

THE MEXICAN CONSTITUTION OF 1917. AN EARLY EXAMPLE OF A TRANSFORMATIVE CONSTITUTIONALISM?

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INTRODUCTION

Over the last two decades, Latin America has witnessed a surge in progressive, post-liberal constitutionalism, which is referred to alternatively as “social constitutionalism” (*constitucionalismo social*), “new Latin American constitutionalism” (*nuevo constitucionalismo latinoamericano*), “popular constitutionalism” (*constitucionalismo popular*), “transformative constitutionalism” (*constitucionalismo transformador*), to mention only some of the most frequently used denominations. This raises the question to which degree this new Latin-American constitutionalism is indebted to the Mexican Constitution of 1917, the first Constitution in Latin America which transcended the constitutional struggles of the 19th century between the conservative and liberal elites of the newly independent Latin American countries to create a constitution with broad popular appeal that has been considered “the most radical constitution of its time in the world.”¹ Its “rad-

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¹ Stuart Easterling, *The Mexican Revolution – A Short History 1910-1920*, Haymarket Books 2012, 129.

ical openness to the social question”² turned the 1917 Constitution into “the most enlightened statement of labour protective principles in the world to that date”³ which resonated far beyond national and even continental borders.⁴

THE GENESIS OF THE 1917 CONSTITUTION AND ITS BASIC FEATURES

The Historical Background of the 1917 Constitution: the Mexican Revolution

The Mexican Constitution of 1917 was the product of an extended period of political turmoil and civil war which became known as the “Mexican Revolution”. The initial period of the armed conflict ended with the overthrow of the authoritarian government of Porfirio Díaz (the *porfiriato*) who had ruled the country since 1876 and his replacement by the liberal Francisco I. Madero. Elected by a huge majority in October 1911, Madero quickly lost much of his political support when he proved unwilling or unable to satisfy the conflicting demands of the different groups which had backed the initial uprising against Díaz. Against the backdrop of worsening political and economic turmoil, Victoriano Huerta, the commander of the armed forces, decided to change sides and to mount his own coup against Madero. In February 1913 Francisco Madero, his brother and the Vice-President were arrested and assassinated while in custody.

Huerta’s coup opened a new stage in the unfolding of the armed conflict which more and more developed into a civil war between the traditional ruling oligarchies of Mexico City and the central areas on the one hand and groups from the northern border areas dissatisfied by the status quo on the other. Some of the rebel forces had radical, even

² Roberto Gargarella, *Latin American Constitutionalism 1810-2010: The Engine Room of the Constitution*, Oxford University Press, Oxford 2013, 100.

³ Charles C. Cumberland, *Mexican Revolution – The Constitutionalist Years*, University of Texas Press 1972, 347

⁴ Gargarella, *Latin American Constitutionalism* (supra note 2), at 100.

revolutionary ideas, notably Emiliano Zapata, who in the so-called Plan of Ayala had called for the wholesale return of lands occupied by the big hacienda owners to the Indian communities.⁵ Most of the leaders from the Northern border areas, however, did not fight for radical social reform. Some of them, like the Governor of Coahuila, Venustiano Carranza, had played an active role in provincial politics during the *porfiriato*. They rallied round the Plan of Guadalupe which called for a return to constitutional rule – their troops were aptly named the ‘Constitutionalist Army’ (*Ejército Constitucionalista*) – but did not contain a word on economic or social reform.⁶ The overthrow of the liberal Madero government and Huerta’s extensive concessions to the Church provided them with the opportunity to portray Huerta and his supporters as anti-liberal reactionaries bent on the preservation of a feudal and clerical order whose origins reached back to the days of the Spanish *conquista*. By April 1914 the tide of war began to turn against Huerta. His authority was dealt a fatal blow when he proved unable to prevent or reverse the US occupation of Veracruz, the major source of revenue for the Mexican government, in response to an alleged affront to the US government by the Mexicans through the arrest of US sailors in Tampico. In July 1914 Huerta resigned and went into exile.

Although the attempts of the old elites to restore the *ancien régime* had effectively failed with the forced departure of Huerta, the preparations for a convention to arrive at a new political settlement involved considerable wheeling and dealing among the victorious factions. Carranza, who had installed himself in the National Palace as provisional President, wanted to keep Pancho Villa and Emiliano Zapata, whose radicals plans for land reform he disliked, away from power.⁷ Villa and Zapata, on the other hand, tried their best to outmanoeuvre Carranza.

⁵ John Womack, *The Mexican Revolution, 1910-1920*, in: Leslie Bethell (ed.), *The Cambridge History of Latin America*, vol. V, Cambridge University Press 1986, 89; Jesús Silva Herzog, *Breve Historia de la Revolución Mexicana: Los antecedentes y la etapa maderista*, Fondo de Cultura Económica, 6th edition Mexico City 1969, 216-218.

⁶ Womack, *Mexican Revolution* (supra note 5), 95; Jesús Silva Herzog, *Breve Historia de la Revolución Mexicana: La etapa constitucionalista y la lucha de facciones*, Fondo de Cultura Económica, 6th edition Mexico City 1969, 19.

⁷ Easterling, *Mexican Revolution* (supra note 1), 86.

za. They succeeded to attract support from some of Carranza's own lieutenants, among them Alvaro Obregón, a rancher from Sonora who had led the Army of the North-West. He joined Villa and Zapata in the town of Aguascalientes to approve a comprehensive redistribution of land to the peasants as proposed in the Plan of Ayala.⁸ However, subsequently Carranza was able to regain the loyalty of Obregón and to push back the forces of both Villa and Zapata. In October 1915 Carranza's government was recognised by the US, and he was able to proceed with his plans for a constitutional assembly which finally opened in Querétaro on November 21, 1916.

The Querétaro Convention

The delegates to the convention had been chosen in a national election based upon universal manhood suffrage. They included a substantial number of Carranza's closest collaborators and of military men who had served as state governors under him. But also among those elected were a great number of delegates who had never taken part in the national struggle, in either a military or a civilian capacity. All in all the Convention represented a broad spectrum of political views and social concepts, from the Zapatistas to the more conservative elements, with the exception of the "old conservatives" still attached to the *porfiriato*.⁹

The draft constitution submitted by Carranza to the Convention was essentially a rewording and reorganisation of the liberal Constitution of 1857. The main innovations concerned the structure of the political system: no reelection for the President or for state governors, direct rather than indirect election for all officeholders chosen by the electorate, the elimination of the vice-presidency, and a change in the procedure for selecting the President in case of his death or resignation. The draft provided for lay education, the joint use of communal indigenous lands (*ejidos*) and protection against monopolies on articles of prime necessities. Foreigners would be barred from land ownership unless they renounced the protection of their home state. By contrast,

⁸ Womack, Mexican Revolution (supra note 5), 111.

