Geothermal Energy Law,[35] which regulates the preferential nature of the exploitation of geothermal energy, is unconstitutional because it has no basis in the Constitution. Transitory Article 8 of the constitutional energy reform —Federal Official Gazette of December 20, 2014— only awards preferential status to the exploration and extraction of

[35] Cámara de Diputados, "Ley de Energía Geotérmica", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LEG_110814.pdf.*

hydrocarbons and to the public service of transmission and distribution of electrical energy. Therefore, there is no constitutional basis to consider the generation of electricity using geothermal energy as preferential.

The unconstitutional exploitation of by-products is allowed without a concession. Pursuant to Article 5 of the law, by-products discovered in the course of the activities provided for by the law may be used without a concession. In accordance with the sixth paragraph of Article 27 of the Constitution, the exploitation, use or development of natural resources in the subsoil may only be carried out through concessions. In other words, the use of the by-products of geothermal energy can only be done through concessions.[36]

The permits and licenses regulated by the law contradict the sixth paragraph of Article 27 of the Constitution.[37] Articles 8 to 25 of the Geothermal Energy Law are contrary to the sixth paragraph of Article 27 of the Constitution, since the exploitation, use or development of natural resources in the subsoil may only be carried out through concessions and not through licenses or permits. It is true that transitory Article 10 of the constitutional energy reform of December 2013 gives the Energy Regulatory Commission the authority to issue permits for the generation of electricity. However, in the case of geothermal energy, this authority, according to the law, belongs to the Ministry of Energy, which reveals the unconstitutional nature of its competence in this matter.

Unconstitutional sale of concessions. Article 29 of the law allows the transfer of concession rights without obtaining a new concession —an authorization from the Ministry of Energy will suffice—. The provision will encourage the purchase and sale of concessions, which is moreover unconstitutional because the sixth paragraph of Article 27 of the Constitution stipulates that the exploitation, use or development of natural resources in the subsoil may only be carried out by means of concessions and not by means of authorizations.

---

[36] In Mexican administrative law, a concession is defined as: "the administrative act by which the public administration, as grantor, confers to individuals, concessionaires, the right to exploit a property owned by the State or to exploit a public service". Nava Negrete, Alfonso y Quiroz Acosta, Enrique, "Concesión Administrativa", *Enciclopedia Jurídica Mexicana*, México, Porrúa-UNAM, Instituto de Investigaciones Jurídicas, 2008, t. V, pp. 359-362.

[37] According to Mexican administrative legal theory, a permit represents an administrative act by which an obstacle or impediment established by law for an individual's exercise of a right is lifted or removed. Hernández Espíndola, Olga, "Permiso administrativo", *Enciclopedia Jurídica Mexicana*, México, Porrúa-UNAM, Instituto de Investigaciones Jurídicas, 2008, t. V, pp. 532-535.

The causes for terminating concessions do not include the violation of the rights of indigenous peoples or the effects on the environment or health. Article 38 of the law sets out the causes that give rise to the termination of a concession. However, despite their importance, the violation of the rights of indigenous peoples —in violation of ILO Convention 169— or effects on the environment and health are not grounds for termination of the concession, which is in violation of the national and conventional legal provisions on this matter.

The procedure for the revocation and the expiry of concessions violates due process. According to Article 40 of the law, the revocation and expiry of geothermal concessions are declared administratively by the Ministry of Energy. In other words, this is a procedure that is decided by the administrative authority and not by a judge, through the rules of due process. This violates Articles 14, 16 and 17 of the Constitution.

The principle *nulla poena sine lege* is violated. Article 62 of the law establishes that violations of the law and its regulations may be administratively sanctioned.[38] This provision violates the third paragraph of Article 14 of the Constitution since punitive sanctions can only be provided for by laws and not by regulations.

Privatization of public law. Article 66 of the law stipulates that commercial and civil law can be applied supplementarily, thus diluting the scope of public law in geothermal matters. This means the privatization of public law as occurs in the rest of the energy reform.