⁹ Cumberland, Constitutionalist Years (supra note 3), 332.

the draft did not address a number of economic and social issues which had played a prominent role in the conflict, including the ownership of the subsoil, the property of religious organisations, the agrarian question, or the rights of workers and labour organisations. While the draft Constitution could be considered as an improvement over the existing Constitution in terms of clarity and organisation, in no sense could it be viewed as heralding fundamental change.¹⁰

The draft would not remain unaltered, however. In the course of the deliberations it underwent profound changes, sponsored by people like Alvaro Obregón and his supporters who understood that the new Constitution had to go some way in addressing the needs of peasants and workers if social rebels like Zapata and Villa were to be prevented from recovering lost ground. As a result, the document which emerged from the debates in Querétaro was much more radical than the mere update of the liberal constitution of 1857 which Carranza and his supporters had envisaged at the outset.

Labour reform

Labour issues were originally addressed by Article 5 of the draft constitution which prohibited forced labour unless it was imposed as a penalty by a court, forbade any contract that limited personal or political freedom and limited personal labour contracts to one year's duration. The Commission on the Constitution, the most important of the nine working committees which was charged with the task of presenting a draft of each Article, accepted Carranza's text but made an important addition: it included a provision on the working hours which limited the maximum working day to eight hours, prohibited night work of women and children in industries and introduced a compulsory day of rest in every week. It quickly became obvious in the debate, however, that while most delegates sympathized with the proposed amendments, they deemed them to be insufficient to adequately address the needs of the working population. Instead the pressure grew for the elaboration of a whole new title on social and labour rights.

¹⁰ Cumberland, *Constitutionalist Years* (supra note 3), 340/41.

By coincidence, the cabinet minister under whose jurisdiction labour issues fell, Pastor Rouaix, was a delegate at the Convention, as was his secretary in the office. Rouaix, took it upon himself to set up an informal working group, with no official mandate, which discussed proposals for the drafting of one comprehensive article on labour and social rights. During early January in 1917 the group which comprised sometimes as many as fifty delegates, drafted and redrafted a proposal which sought to compress the guarantees needed for the protection of labour into one provision.¹¹ Finally they submitted their proposal to the Convention which, after much discussion and some minor changes, approved it unanimously as the new Article 123 of the Constitution. This Article, the second longest at the time, established a mandate and framework for the enactment of labour protection legislation by the central government and the States. The main elements of this framework were a maximum working day of eight hours (six for children between 12 and 16), a weekly day of rest, protection of pregnant women, the guarantee of a minimum wage sufficient to satisfy “the normal necessities of life of the worker, his education, and his honest pleasures”, equal pay for equal work, the right to organise and to strike. Moreover, the article stipulated doubly pay for overtime and required the installation of proper safety devices in the working place, the furnishing of adequate housing at low costs and schools when the enterprise was in an isolated area, the responsibility of the employer for work-related accidents and illnesses, provided for a procedure for settling conflicts between employers and employees through special employment tribunals and encouraged the formation of mutual insurance societies and cooperative housing organisations.

At that stage, the Convention had already come under severe pressure in meeting the deadline set for the completion of its work. According to the schedule fixed by Carranza at the beginning of the constitutional process, the Convention was due to finish its work

¹¹ Many years later, Rouaix would publish his memories of the Constitutional Convention in Querétaro and his role in the deliberations on the central provisions of the constitutional text, see Pastor Rouaix, *Génesis de los artículos 27 y 123 de la Constitución política de 1917*, Biblioteca del Instituto Nacional de Estudios Históricos de la Revolución Mexicana, México 1961.

until January 31, 1917. But by mid-January only half of the Articles in Carranza's draft constitution had come before the Convention, and of those only 80 percent had been approved. On January 14, the Congress began to meet twice a day instead of once; in addition, the Committee of the Constitution introduced the practice to present whole blocks of the new Constitution to the Assembly, and the delegates in turn voted on as many as six or eight Articles simultaneously.¹²

Land reform

In these circumstances, the most significant of all constitutional provisions, i.e. those on property and property rights, received less attention than did others. The original draft Article 27 made only few additions to the relevant provisions of the 1857 Constitution. It limited public ownership of real estate, confined corporate property to that needed for its direct operations, barred any church or religious organisation from owning or managing any property other than that intimately related to its religious functions, and provided for expropriation on the ground of public utility. Other particularly pressing issues, like those concerning land reform, the public control of the subsoil and foreign ownership, were barely addressed at all.¹³

The draft fell far short of the expectations of a substantial majority of delegates. However, faced with severe time restraints, the Commission on the Constitution decided to use the technique it had applied to the redrafting of the Article on labour protection once again. As a consequence Pastor Rouaix again volunteered to chair an unofficial committee to work on the reexamination of the concepts of property and agrarian reform. His committee worked doggedly on the new draft Article for about ten days and presented its proposal on January 25 to the Committee of the Constitution. The Commission used the proposal as a basis for its own discussions but expanded upon it. On January 29 the new draft Article 27 was submitted to the Convention.

¹² Cumberland, *Constitutionalist years* (supra note 3), 348.

¹³ Cumberland, *Constitutionalist years* (supra note 3), 351.

After a mostly uncontroversial debate of eight hours the Article was adopted by unanimous vote.¹⁴

Article 27 was widely seen, then and later, as the most progressive provision of the whole constitution.¹⁵ Together with Article 123, it most clearly showed the basic shift which had taken place in Mexican constitutional thought since the beginning of the revolution: while the members of the Convention stuck to many of the liberal precepts in the 1857 constitution, especially with regard to the structure of the political system – federal system, separation of powers, bicameral legislature, civil and political rights guaranteed – they moved decisively beyond the confines of 19th century liberalism by accepting as a fundamental assumption the positive role of government in social and economic affairs.¹⁶

In particular, Article 27 marked a radical change in the concept of property rights, clashing with most traditional doctrines on the matter. Property rights were subordinated comprehensively to the needs of society. All big land holdings (*latifundia*) were subject to expropriation for the purpose of creating small private holdings or community properties (*ejidos*); towns, villages and communities that lacked lands had a right to receive them through either restoration or dotation. Any land expropriated for the purpose of establishing agricultural communities were to be compensated on the basis of the declared tax value, and the prior owner was obliged to accept twenty-year, five percent bonds in return.

Equally important, the Mexican nation declared its direct dominion over all subsoil deposits, including petroleum and all hydrogen carbides, solid, liquid, or gaseous. National ownership of these deposits was to be inalienable and imprescriptible, and concessions for exploitation could be granted only by the national government to individuals or corporations operating under Mexican law. The right of ownership was restricted to Mexicans; foreigners could acquire ownership rights

¹⁴ Cumberland, *Constitutionalist years* (supra note 3), 352.

¹⁵ Silva Herzog, *La etapa constitucionalista* (supra note 6), 258: “El artículo 27 que fue aprobado por unanimidad es, sin duda, el más avanzado de la Carta Magna vigente.....”