Violation of Article 81 of the National Waters Law to the sixth paragraph of the Constitution.[39] Article 81 of the National Waters Law regulates construction permits for exploratory wells. The sixth paragraph of Article 27 of the Constitution states that any use or exploitation of resources in the subsoil must be done through the figure of concessions and not of permits.

## 4. *Mexican Petroleum Law and the Federal Electricity Commission Law*

The 2013-2014 energy reform means razing Articles 25, 27, and 28 of the Constitution, which establish that the nation is the owner of hydrocar-

[38] Cámara de Diputados, "Ley de energía geotérmica"…, *op. cit.*, p.19.

[39] *Constitución Política de los…, op. cit.*, p. 28; *Cfr.* "Ley de Aguas Nacionales", Cámara de Diputados, 2016, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/16_240316.pdf.* The National Waters Law was amended on January 6, 2020, and May 11, 2022. Publications of the Official Gazette of the Federation of those dates. The modifications do not change the meaning of what is held here.

bons and that these should be exclusively exploited by the State through its public agencies. The concept of strategic area has changed meaning. Today, it does not imply the State's exclusive and direct exploitation of energy, but rather the prevalence of energy exploitation by private parties or by the State over the property rights of individuals, of *ejidos*, of communities and of the territories of native peoples as established in transitory Article 8 of the 2013 constitutional energy reform.

The reform proposes the elimination of any energy independence on behalf of our country, which will entail subjecting ourselves to the hegemonic US energy policy.[40]

The privatizing and denationalization model of the reform recommended by the Organization for Economic Cooperation and Development (OECD) can be summarized in three components: 1) privatization of national energy industry objectives; 2) privatization of its structures, and 3) privatization of the instruments for operation.[41]

First. The objectives of the national energy industry are privatized because Pemex and CFE are assigned corporate characteristics like those of a private company.[42] The public nature of Pemex and CFE is blurred and their objectives and those of other bodies in the sector are aligned with those of private companies —it is true that under Mexican public law there have been private companies to assist the public administration, but never in recent years have the State's main public bodies, Pemex and CFE, had the nature of a company. The objective is to extract and sell energy resources as quickly as possible so as to "maximize profit". Pemex and CFE will no longer retain their strictly public nature in order to serve as drivers of national development, but rather quasi-private companies that will not be governed by the guiding principle of safeguarding the general interest, but of private law —the principle of autonomy of will— and by the provisions of trade and foreign investment treaties.

Article 4 of both laws state that the purpose of productive enterprises is to undertake business activities. In these laws, constitutional purposes are dispensed with, but are: The State holds economic stewardship; the Nation retains the original, direct, inalienable and non-prescriptible ownership of natural resources (hydrocarbons); hydrocarbons in the subsoil are, under

[40] Contrary to what is stated herein, see: *Nos cambiaron el mapa: México ante la revolución energética…*, *op. cit.*, pp. 103 and *ss*, and Grunstein, Miriam, *De la caverna al mercado. Una vuelta al mundo…*, *op. cit.*, pp. 232-236.

[41] Bartlett Díaz, Manuel (coord.), *Estrategia urgente en defensa…*, *op. cit.*, pp. 128 and 129.

[42] Bartlett Díaz, Manuel, *Reforma energética. Un modelo privatizador*, México, self-published, 2009, pp. 33 and 34.

any circumstances, property of the Nation; individuals can intervene in the strategic area of hydrocarbons, but without presiding over the hydrocarbon industry, or the control and administration of productive State enterprises —Article 25 paragraph 4—; the modalities of property and intervention of individuals in the strategic areas are dictated by the State and must respond to national development objectives —Article 26 of the Constitution—; hydrocarbon exploration and extraction activities are matters of social interest and public policy; in other words, they are not or should not be subject to the market; on leaving the subsoil, hydrocarbons belong to the Nation because the participation of individuals in the industry is intended for the State to obtain revenues and thus contribute to the long-term development of the nation and not for individuals to obtain benefits above all else —seventh paragraph of Article 27— and hydrocarbons are not commodities but resources for national development.

Second. The structures are privatized because the organization is privatized. The new laws of Petróleos Mexicanos and of CFE build a legal system of exception. Pemex and CFE will have a specific acquisition, budgetary, and asset system different from the rest of the national public sector. A Board of Directors is created in both productive enterprises, whose "independent board members" act under different rules than those for the rest of public servants —in terms of accountability, transparency, salaries, responsibilities, and immunity—. This structure is for the State and the government to lose control over the national energy industry and for it to be guided by business goals unrelated to the State's public interest, although the Mexican President will retain his own personal control: partaking in the appointment of board members and the directors of Pemex and CFE.

The purpose of this special system —Article 1 of the Law of Pemex and of CFE— in terms of its legal nature, remunerations, acquisitions, assets, responsibilities, State dividend, budgetary autonomy, and debt, is to limit and reduce the controls that the other public administration institutions receive from other State institutions[43] (Chamber of Deputies or Federal Audit Office). Treating Pemex and CFE as institutions almost alien to the public administration under frameworks which are more in keeping with private law than with public law is to highlight their status as quasi-private companies.

[43] "Ley de la Comisión Federal de Electricidad", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LCFE_110814.pdf*; the latest reform was published on May 11, 2022, mainly to introduce the principle of gender parity in collegiate bodies provided for by law; and "Ley de Petróleos Mexicanos", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LPM_110814.pdf*.

The reform permits the creation of multiple subsidiaries and affiliates by the Boards of Administration, which will dismantle the national vision of an integrated energy industry.

The Pemex and CFE Boards of Administration assume anti-constitutional legislative powers. They are empowered to issue general energy regulations contrary to Article 73 Section X of the Constitution, which stipulates that these are the responsibility of Congress.

Third. The instruments of operation are privatized because the country's energy resources will be handed over to transnational companies by means of contracts, concessions, permits and authorizations, and these companies will obtain the main economic benefits. Energy revenues will no longer belong exclusively to the nation and will be shared with foreign interests.

The framework of the Pemex and CFE laws is to limit the importance of these institutions in the national economy, so that they can eventually disappear, and transnational companies can obtain the main benefits from the exploitation of energy resources.

### 5. *Law on the Coordinated Regulatory Energy Agencies and the Law on the National Agency for Industrial Security and Environmental Protection for the Oil & Gas Industry*

The coordinated regulatory agencies —the National Hydrocarbons Commission and the Energy Regulatory Commission— are very weak and will be unable to control the transnationals.

The Law on the Coordinated Regulatory Energy Agencies is the result of political corruption. It intends that the Ministry of Finance (SHCP) and the Chamber of Deputies lose their powers. Article 3 of the law establishes that the coordinated regulatory energy agencies may dispose of the income derived from the rights and uses, which implies that they will be exempt from paying these resources to the Federal Treasury.[44] This policy entails loss of control of the SHCP and will certainly be a source of corruption.

The appointment of commissioners to the coordinated regulatory energy agencies and the national agency for industrial security will also be a source of political corruption. The appointments are to hand out quotas among political parties.

[44] "Ley de los Órganos Reguladores Coordinados en Materia Energética", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LORCME_110814.pdf.* Last reform published on May 20, 2021.

The rules on conflicts of interest and anti-corruption measures contained therein are insufficient.

These agencies are endowed with powers that are unconstitutional because they encroach on the powers of public authorities. For example:

1. Section II of Article 22 of the Law on Regulatory Agencies empowers them to issue general administrative rules, which violates Article 89 Section I of the Constitution since regulatory power belongs to the Executive.
2. Section VI of Article 22 of the Law on Regulatory Agencies authorizes them to dispose of the income derived from the rights and uses established to finance their budget, which implies a violation of Article 74 Section IV of the Constitution since in Mexico it is the Chamber of Deputies that constitutionally determines expenditures.
3. Section XVIII of Article 22 of the Law on Regulatory Agencies enables them to issue regulations on professional service, which violates the powers of Congress —Article 73 Section X of the Constitution and Article 123 Section XIII of Paragraph B of the Constitution.