¹⁶ Cumberland, *Constitutionalist years* (supra note 8), 359.

only if they solemnly renounced the aid of their governments in case of difficulty. Failure to keep this promise would be sufficient justification for confiscation. New foreign investments were to be subjected to stringent conditions. In a display of their “deadly fear of wealth and vested interest”,¹⁷ the delegates also imposed stringent limitations on the ownership of domestic corporations and entities of any kind: churches, of whatever denomination, could not own or invest in real estate of any kind, and public institutions as well as businesses could own only property which was closely related to their function. In addition, the national government was authorized to revise or nullify any concession or contract made after 1876 (i.e. the year of Díaz’ accession to power) which had as its purpose or consequence the creation of a monopoly over land, water or natural wealth.

The Aftermath of Querétaro

The last task of the Convention consisted in the adoption of the transitory provisions. These provided for the immediate publication of the new Constitution, elections for President and Congress in the near future and authorized Carranza to issue the necessary decrees for the installation of the new government with a special session of Congress and the inauguration of the new President on May 1, 1917. In addition, the transitory provisions provided for the direct application of the bases established in the Constitution with regard to agrarian and labour reform until such time as the national and state governments passed legislation on these matters. On the afternoon of January 31, 1917, the Convention finished its work by swearing, in the presence of the First Chief Carranza, allegiance to the new Constitution. It was published in the *Diario Oficial* of the Federation on February 5 and entered into force – save the provisions on the election of the federal President and Congress and of the governors and legislatures in the States, which became effective immediately – on May 1, 1917.

The adoption of the new Constitution, however, did not mark the end of the era of armed conflict and political instability. It would take

¹⁷ Cumberland, *Constitutionalist years* (supra note 8), p. 354.

another decade before bloodshed and violent revolts finally subsided. During this period the bases for the post-revolutionary state were gradually created, by co-opting the new *caudillos*, i.e. the leaders of the trade unions and the agrarian leagues, into a corporatist political and social order and by creating a revolutionary mythology.¹⁸ Obregon's successor as President, Plutarco Elías Calles, took the historic decision to "institutionalize" the Revolution by founding the National Revolutionary Party – later to be redesignated as the Institutional Revolutionary Party (*Partido Revolucionario Institucional – PRI*) – which would put forward the victorious candidate at any presidential election for the rest of the twentieth century.¹⁹

While the principle of no-reelection was thus nominally reaffirmed, Calles himself succeeded in perpetuating his rule by ruling through proxy. It was left to the administration of Lázaro Cárdenas (1934-1940) to give the self-perpetuating, one-party state its definitive shape. Proxy rule through stooges which had been the preferred instrument of his predecessors to perpetuate their powerful position would no longer be accepted. The Mexican President would be all-powerful, but once his six years in office had been completed, he would be required to step down for good. While he would be given the opportunity to select his successor, this choice would have to be made in consultation with the bosses of the various branches of the party – agrarian, labour, military and popular – so as to arrive at an internal consensus which would also reflect the mood of the party's grassroots and of the country at large.²⁰

Cárdenas also executed the legacy of the revolutionary period in other important respects. He made an energetic effort to implement the social provisions of the 1917 Constitution through renewed agrarian reform which led to the massive redistribution of agrarian lands to small-holdings, co-operative profit sharing farms and *ejidos*, i.e. the traditional Indian communal holdings in which the title to land was

¹⁸ Easterling, Mexican Revolution (supra note 1), 140.

¹⁹ Jean Meyer, Mexico: revolution and reconstruction in the 1920s, in: Leslie Bethell (ed.), The Cambridge History of Latin America, vol. V (note 5), 155, at 169.

²⁰ Edwin Williamson, The Penguin History of Latin America, Penguin Books, Revised edition 2009, 399.

held by the community which then leased out lands to individual communities. In another important step, Cárdenas nationalized the oil industry, thus putting an end to the meddling of foreign oil companies in Mexican affairs and giving meaning to the claims of ownership of the Mexican State to the subsoil enshrined in the 1917 Constitution.²¹

TRANSFORMATIVE CHARACTER OF THE MEXICAN CONSTITUTION

*The concept of transformative constitutionalism
in the Latin American context*

It is only a short while ago that “transformative constitutionalism” has emerged as a distinct theoretical concept for analysing constitutions. In his seminal article “Legal Culture and Transformative Constitutionalism” Karl E. Klare defined transformative constitutionalism as

“a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large scale social change through nonviolent political processes grounded in law.”²²

Klare used the concept as a tool to analyse, and to better understand the peculiar characteristics of the South African constitution. This is clearly a constitution which was drafted with the firm intention of breaking with a racist and repressive past and was understood as such by all those involved in its interpretation, implementation and enforcement.²³ Thus in Klare’s concept of transformative constitution-

²¹ Alan Knight, Mexico c. 1930-1946, in: Leslie Bethell (ed.), The Cambridge History of Latin America, vol. VII, Cambridge University Press 1990, 3, at 18 ff.

²² Karl E. Klare, Legal Culture and Transformative Constitutionalism, 14 South African Journal on Human Rights 146, at 150 (1998).

²³ See *S v Makwanyane* 1995 (3) SA (CC) para 261 (S Afr.): “The South African constitution ...represents a decisive break from, and a ringing rejection of, that part

alism, enactment, interpretation and enforcement of the constitution are all directed towards the end of transforming a country's political constitution. In other words, the drafters of the constitution, the legislators, and the courts, in particular the Constitutional Court, all share the commitment to transformation. Other authors have applied the concept to cases in which one or several of these elements were missing, namely those cases in which the constitution does not contain any clear transformational mandate and the courts, i.e. in particular the Supreme Court or the Constitutional Court, undertake the ambitious transformation project in the absence of a nationally defining moment and without legitimacy from the constitutional text.²⁴

The concept of transformative constitutionalism also has gained currency in Latin America recently. It is used by some authors with regard to the phenomenon which has become known as “new Latin American constitutionalism” (*nuevo constitucionalismo latinoamericano*, NCL). It seems that the term was introduced in the Latin American debate by the sociologist Boaventura de Sousa Santos, who qualifies the recent new Latin American constitutions as “transformative” because they propose inclusive societies capable of bringing democracy and benefits to traditionally excluded sectors of Latin American societies by promising some level of rights and welfare to all.²⁵ In building upon his analysis Rodrigo Uprimny describes the new Latin American constitutionalism as

“aspirational or transformative with a strong egalitarian matrix. Indeed, it seems clear that the constitutional processes sought to deepen democracy

of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalist, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.”

²⁴ See Moshe Cohen-Eliya, *The Israeli Case of a Transformative Constitutionalism*, in: Gideon Sapir/Daphne Barak-Erez/Aharon Barak, *Israeli Constitutional Law in the Making*, Hart, Oxford 2013, 174 with regard to Israel and the Israeli Supreme Court, especially in the era of Chief Justice Aharon Barak.