Regulatory agency commissioners are exceptional public servants who enjoy benefits that the other public servants do not have, not even the President of the Republic. These benefits violate Article 127 Section II of the Constitution.

It is contradictory that the regulatory agencies are part of the centralized public administration and at the same time are considered decentralized bodies with technical, operational, and administrative autonomy.

The Law on the National Agency for Industrial Security is part of the corruption and closed-door political agreements between the PRI and the PVEM. It is a law that will not prevent damage to the environment. The agency does not have the authority to terminate a hydrocarbons contract, license or permit for violating environmental laws.

### 6. *Fiscal and budgetary energy legislation*

The financial aspects of the energy reform were embodied in the decrees that were voted in Congress regarding: The Hydrocarbons Revenue Law, the reforms to the Federal Law of Rights and the Fiscal Coordination Law, the issuance of the new Law of the Mexican Oil Stabilization

and Development Fund, and the modifications to the Federal Budget and Fiscal Responsibility Law and the General Public Debt Law.

The Hydrocarbons Revenue Law contains two tax regimes: one for Pemex and another for private contractors.[45] The Pemex tax regime is very similar to the one that has been in effect until now because according to its regime, Pemex will continue to provide the Mexican treasury with significant amounts of tax revenue for the Federal Expenditure Budget. Moreover, this tax regime is disproportionate for Pemex compared to private companies and it is much more burdensome than the one the Hydrocarbons Revenue Law provides for private contractors, who will contribute paltry sums to the Mexican treasury.

Private contractors will not pay contributions to the Mexican treasury but rather considerations, which are to be determined as agreed *in the contracts* in each specific case. Additionally, income tax will be paid to the public treasury. However, their contributions are far from, and certainly far below, those that Pemex will have to pay.

The considerations private companies will pay to the State are not considered taxes or contributions but will be governed by the rules of private law. This legal principle, completely alien to Mexican law, violates the provisions of Article 31 Section IV of the Constitution since contributions cannot be the subject of agreements or contracts, but must be provided for by law and have at least the characteristics of generality and certainty.

The supervision of the financial aspects of the contracts regarding the considerations will not be monitored by citizens, and the terms of the audit will not be disclosed to the public during the audit process. In other words, the supervision of the administration of financial aspects of the contracts regarding the considerations will be carried out behind closed doors and will surely be a source of corruption and kickbacks.

Articles 254 to 261 of the Federal Law of Rights are repealed, and these provisions are transferred to Articles 38 to 62 of the Hydrocarbons Revenue Law. The difference now is that these contributions will not be passed on to the Federal Treasury but will be sent to the Mexican Petroleum Fund.

The Fiscal Coordination Law is amended to preserve the percentage of *ingresos por derechos* [a type of tax revenue in Mexico] assignable under the new oil revenue system. It is believed that 85.31% of the collections ob-

[45] *Diario Oficial de la Federación*, August 11, 2014…, *op. cit.*, first evening section, pp. 2-25. The quantities have been updated. The latest reform was published in the Official Gazette of the Federation on January 13, 2022.

tained from the sum of the ordinary right on hydrocarbons,[46] of the special right on hydrocarbons and the additional right on hydrocarbons will still be assignable. The difference is that the transfers will be paid into the Mexican Petroleum Fund and not to the Federal Treasury. The income tax generated by the contracts will be added to this amount, establishing an assignable coefficient of 79.73% in order to minimize the impact on the amount transferred to states for their participation in oil revenues.

The Mexican Oil Stabilization and Development Fund is a trust that will be managed by a committee comprised of federal government officials, but the provisions governing public trusts will not apply in this specific case.[47] This fund will be chaired by the Finance Minister. When this fund was established in the Constitution in 2013, the idea was to imitate the oil fund in Norway, which holds all the resources of the country's oil revenues as reserves for future generations.[48] Unlike the Norwegian case, under the Mexican secondary law of 2014, the resources that make up the Mexican Petroleum Fund will be predominantly used for current expenditure. These resources will not be assigned to guarantee the development of the nation's industrial and productive capacity and to support small and medium companies; nor will they be allocated to compensate for social and regional inequalities; and in the same way, they will not be used preferentially to finance the development of human capital.

The new 2014 Law of the Mexican Oil Stabilization and Development Fund specifies allocations to the fund on a priority basis, thus eliminating flexibility. The contributions to the fund are:

— Payment of allotments and contracts.
— Transfers to the Oil Revenue Stabilization and State Revenue Funds.
— Transfers to the Hydrocarbons Extraction Fund.
— Transfers of resources to the Federal Treasury so that oil revenues are kept at 4.7% of the Gross National Product
— Allocate resources to long-term savings.

46 "Ley de Coordinación Fiscal", *Diario Oficial de la Federación*, January 30, 2018, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/31_300118.pdf.*

47 Ramírez de la O, Rogelio, *Fondo Mexicano del Petróleo para la Estabilización y el Desarrollo*, México, Friedrich Ebert Stiftung, 2014, pp. 1-24.

48 Sovereign Wealth Funds based on the Norwegian model have been set up in various countries around the world. These funds are generally controlled by the central banks of the States and serve as an instrument for intergenerational income transfer. Except in the case of Norway, they are usually called into question because of their opacity and weak accountability mechanisms.

The law indicates that only when the balance of investments in long-term public savings is equal to or greater than 3% of the GNP of the year prior to the one in question, the resources in the fund can be used.[49] These resources will be allocated to:

— Universal pensions up to 10% of the increase from the previous year.
— Research and innovation, up to 10% of the increase from the previous year.
— Investment vehicles in oil projects (and if applicable in investments for national development, which means it is optional) up to 30% of the increase from the previous year.
— University and postgraduate scholarships, up to 10% of the increase from the previous year.

The Federal Budget and Fiscal Responsibility Law proposes to endow Petróleos Mexicanos and the Federal Electricity Commission with a special regime that grants them budgetary autonomy, removing the controls and rules associated with a budgetary process, debt management and spending control to which they had been subject.

Against the rights of workers and citizens, the General Public Debt Law establishes that Pemex's and CFE's so-called labor liabilities are to be paid from the budget. The labor liability argument has been misused to question Pemex's and CFE's financial viability, and to allude to the privileges and corruption of union leaders. However, although Pemex's and CFE's labor liabilities may be considered high compared to other public sector agencies and entities, they reflect workers' constitutional labor rights and represent relatively small amounts in comparison with, for instance, Pemex's oil revenues. As for corruption and privileges in Pemex and CFE, the solution is not to fight it by affecting workers' rights and benefits, but rather to confront it by charging union leader with any criminal acts they may have committed.

In terms of financing, it is proposed that productive State enterprises be granted additional flexibility (Section VII is added to Article 1 of the General Public Debt Law).[50] The liabilities of productive State enterprises —Pemex and CFE— are considered public debt, which implies that the

[49] *Diario Oficial de la Federación*, August 11, 2014…, *op. cit.*, first evening section, pp. 26-40. Last reform published on May 11, 2022, in the Official Gazette of the Federation.

[50] *Ibidem*, first evening section, p. 41.

large private transnational companies that enter the energy business by way of contracts will not share the risk, but only the profits, thus burdening the public treasury with Pemex's and CFE's liabilities as public debt and ultimately the Mexican people, who will pay Pemex's debt through higher taxes.

The financial aspects of the energy reform palpably show the most negative consequences of the energy reform. This consequence consists of handing over a very substantial percentage of oil revenues to foreign companies in detriment of national public finances, which will lead to an enormous fiscal void to be covered with debt, with cutbacks in public spending or with higher taxes to be paid by Mexicans.