²⁵ Boaventura de Sousa Santos, *Refundación del Estado en América Latina: Perspectiva desde una Epistemología del Sur*, Instituto Internacional de Derecho y Sociedad, Lima 2011, at 107, quoted by Rodrigo Uprimny, *Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos*, in: César Rodríguez Garavito (ed.), *El derecho en América Latina: Un mapa para el pensamiento jurídico del siglo XXI*, 109, at 123.

and combat social, ethnic and gender exclusion and inequality. In that sense, most of the reforms...led to texts that are forward-looking rather than backward-looking. Rather than trying to codify the existing power relationships, the constitutions outline a model of society to build going forward.”²⁶

The precise scope of the concept, however, remains unclear. While some comparatists include in the NCL all new constitutions and major constitutional reforms which have taken place in Latin America since the return of democracy at the end of the 1980s,²⁷ others apply the term more restrictively and reserve it for those constitutions which openly claim to have inaugurated a new political and constitutional era that in key aspects is fundamentally different from other forms of contemporary constitutionalism, and especially from post-war constitutionalism in Europe.²⁸ But even those who propose to apply the notion of new Latin American constitutionalism in a broader way recognise that there are important differences between the various national constitutional processes and that it is possible to distinguish the more transactional or consensual processes that seek to correct the defects of the existing institutions while retaining some of their traditional elements from the more foundational constitutional processes that consciously try to make a break with the past.²⁹ There is a general consensus that the Venezuelan constitution of 1999, the constitution of Ecuador of 2008 and the constitution of Bolivia of 2009 belong to this core group of transformative Latin American constitutions.³⁰

²⁶ Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 *Texas Law Review* 1587, at 1600 (2011).

²⁷ Uprimny, *Transformaciones constitucionales recientes* (supra note 25), 109.

²⁸ Pedro Salazar Ugarte, *El nuevo constitucionalismo latinoamericano (Una perspectiva crítica)*, in: Luis Raúl González Pérez/Diego Valadés (eds.), *El constitucionalismo contemporáneo*, Universidad Nacional Autónoma de México, México 2013, 345, at 350.

²⁹ Uprimny, *Transformaciones constitucionales recientes* (supra note 25), 127.

³⁰ Roberto Viciano Pastor/Rubén Martínez Dalmau, *Fundamento teórico del nuevo constitucionalismo latinoamericano*, in: Roberto Viciano Pastor (ed.), *Estudios sobre el nuevo Constitucionalismo Latinoamericano*, Tirant Lo Blanch, Valencia 2012, 11, at 34-35; Salazar Ugarte, *Nuevo constitucionalismo latinoamericano* (supra note 28), 350; Uprimny, *Transformaciones constitucionales recientes* (supra note 25), 127.

Popular involvement in the constitution-making process

These constitutions share a number of basic characteristics which set them apart from other recent Latin American constitutions and which can be used to identify the defining criteria of the NCL. All three constitutions emerged from constitutional processes which responded to a “constitutional moment”, i.e. the need to establish new bases for the state after the existing political and economic institutions had largely been discredited by a corrupt and self-serving elite.³¹ This was done through constitutional processes relying heavily on the active involvement of the people: a popular referendum on the issue whether the existing constitution needed to be replaced by a new one, the popular election of the members of the constituent assembly and the final approval of the constitutional document drafted by the assembly in a national referendum.³²

The 1917 Mexican Constitution clearly was born out of such a constitutional moment, namely the profound constitutional crisis which had resulted from the breakdown of the dictatorship of Porfirio Díaz and the failed attempt to replace it by a liberal government on the basis of the 1857 Constitution. These events triggered numerous conflicts and divisions also in the rebel camp, with people like Pancho Villa and Emiliano Zapata vehemently opposing a restoration of the liberal 1857 Constitution and pushing for radical reform, especially in the agrarian sector. The conflicts only started to calm down when Venustiano Carranza, then one of the chiefs of the rebels and head of the so-called Constitutionalist Army (*Ejército constitucionalista*), decided to call a Constitutional Convention.³³ As to popular involvement, no prior constitutional process in Mexico or elsewhere in Latin America had managed to mobilize mass support on such a huge scale. While the Convention, when it was finally called, was composed mainly of

³¹ Viciano Pastor/Martínez Dalmau, *Fundamento teórico* (supra note 30), 36; Salazar Ugarte, *Nuevo constitucionalismo latinoamericano* (supra note 28), 353.

³² Javier Cousu, *Las Democracias Radicales y el “Nuevo Constitucionalismo Latinoamericano”*, 8, at: http://www.law/yale/edu/documents/pdf/sela/SELA13_Cousu_CV_Sp_2014/04/20.pdf.

³³ Gargarella, *Latin American Constitutionalism* (supra note 2), 98.

representatives of the conservative political faction, namely Carranza's group and the more accommodated sectors of society, it was the culmination of a revolutionary process marked by unprecedented social mobilization and radical reform debates.³⁴ This was particularly true for the Aguascalientes Convention, the main antecedent of the Querétaro Convention, which claimed to be the first of its kind in the history of Mexico to legislate according to the actual needs of the Mexican people. The Aguascalientes Convention defied the power of Carranza by proclaiming that sovereignty resided in the armed people.³⁵ There is little doubt that the presence of representatives of hitherto subordinated groups, in the run-up to the Constitutional Assembly as well as in and outside that Assembly itself, plays a crucial role in explaining and understanding the emergence of debates on the "social question", which had not appeared before in any other constitutional assembly in Latin America.³⁶ In the words of the Deputy Pastor Rouaix, who, as has already been mentioned, contributed more than anyone else to the radical agrarian reform which became one of the hallmarks of the Constitution, the Convention represented the "genuine voice of the Mexican people", including "artisans and peasants, local and reputed professionals, and improvised military officers..., all of them completely inexpert in the Congressional affairs."³⁷ This diversity of represented social interests in the Assembly reflected an unprecedented popular mobilization at the height of the Mexican revolution: more of the population, especially among the lower social classes, was mobilized and participating in politics than anywhere else in Latin America at the time.³⁸ And the popular organisations which emerged during the revolutionary era especially in the peasant and labour sector would not

³⁴ Alain Knight, *The Peculiarities of Mexican History: Mexico Compared to Latin America, 1821-1992*, 24 *Journal of Latin American Studies*, Quincentenary Supplement: *The Colonial and Post Colonial Experience. Five Centuries of Spanish and Portuguese America* (1992), 99, at 130; Easterling, *Mexican Revolution* (supra note 1), 141.

³⁵ Gargarella, *Latin American Constitutionalism* (supra note 2), 99-100.

³⁶ Gargarella, *Latin American Constitutionalism* (supra note 2), 103.

³⁷ Pastor Rouaix, *Génesis de los artículos 27 y 123 de la Constitución política de 1917*, Biblioteca del Instituto Nacional de Estudios Históricos de la Revolución Mexicana, México 1959, 61, as quoted by Gargarella, *Latin American Constitutionalism* (supra note 2), 104.