## IV. Conclusions

The main contents of the energy reform can be characterized, *inter alia*, by the following elements:

1. *Dismantling of the State.* The Mexican State is severed by the reform and reduced to a minimum so as to favor the international market. The main financing and operating instruments of the State are suppressed or limited: *a)* Pemex and CFE meet the corporate governance criteria set by the OECD and mainly consist of managing Pemex and CFE as private companies and not public entities under State stewardship; *b)* Pemex's and CFE's exception regime for budget, debt, responsibilities, transparency, oversight or acquisitions is to ensure that the instruments of parliamentary or government control no longer apply as in the case of the branches of government and government agencies and bodies, i.e., they are evidence of the transition of Pemex and CFE to the status of quasi-private companies; *c)* the fiscal void that the reform will create as a result of the special tax regime for contractors will deprive the public treasury of resources for public spending and force the State into debt, reduce public spending or increase taxes to compensate for the tax deficit that the reform will generate; *d)* the effect on the principle of direct rule of the nation over natural resources in the subsoil —by sharing oil revenue— will imply the loss of sovereignty; and *e)* the temporary occupation of private, public and social property by transnational companies *without binding consultation with native peoples or society* implies the end of Mexicans' right to property.

2. *Privatization of public law*. This is made evident in: *a)* the end of the Calvo clause because any disputes arising from the reform will not be resolved by national courts, but by international arbitration; *b)* the protection of foreign

investments over national ones —Articles 1103 and 1110 of NAFTA— implies that Mexican public law and the property of nationals is subordinated to international trade law; *c)* the supplementary application of private law in this matter; *d)* the tax regime of contracts is not applied as a tax contribution but as a consideration governed by private law; *e)* the Mexican Petroleum Fund which is not governed by the rules for public trust, but as a *sui generis* trust outside the State controls that apply to other trusts; *f)* simulated expropriations *without the binding consultation with the native peoples and society* under the figure of temporary occupation or easements that will be carried out not to ensure public good but to satisfy the private interests of contractors; *g)* the booking that allows the nation's hydrocarbon reserves to be offered as collateral to obtain loans from international banks; *h)* the securitization of national reserves in foreign stock markets; and *i)* subjecting *ejido* and indigenous property to the purposes of the energy reform, according to transitory Article 8 of the 2013 constitutional energy reform.

3. *Reduction of the Welfare State to its minimum levels.* This characteristic is seen in: *a)* considering the rights of Pemex and CFE workers as a labor liability and not as genuine human rights; *b)* denying the right to development of peoples as provided for in Article 1 of the UN Covenant on Civil and Political Rights and the UN Covenant on Economic and Social Rights by subordinating the latter to the interests of foreign investors; *c)* subordinating the rights of native peoples to private investments because the results of consultation proceedings are not binding should the communities refuse said investments; *d)* violating the rights to the social supply of electricity and hydrocarbons because public bodies —Pemex and CFE— will not be responsible for this supply and the State will not be able to guarantee it given the number of economic agents; and *e)* reducing the content of fundamental rights to social property because this is subordinate to the preferential nature of energy-related activities.

4. *Subordination of the Mexican State to the geostrategic interests of the United States.* The energy reform was designed from abroad —by the USA and international financial organizations— to hand over the nation's energy resources to foreign interests. With this reform, the nation loses part of its natural wealth and the State abdicates its former power to exclusively harness the energy resources of the Mexican people, both this generation and future ones. The reform has been imposed by the government to benefit foreign interests and was implemented without proper consultation with the society, but through the propagandistic apparatus of the television duopoly that drowned out or silenced the voices of opposition.[51]

[51] Cabrera, Rafael, "Gastó gobierno de EPN $1,181 millones para promover la reforma energética", *Aristegui Noticias*, January 4, 2016, available at: *https://aristeguinoticias.com/0401/mexico/gasto-gobierno-de-epn-1181-millones-para-promover-la-reforma-energetica/*.