³⁸ Easterling, *Mexican Revolution* (supra note 1), 141.

simply fade away with the end of the revolutionary period. They would persist and keep an eye on the fulfillment of the promises of agrarian and social reform included in the Constitution. During the presidency of Lázaro Cárdenas (1930-40), Mexico's greatest post-revolutionary social reformer, they would play a major role.³⁹

*The material contents of transformative constitutionalism:
social equality, diversity and rehabilitation of the Indian*

In terms of constitutional contents, the main question which the new Latin American constitutions, and especially those of a transformative character, try to answer is how best to tackle the problem of extreme social inequality.⁴⁰ Two themes within this vast and complex area are particularly relevant to any analysis of the transformative character of the new Latin American constitutions: the relationship between the state and the economy, especially the market, and the issue of diversity and autonomy of ethnic communities.⁴¹

The rehabilitation of the State and the return of economic nationalism

With regard to the first issue, the transformative constitutions openly declare their adherence to a post-Washington consensus agenda, which embraces and promotes alternative forms of economic production and assigns the state a central role in the management of the economy. The 2009 Constitution of Bolivia provides a good example. The fourth part of the Constitution, which comprises more than one hundred Articles (Articles 306 to 409), deals with the structure and organisation of the economy. It constitutes a powerful rejection of the neoliberal policies of previous Bolivian governments. The Constitution commits Bolivia to the model of a "plural economy" (*economía plural*), which is in fact a mixed economy based on state, private, communitarian and cooperative forms of ownership and production (Article 306). In

³⁹ See infra c).

⁴⁰ Roberto Gargarella/Christian Courtis, El nuevo constitucionalismo latinoamericano: promesas e interrogantes, CEPAL, Santiago de Chile 2009, 11; Viciano, supra note 16, at 21.

⁴¹ Uprimny, Transformaciones constitucionales recientes (supra note 25), 127.

principle, all these forms of ownership enjoy equality before the law (Article 311). However, the private accumulation of economic power to an extent which threatens the economic sovereignty of the state shall not be permitted (Article 312). Ownership of land is subject to particularly stringent limits. The state recognises and protects individual, collective and communitarian property as long as it fulfills a social or social-economic purpose (Article 393). Certain forms of land use which are collectively designated as *latifundio* are prohibited. The prohibition extends to the unproductive holding of land as well as to land use based on servitude, slavery or semi-slavery in labour-relations, and the ownership of land in excess of a maximum surface of 5,000 hectares (Article 398). The holding of *latifundios* and the failure to fulfill a social-economic function constitute grounds for the reversion of the land into the property of the Bolivian people. Unlike expropriation which may only proceed in cases of public necessity and utility and upon prior payment of a fair compensation, reversion of land is not subject to compensation (Article 400): it is a sanction for the unproductive use of land. In no circumstances may foreigners acquire lands of the state (Article 396).

The constitutional crisis in Bolivia which swept Evo Morales into the presidency and paved the way for the adoption of the 2009 Constitution had been triggered by mass protests against the economic policies of Morales' predecessors. The government liquidated loss-making state industries and allowed foreign companies to acquire shareholding and management control of formerly state-owned firms in return for injecting fresh capital. As a result of these policies, foreign investors achieved a dominant position not only in the communications, transport and electricity sectors, but were also able to take over the oil and gas industries, the main symbols of national economic sovereignty. This development did much to trigger mass protests which led to the downfall of the old regime.⁴² Not surprisingly, therefore, the 2009 Constitution stresses the principle of national sovereignty in all economic matters. Bolivian investment shall be given priority

⁴² Benjamin Kohl/Linda Farthing, Material constraints to popular imaginaries: The extractive economy and resource nationalism in Bolivia, 31 *Political Geography* 225, at 229 (2012).

over foreign investment. Every foreign investment shall be subject to Bolivian jurisdiction, laws and authorities, and nobody may invoke an exceptional situation, or have recourse to diplomatic protection, in order to obtain a more favorable treatment. The state shall not accept demands or conditions of domestic economic policy imposed by other states, foreign or Bolivian banks, or foreign financial institutions or multilateral bodies (like the IMF or the World Bank) or transnational companies (Article 320).

The principle of full national sovereignty acquires particular importance with regard to the country's natural resources and hydrocarbons. The constitution commits the Bolivian state to taking control of the exploration, exploitation, industrial use, transport and trade of natural resources through public, cooperative or communitarian companies, which may in turn contract private enterprises or establish mixed enterprises. The state may also enter into joint ventures with legal entities, Bolivian or foreign, for the exploitation of natural resources, but must make sure that the resulting benefits are reinvested in the country. The organisation of the oil and gas industries, the main symbols of Bolivian economic nationalism, is even more tightly regulated. According to Article 359, the state, on behalf of the Bolivian people, owns the entire production of hydrocarbons and is the only authority entitled to sell it. The production of the hydrocarbons is the responsibility of *Yacimietos Petrolíferos Fiscales Bolivianos* (YPFB), a public law company which acts as the operative arm of the state under the guidance of the competent ministry (Articles 361, 363). YPFB may sign service contracts with public or private companies, Bolivian or foreign, under which these companies may perform services in the exploration or extraction of the hydrocarbons in exchange for compensation or payment of their services. These contracts must obtain the prior and express approval of the Legislative Assembly (Article 362). Every foreign enterprise which carries out activities in the oil or gas sector in Bolivia must submit to the authorities and laws of the country. No foreign court or jurisdiction shall be recognised in any circumstances, and the recourse to international arbitration or to diplomatic protection shall not be accepted even in exceptional cases (Article 366).

The parallels between the Bolivian Constitution and the 1917 Mexican Constitution are hard to miss. Both constitutions are built on the principle of unfettered national sovereignty in the economic sphere. Mexican history up to the Revolution had been marked by frequent foreign intervention, which in two cases – the war with the United States in 1846-8 and the occupation by France 1863-66 – took the form of outright invasion.⁴³ Not surprisingly, the drafters of the 1917 Constitution adopted a position which was radically hostile to interventions by foreigners into the political and economic affairs of Mexico. With regard to the economic system, the ownership of the lands and waters within the boundaries of the national territory was vested in the Nation which has the sole right to transmit title thereof to private persons, thereby constituting private property (Article 27, paragraph 1). The public ownership extends to all natural resources of the continental shelf and the submarine shelf of the islands, including petroleum and all solid, liquid and gaseous hydrocarbons (Article 27 paragraph 4). Public ownership of these resources is inalienable and imprescriptible; their exploitation or appropriation by private companies or individuals may only be undertaken on the basis of concessions granted by the federal government. In principle, only Mexicans or Mexican companies may acquire ownership of land or obtain a concession for the exploitation of natural resources belonging to the Nation. By contrast, the acquisition of such titles or concessions by foreign nationals is subject to compliance with the so-called Calvo clause⁴⁴ which requires them to declare before the Ministry of Foreign Relations that they consider themselves nationals with respect to such property and agree not to invoke the protection of their governments in relation thereto. If they violate this agreement, the acquired property is forfeited to the Nation.

⁴³ Knight, Peculiarities of Mexican history (supra note 34), 125.