## V. Bibliography

Almazán González, José Antonio (coord.), *Exclusividad de la nación en materia de petróleo*, Mexico, Grupo Parlamentario del PRD, Cámara de Diputados, LX Legislatura, 2008.

Bartlett Díaz, Manuel (coord.), *Estrategia urgente en defensa de la nación. Política energética para que México sea potencia económica en el siglo XXI*, Mexico, Talleres Gráficos del Partido del Trabajo, 2013.

Bartlett Díaz, Manuel, *Reforma energética. Un modelo privatizador*, Mexico, self-published, 2009.

Bassols Batalla, Narciso, *Las etapas de la nacionalización petrolera*, México, Miguel Ángel Porrúa, 2006.

Becerra Ramírez, Manuel, "Aspectos legales de los yacimientos transfronterizos de petróleo y gas", in Almazán González, José Antonio (coord.), *Exclusividad de la nación en materia de petróleo*, Mexico, Grupo Parlamentario del PRD en la LX Legislatura de la Cámara de Diputados del Congreso de la Unión, 2008.

Beder, Sharon, *Energía y poder. La lucha por el control de la electricidad en el mundo*, Mexico, Fondo de Cultura Económica, 2005.

Cabrera, Rafael, *Aristegui Noticias*, "Gastó gobierno de EPN $1,181 millones para promover la reforma energética", January 4, 2016, available at: *https://aristeguinoticias.com/0401/mexico/gasto-gobierno-de-epn-1181-millones-para-promover-la-reforma-energetica/*.

Cámara de Diputados, "Ley de los Órganos Reguladores Coordinados en Materia Energética", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LORCME_110814.pdf.*

Cámara de Diputados, "Ley de Coordinación Fiscal", *Diario Oficial de la Federación*, January 30, 2018, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/31_300118.pdf.*

Cámara de Diputados, "Ley de la Comisión Federal de Electricidad", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LCFE_110814.pdf.*

Cámara de Diputados, "Ley de Petróleos Mexicanos", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LPM_110814.pdf.*

Cámara de Diputados, "Ley de Energía Geotérmica", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LEG_110814.pdf.*

CÁMARA DE DIPUTADOS, "Ley de la Industria Eléctrica", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/LIElec_110814.pdf.*

CÁRDENAS GRACIA, Jaime, *Crítica a la reforma constitucional energética de 2013*, Mexico, UNAM, 2014.

CÁRDENAS GRACIA, Jaime, "La nueva legislación secundaria en materia energética de 2014", *Boletín Mexicano de Derecho Comparado*, Mexico, UNAM, Instituto de Investigaciones Jurídicas vol. 48, No. 143, May-August 2015.

CÁRDENAS GRACIA, Jaime, *Reforma energética. Análisis y consecuencias*, Mexico, UNAM-Tirant lo Blanch, 2015.

CÁRDENAS GRACIA, Jaime, *Del Estado absoluto al Estado neoliberal*, Mexico, UNAM, 2017.

CASTAÑO GUILLÉN, Julián, *La dirección de los resultados en las empresas privatizadas*, Tesis Universidad de Extremadura, 2006.

*Constitución Política de los Estado Unidos Mexicanos*, Cámara de Diputados, 2018, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/1_270818.pdf.*

CUARÓN, Alfonso, "10 preguntas del ciudadano Alfonso Cuarón al presidente Enrique Peña Nieto", *La Jornada*, Mexico, April 28, 2014.

*Diccionario de la Real Academia Española.*

*Enciclopedia Jurídica Mexicana*, Mexico, Porrúa-UNAM, Instituto de Investigaciones Jurídicas, 2008, serie doctrina Jurídica, t. V.

GRUNSTEIN, Miriam, *De la caverna al mercado. Una vuelta al mundo de las negociaciones petroleras*, Mexico, Centro de Investigación para el Desarrollo, 2010.