⁴⁴ Named after the Argentine lawyer and diplomat Carlos Calvo (1824 – 1906). The Calvo clause was designed to protect the jurisdiction of weaker nations against the overwhelming economic and military power of European states and the US by providing that in cases of disputes arising out of concession contracts with foreign nationals the foreigners relinquished the right to request the diplomatic and judicial protection of their national state and agreed to have the dispute settled by local tribunals. On the clause see Donald R. Shea, *The Calvo Clause – A Problem of Inter-American and International Law and Diplomacy*, Minneapolis University Press, Minneapolis 1955.

Social rights as a means to create inclusive societies

The central role of the state in the exploitation of natural resources and the management of the economy is meant to provide the state with the resources needed to foster economic development, combat poverty and eliminate the root causes of social inequality. This concept requires an effective guarantee of a number of central social and economic rights which form the basis of the economic empowerment of individuals in general and of vulnerable groups in particular. The new Latin American constitutions provide ample guarantees of this kind. The Ecuadorian Constitution, for example, differs from many other constitutions in that it puts the “rights of the good way of living”, i.e. those fundamental rights which are traditionally categorized as social, economic and cultural rights, at the top of the human rights chapter: the right to water and food (Articles 12, 13), the right to a healthy environment (Articles 14, 15), the right to culture and science (Articles 21 to 25), the right to education (Articles 26 to 29), the rights to habitat and housing (Article 30, 31), the right to health (Article 32), and the right to work and social security (Articles 33, 34). These rights, which are applicable to all, are then followed by special rights which have been specifically designed to protect particularly vulnerable individuals and groups and to facilitate their integration into society: rights for the elderly (Articles 36 to 38), pregnant women (Article 43), children and adolescents (Articles 44 to 46), persons with disabilities (Articles 46 to 49), persons suffering from serious illness (Article 50), persons deprived of their liberty (Article 51) and consumers (Articles 52 to 55).

Similarly, the Bolivian constitution is notable for the meticulous care given to social rights, in particular the right to health and social security (Articles 35 to 45), the right to work and employment (Article 46 to 55), and the right to education (Article 77 to 97); on the other hand, more traditional rights, like the right to property, are given rather short shrift (Articles 56, 57). The right to property, in particular, is only protected as long as it performs a social function or, in the case of private property, is not detrimental to the collective interest (Article 56). By contrast, the rights to health and education are guaranteed in a broad and detailed manner. For example, Article 41 expressly stipu-

lates that the right of access to medicines shall not be restricted by intellectual property and trade rights, and that the state shall encourage the domestic production of generic drugs. Education is identified as a fundamental function and priority financial responsibility of the state (Article 77). The state guarantees the access to education of all citizens in conditions of full equality (Article 82). The Bolivian Constitution also protects the rights of particularly vulnerable groups of persons. Special attention is given in this regard to the rights of children and adolescents (Articles 58 to 61), of families (Articles 62 to 66), senior citizens (Articles 67 to 69), persons with disabilities (Articles 70 to 72), persons deprived of liberty (Articles 73, 74) and users and consumers (Articles 75, 76). All rights are directly applicable and protected by equal guarantees. They can be enforced by a variety of legal remedies expressly enshrined in the Constitution, namely the protection in defense of liberty, the action of constitutional protection, the action of protection of privacy, the action of unconstitutionality, the action of compliance, and the popular action (see Article 109).

Social and economic rights also occupy a central role in the Mexican Constitution. It has already been noted that the Constitution became famous for its Article 123 which constituted the most elaborate and comprehensive guarantees of workers' rights in the world to that date.⁴⁵ Nor were these rights framed in vague terms which would make them unenforceable in the courts. Instead Article 123 fixes detailed standards for the labour legislation to be enacted by Congress, including the maximum number of working hours per day, the prohibition of child labour, the maximum number of working days per week, the minimum wage, the principle equal pay for equal work, the protection of pregnant female workers, the right to strike and the right to lock workers out. The comprehensive protection which the drafters of the Constitution meant to provide to workers is evident in the fact that they are not directed exclusively or even primarily to the state, but to private persons and companies. They have a direct impact on private law relations that are not consistent with the principles and standards defined in Article 123. Employment contracts which impose an exces-

⁴⁵ See supra note 1.

sive workload on the employee, fix wages that are not remunerative or permit the retention of wages as a fine are null and void by virtue Article 123 section XXVII.

Nor did the Constitution of 1917 stop there. It also granted express constitutional protection to the right of peasant communities to collectively and individually own their communal lands (Article 27), thus granting one of the key demands of the revolutionaries of the rural areas. Agrarian reform was the major structural achievement of the Revolution.⁴⁶ Under the original provision enacted in 1917 the Mexican state was under an obligation to give land to any peasant community which lacked lands and asked for them. In order to provide for enough land to be distributed, all *latifundia* were subject to expropriation for the purpose of creating small private holdings or community properties. The national and the state governments were authorized to fix the maximum size of any holding and to divide the excess land according to an established formula. In order to avoid the reappearance of large land holdings, the Constitution prohibited the peasant communities and their members who owned these communal lands (*ejidos*) from selling or renting them or pledging them as collaterals for loans. They were only given the options of either using the lands themselves or abandoning them and moving elsewhere.⁴⁷

From cosmic race to plurinational state: national identity
in post-colonial times

If there is one area where the new constitutions, especially those of Ecuador and Bolivia, have broken new ground, it is with regard to the seemingly intractable issue of a post-colonial identity in societies still fraught with the racial divisions of the past. The desire to finally leave behind the disastrous legacy of colonialism has led the drafters of the Ecuadorian and the Bolivian constitutions to embrace a state model which abandons the pretensions to homogeneity characteristic of the traditional nation state in favor of a comprehensive recognition

⁴⁶ Knight, Peculiarities of Mexican History (supra note 34), 130.

⁴⁷ Cumberland, The Constitutionalist Years (supra note 3), 353.

of the diversity and equality of the various groups composing these societies.⁴⁸ The Ecuadorian Constitution was the first to expressly recognise the “plurinational” character of the state (Article 1) where the “different communities, peoples and nations” live together peacefully. These comprise, according to Article 56 of the new Constitution, the indigenous communities, peoples and nations, the Afro-Ecuadorian people, and the back-country people living in the inland coastal region. They shall have the right to freely maintain and develop their identity, to practice their culture and language, to retain their ancestral lands and to create and apply their own legal system or customary law. Their practices of managing biodiversity and the natural environment shall be protected, and they shall be consulted before any legislative measure which might affect their collective rights is adopted (Article 57).