INSTITUTO MEXICANO PARA LA COMPETITIVIDAD, *Nos cambiaron el mapa: México ante la revolución energética del siglo XXI*, Mexico, 2013.

INTER-AMERICAN COURT OF HUMAN RIGHTS, *Case of the Kichwa Indigenous People of Sarayaku* v. *Ecuador*, Judgment of June 27, 2012. Series C, No. 245, available at: *http://www.corteidh.or.cr/docs/casos/artículos/seriec_245_esp.pdf.*

INTER-AMERICAN COURT OF HUMAN RIGHTS, *Case of the Saramaka People* v. *Suriname*, Judgment of November 28, 2007, Series C, No. 172, available at: *http://www.corteidh.or.cr/docs/casos/artículos/seriec_172_esp.pdf.*

JALIFE-RAHME, Alfredo, *Muerte de Pemex y suicidio de México*, Mexico, Grupo Editor Orfila Valentini, 2014.

JIMÉNEZ ESPRIÚ, Javier, *Análisis a la reforma energética 2013*, Mexico, Innova, 2013.

JOHNSTON, Daniel, *International Petroleum Fiscal Systems and Production Sharing Contracts*, Oklahoma, Penn Well Publishing Company, 1994.

JOHNSTON, Daniel, *International Exploration Economics, Risk and Contract Analysis*, Oklahoma, Penn Well, 2003.

KERRY, John, "Oil, Mexico, and The Transboundary Agreement", *A Minority Staff Report. Prepared for the use of The Committee on Foreign Relations*, United States Senate, One Hundred Twelfth Congress, Second Session, Printed for the use of The Committee on Foreign Relations, Washington, D. C., December 21, 2012.

MEYER, Lorenzo, *Nuestra tragedia persistente. La democracia autoritaria en México*, Mexico, Random House Mondadori, 2013.

NOCEDA, Miguel Ángel, "Las eléctricas disuaden al consumidor. El coste de las ofertas fijas anuales presentadas por las grandes compañías a la CNMC supera hasta en 100 euros anuales a la media de los últimos cuatro trimestres", *El País*, Madrid, April 26, 2014.

PASCUAL, Carlos, *Written Testimony of Special Envoy and Coordinator for International Energy Affairs Carlos Pascual U.S. Department of State, Before the House Committee on Foreign Affairs*, Subcommittee on the Western Hemisphere United States House of Representatives, Energy and the Western Hemisphere, April 11, 2013.

RAMÍREZ DE LA O., Rogelio, *Fondo Mexicano del Petróleo para la Estabilización y el Desarrollo*, Mexico, Friedrich Ebert Stiftung, 2014.

RATHBONE, John Paul, "Peña Nieto Pledges Transformational Reform of Pemex", *Financial Times*, London, June 17, 2013.

SECRETARÍA DE GOBERNACIÓN, "Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Energía", *Diario Oficial de la Federación*, December 20, 2013, available at: *http://dof.gob.mx/nota_detalle.php?codigo=5327463&fecha=20/12/2013*.

SECRETARÍA DE GOBERNACIÓN, "Primera Sección. Poder Ejecutivo", *Diario Oficial de la Federación*, August 11, 2014, available at: *http://www.dof.gob.mx/index.php%3Fyear%3D2014%26month%3D08%26day%3D11*.

TELLO, Carlos y IBARRA, Jorge, *La Revolución de los ricos*, Mexico, UNAM, 2012.

WITKER, Jorge (coord.), *El Tratado de Libre Comercio de América del Norte. Análisis, diagnóstico y propuestas jurídicas*, Mexico, UNAM, 1993, t. I.

WITKER, Jorge, *El Tratado de Libre Comercio de América del Norte. Evaluación jurídica: diez años después*, Mexico, UNAM, 2005.

WITKER, Jorge and Hernández, Laura, *Régimen jurídico del comercio exterior de México*, 3a. ed., Mexico, UNAM, 2008.