The Bolivian Constitution follows the same path. Article 1 of the 2009 Constitution defines Bolivia as a plurinational state (*Estado Plurinacional*) and thus openly acknowledges the existence of not one, but various nations living on Bolivian territory, transcending the traditional notion of the state as the political organisation of *the* nation. The “nations” to which the term “plurinational” refers are primarily the indigenous communities living in Bolivia. Their recognition as peoples and nations in the new Constitution is based on the rejection of the legacy of colonialism referred to in the Preamble of the Constitution, but also of the “republican” and “neoliberal” state models with their perceived traditions of assimilationist policies and disregard for the special traditions and needs of Bolivia’s indigenous peoples. The new Constitution has framed the term “indigenous originary peasant nations and peoples” for these groups. The indigenous originary peasant nations and peoples are defined through their existence already in pre-colonial times, the ancestral possession of their territories, a shared history, culture and language, and their own legal, political, social and economic institutions (Articles 2, 289).

⁴⁸ Alberto Acosta, El complejo desafío de la construcción del estado plurinacional. Reflexiones para el debate, in: Katu Arkonada (ed.), Un Estado, muchos pueblos – La construcción de la plurinacionalidad en Bolivia y Ecuador, Icaria editorial, Barcelona 2012, 7, 11-14.

Article 2 of the Constitution grants the indigenous groups thus defined the right to free determination, which has to be exercised “within the framework of the unity of the state”, and thus does not include the right to secession. Below this threshold, however, the right to free determination provides the indigenous-peoples with far-reaching autonomy rights which include the right to self-government, to their culture, to the recognition of their institutions and to the consolidation of their territories.

But the Constitution does not only protect the autonomy of the indigenous communities within the framework of the Bolivian state. It also integrates their values, practices and beliefs into mainstream culture. Article 5 elevates the 36 indigenous languages to the rank of official languages of the state. The central government and the departmental governments must use at least one of them alongside Castilian, depending on the language preferences of the population in the territory in question. The wiphala, the square emblem which represents the native peoples of the Andean regions of Bolivia, forms part of the state symbols (Article 6); and the indigenous values, like the cardinal virtues “don’t be lazy, don’t be a liar, don’t be a thief”, are recognised as the ethic-moral principles constituting the basis of society and the state, together with the secular principles of equality, dignity, inclusion, solidarity, or social justice (Article 8). The cosmovisions and the myths of the indigenous peoples are recognised as forming part of the identity of the state (Article 100). The state gives special protection to the special indigenous forms of knowledge as well as to their art and popular crafts (Articles 100, 101).

By contrast, the protection of indigenous communities in the 1917 Mexican Constitution was much more indirect. The text of the Constitution of 1917 was silent on the “Indian problem”. While it embraced important goals and aspirations advanced by the indigenous people of Mexico, namely their claim to constitutional protection for their communal lands in Article 27, it studiously avoided any explicit reference to the existence of indigenous communities which could have been interpreted as granting a distinct constitutional status to those groups. The expectation at the time was that the needs of Mexico’s indigenous communities would be best served by their full integration

in the mainstream of Mexican society through a policy of assimilation. It was only during the 1980's that this official policy was seriously questioned. In line with recent international developments, President Salinas in 1989 created the National Commission of Justice for the Indigenous People (*Comisión Nacional de Justicia para los Pueblos Indígenas de México*) and asked it to submit a proposal for a constitutional amendment establishing the legal basis for a more effective protection of Mexico's indigenous peoples. The Commission came up with a proposal which for the first time officially recognised the pluriethnic composition of the Mexican nation and required the Federation, the States and the municipalities to enact within their respective competences the laws necessary for the protection of the languages, cultures, customs and specific forms of social organisation of the indigenous communities. An amendment to this effect was finally adopted by the Mexican Congress and went into effect on January 28, 1992. A constitutional amendment adopted in 2001 shifted the guarantee of indigenous autonomy from Article 4 to Article 2 and complemented it with an extensive catalogue of political, economic, social and cultural rights of the indigenous communities which incorporates the key guarantees of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries into Mexican law.⁴⁹

Despite this seemingly conservative approach to the Indian question, it should not be overlooked that the 1917 Constitution constituted a major progress also for indigenous peoples in Mexico compared to their situation in other Latin American countries at the time. The Constitution addressed their most pressing economic demand, i.e. their claim to their ancient lands, and tried to resolve it in a manner which gave special protection to indigenous lands by largely removing them from the market mechanisms of a capitalist economy. It also paved the way for a larger effort to remake the image of the Mexican nation in a way which fully accepted and integrated the Indian legacy in the 1920s, led by Obregón's minister of education, José Vasconcelos, who believed that the future of Mexico, and of the continent, lay

⁴⁹ On the Convention see S. J. Anaya, *Indigenous Peoples in International Law* (2nd edition 2004), p. 58. Mexico has been one of presently only 19 states which have ratified the Convention (it was the second to do so after Norway in 1990).

in the creation of a ‘cosmic race’ created from the eventual fusion of all the ethnic groups in America. This concept may seem outdated or even suspicious from today’s perspective, which has rejected concepts of “fusion”, “melting pot” in favour of a vibrant multiculturalism that accepts, and even tries to protect, the existence of traditional ethnic and cultural identities. But it was not when originally conceived, at least not when measured by the dominant standards of the time. It also reflected the fact that race mixture was much more dynamic in Mexico than elsewhere in Latin America, and particularly in the Andean countries with their racial pluralism inherited from colonial times.⁵⁰ In any case it provided the inspiration for the tremendous effort in the early 1920s to rehabilitate the Indian (and the mestizo) in the cultural self-image of Mexico. As one of the most lucid chroniclers of Latin American history has noted:

“this campaign was undoubtedly one of the triumphs of the Revolution; it represented the earliest and most enduring attempt to overcome the racial divisions which had been the worst legacy of the Spanish Conquest, and to forge a coherent sense of national identity. Mexico’s political stability in the twentieth century is due in no small degree to the success of this policy of incorporating the Indian heritage in the idea of the nation.”⁵¹

The effectiveness of constitutional transformations

As Uprimny notes with regard to the new Latin American constitutions, these constitutions are “normative in nature and full of promises, yet their promises have not necessarily been fulfilled”.⁵² The contradictions and weaknesses inherent in the basic assumptions and normative prescriptions of the NCL have already been dissected in considerable detail by a number of critics from the region.⁵³

In the Mexican case, substantial efforts were made to put promises of the 1917 Constitution into practice, especially in the early decades

⁵⁰ Knight, Peculiarities of Mexican History (supra note 34), 118.

⁵¹ Williamson, History of Latin America (note 20), 393.

⁵² Uprimny, Recent Transformation of Constitutional Law (supra note 26), 1602.

⁵³ See Salazar Ugarte, Nuevo constitucionalismo latinoamericano (supra note 28), 356 ff.; Cousu, Demoracias Radicales (supra note 32), 9 ff.

following its entry into force. The drafters of the Constitution were fully aware of the difficulties facing the implementation of the ambitious agrarian and labour reforms enshrined in the constitutional text. The transitory provisions therefore expressly provided for the direct application of the bases established in the Constitution with regard to agrarian and land reform until such time as the national and state governments passed legislation on these matters. During the presidency of Lázaro Cárdenas (1934-40), a wholesale expropriation of hacienda land was carried out in an unprecedented drive to implement the agrarian reform envisaged by Article 27, and more than twenty-five million hectares of land were distributed in what constituted the largest land reform in Latin American history.⁵⁴ Cárdenas also decreed the nationalization of the oil industry, in the face of stiff opposition from Britain and the United States.⁵⁵ These reforms were immensely popular and did much to strengthen the alliance between the political elite and the peasant and labour organisations of the country which would allow the regime to avoid any major popular challenges until well into the 1980s.

It was also Cárdenas which found a problem to the vexing problem how to prevent presidential abuse of power in a system which still depended very much, if not primarily, on an energetic executive power capable of promoting and implementing the reform policies mandated by the Constitution. This is, after all, one of the great and recurring themes of Latin American constitutionalism, and has also been identified as one of the main, if not *the* main weakness of the new Latin American constitutionalism: the threat of a return to *caudillismo*.⁵⁶ Following the thirty-four years of rule by Porfirio Díaz, the revolution had put the principle of no-re-election of the President into the Constitution.⁵⁷ But it was only during the presidency of Cárdenas that the rule of no-re-election became embedded in an institutional practice which prevented the Mexican presidential system all from degener-

⁵⁴ Easterling, Mexican Revolution (supra note 1), 141.

⁵⁵ Knight, Mexico c. 1930-1946 (supra note 21), 41-46.

⁵⁶ Uprimny, Transformaciones constitucionales recientes (supra note 25), 131.

⁵⁷ Art. 83: „El Presidente entrará a ejercer su encargo el 1. de diciembre, durará en él cuatro años, y nunca podrá ser reelecto.”

ating into the traditional rule of the strongman.⁵⁸ It was rule by one party rather than rule by one man which became the distinctive feature of post-revolutionary politics in Mexico, a one-party rule, moreover, which managed to retain the loyalty of many social and labour organisations. The regime which finally emerged from the revolution was undoubtedly authoritarian – which was the rule rather than the exception in the world of the mid-twentieth century– but in a rather benign and ‘inclusionary’ way.⁵⁹

CONCLUSION

As the preceding analysis has demonstrated, the Mexican Constitution of 1917 took into account to an unprecedented degree the needs and aspirations of large sectors of the population – peasants, workers, indigenous groups – which had been largely absent from previous constitutional debates. Without rejecting liberal democracy and capitalism wholesale – the Constitution put a Bill of Rights drafted in the traditional liberal style at the top of its provisions – it tried to fashion a political and economic system which provided new avenues for participation and inclusion of hitherto neglected groups, namely through strengthening the state’s role in the economy. The 1917 Constitution rejected the liberal doctrines which had formed the basis of the economic modernization policies pursued under the dictatorship of Porfirio Diaz and gave constitutional protection to those interests, namely the village corporate landholdings, which had increasingly come under attack during the pre-revolutionary period.⁶⁰ In this central aspect the parallels to the transformative Latin American constitutions of the early 21 century, which turn their back on the neoliberal policies of the recent past and seek to build a new state capable of addressing the twin evils of Latin American history, poverty and inequality, are unmistakable.

These reforms gave life and durability to the constitutional settlement achieved in 1917. Together with the Constitution of 1917 they

⁵⁸ See II. 5. above.

⁵⁹ Knight, *Peculiarities of Mexican History* (supra note 34), 137.

⁶⁰ Knight, *Peculiarities of Mexican History* (supra note 34), 107-108.

managed to transform Mexico, a country beset by political instability and financial anaemia during much of the nineteenth century,⁶¹ into a country which, based on a constitution with broad popular support, enjoyed a degree of political and social stability unusual in the twentieth century not only in Latin America, but in the rest of the world as well. If these significant achievements have not always been fully appreciated, this failure is less due to a lack of intrinsic virtues of the 1917 Constitution than to the inevitable comparison with the political and economic powerhouse north of the border. But the political and social consensus which emerged from the revolution and became embodied in the 1917 constitution started to crumble at the end of the 1980s when the country came under pressure to modernize its political and economic system in order to respond effectively to the new challenges of the beginning era of globalization, which in the Mexican case meant greater integration with the US and the Canadian economies through the North American Free Trade Agreement (NAFTA). The reforms triggered by NAFTA membership did away with some of the revolutionary achievements of 1917, notably the constitutional protection of communal land holdings.⁶² In other respects, however, the reforms led to important advances, particularly with regard to the deepening of democracy⁶³ and the recognition of the status and the

⁶¹ Knight, Peculiarities of Mexican History (supra note 34), 101, who calls Mexico “the sick man of Spanish America” in the period following independence, until the start of the *porfiriato*.

⁶² The reform eliminated the constitutional right to be granted land by the state, based on the assumption that further land redistribution would only result in lower productivity, greater poverty and increased insecurity concerning individual property rights. In addition, the owners of communal lands were allowed to retain ownership of their *ejido* lands even if they did not cultivate them personally and to sell or rent them to other members of the peasant community. Perhaps even more importantly, owners of communal lands who decide against renting or selling their land may enter into joint ventures with private individuals and companies or long-term production contracts with outside investors. Finally, the reform paved the way for foreign investment in communal lands since it does not limit the possibility to set up a joint venture with *ejidarios* to Mexican nationals or companies, see Guillermo Marrero/Douglas J. Rennert, The Long and Winding Road: An Overview of Legislative Reform of Mexico’s Road to a Global Economy, Southwestern Journal of Law & Trade in the Americas 1 (1994), 92.

⁶³ The 1988 presidential elections proved to be a turning point. Although the candidate of the PRI, Carlos Salinas, was elected, the allegations of massive fraud triggered

rights of the indigenous communities.⁶⁴ It is no small irony, however, that the same processes of liberalising reform which, beginning in the 1980s, did so much to erode the model of state-induced and supervised economic growth established by the Mexican revolution were the very same processes that triggered in due course the emergence of new transformative constitutional projects further down in the South.



a series of constitutional reforms which ended the executive branch's control over federal elections and vested the power to organise those elections in an independent institution, the Federal Electoral Institute (*Instituto Federal Electoral*, IFE). Established in October 1990 as a result of constitutional reforms adopted in the wake of the controversial 1988 presidential elections, the IFE was given full autonomy from the executive branch through constitutional reform in 1996.

⁶⁴ The amendments introduced since 1992 have strengthened the rights of indigenous groups considerably. Section A of Article 2 guarantees the indigenous people a number of specific rights which give expression to their constitutionally recognised right to self-determination. These include, among others, the right to decide freely on their internal political, economic, social and cultural organisation; to apply their own system of rules in the resolution of their internal conflicts, to the extent that these rules are consistent with the general principles of the Constitution and human rights provisions; to elect their own authorities for self-government; to preserve and develop their languages and cultures; to protect their living environment and the integrity of their territories; and to have access to the preferential use of the natural resources in their territories, with the exception of the strategic areas designed by the Constitution and subject to the forms of land usage established by the Constitution and the rights acquired by third parties or by individual members of the community.