

Chapter 1

General Introduction

1.1 Background: Ineffective Rule-of-Law Reforms in Mexico

There is a broad international consensus regarding the *Rule-of-Law* as a desirable goal and as a good idea for every society. The United Nations Organization refers to this concept as a principle of governance that is central to its mission.¹ Western foreign aid agencies (e.g., USAID, GIZ) and private donors invest large part of their resources on Rule-of-Law projects all over the developing world.² Likewise, international financial institutions such as the World Bank grant substantial credits every year to their members so that they undergo reforms to bring their legal systems closer to that ideal. There is, in sum, a deep-rooted belief that the Rule-of-Law “promotes economic growth and reduces poverty providing opportunity, empowerment, and security through law and legal institutions.”³ The potential benefits of having Rule-of-Law are so widely accepted that its international recognition as a core development goal has faced only little—perhaps too little—critique.⁴ Because everyone wants it and in principle everyone can have it, virtually all current development efforts around the world include a substantial Rule-of-Law component.

Just like most Latin American nations in transition from authoritarianism to democracy, Mexico has not remained immune to this global Rule-of-Law reforming trend. Though rather late in comparison to other countries of that region, as of the 1980s Mexico undertook the makeover of its legal institutions with the initial goal of creating better conditions for economic growth. One of the pillars of these still ongoing Rule-of-Law transformation efforts is the so-called *Judicial*

¹ See Secretary General of the United Nations (2004), p. 4.

² Compare Carothers (2006), p. 4.

³ Dakolias et al. (2003), p. 1.

⁴ See, notably, Humphreys (2010), p. 2; and Santos (2006), pp. 253–300.

*Reform.*⁵ Indeed, after the country implemented important economic liberalization policies and its hegemonic single-party regime started to collapse, progressively more time and resources have been directed to improve the several laws and institutions that comprise the Mexican justice “sector” (i.e., judges, prosecutors, lawyers, and police).⁶ Whether focused in the Supreme Court in the late 1980s, in the lower federal judiciary throughout the 1990s, or in the courts of the states during the last decade; the country has undergone modifications in virtually every corner of the justice system. Accordingly, billions of euros from domestic and foreign tax payers have been invested to transform Mexican judicial entities.⁷

Despite the enormous amounts of financial and human resources that during the past three decades have been invested in the transformation of Mexican legal and judicial institutions, there is to this day a generalized perception of discontent with the country’s justice system.⁸ Indeed, the passing of new constitutional amendments and statutes has already been ongoing for more than a quarter of a century and by now it has touched upon almost every sector of the Mexican legal system. Policy makers have come up with several new expensive institutions and restructured many others. And yet, there is no real sign of improvement in the country’s general Rule-of-Law levels.⁹ Quite the reverse: crime rates in Mexico are at their historical high, corruption seems to be out of control, the number of casualties of the so-called “war on drugs” grows at a constant pace, and massive fundamental rights’ violations to both victims and perpetrators occur regularly.¹⁰ While parts of the territory have become some of the most violent places in the world, the entities related to the justice system are among the less trusted institutions in the country.¹¹

The perception of failure of the Mexican justice institutions is not only domestic. One only needs to open the international section of the main newspapers abroad to

⁵ Compare Fix-Fierro (2003b), pp. 240–241.

⁶ Compare Hammergren (2008), p. 89.

⁷ For instance, whereas only in the last 20 years the Mexican federal judiciary’s annual budget has increased in nominal terms more than 500 % to approximately \$3.7 billion (3 billion EUR), since the fiscal year 2008 the United States Congress has appropriated for Mexico a total of \$2.1 billion (1.7 billion EUR) to fight organized crime. See, respectively, Mexican Congress (2013), p. 36 (Annex 1); and U.S. Department of State (2014). But see Pásara (2012), p. 3 (showing that in the period between 1992 and 2011 the funding for Justice Reform projects in Mexico financed by the World Bank was only \$30 million (24 million EUR) and, in contrast to other Latin American countries, there was no such funding from the Inter-American Development Bank).

⁸ See, for instance, Ray (2008) (a Gallup poll stating the lack of confidence in the judicial system and the courts).

⁹ See, for instance, The World Bank (2014) (where Mexico’s Rule-of-Law estimate has been rather weak since the 1990s).

¹⁰ See Shirk (2011), pp. 191–192. See also, among many, Freedom House (2015) (whose indicators led to change Mexico’s status from “Free” to “Partly Free” in 2011 where it has remained ever since).

¹¹ See Campos (2014) (showing that whereas the Supreme Court barely passes on approval rate, only Mexican legislators and political parties score worse than the police).

confirm that a large majority of the news concerning Mexico involve some account of violence, drug trafficking, kidnapping, extortion, or gross human rights violations. Though media can always exaggerate, other facts are indicative of a very serious Rule-of-Law problem. It is no coincidence, for instance, that the number of complaints against Mexico in the Inter-American Commission of Human Rights is by far the largest of them all.¹² Neither is it, likewise, that the European Parliament recently passed a resolution expressing its deepest concern regarding the levels of Rule-of-Law in Mexico.¹³ In sum, if anyone with a lay understanding of what Rule-of-Law means thinks of a prototype country, it must be openly said that Mexico is definitely not it.¹⁴

1.2 The Research Gap: ‘Culture’ as the Miscellaneous Explanation

For anyone who is confronted with this paradox, an obvious question comes to mind: what has been standing in the way of Mexico’s Rule-of-Law transformation? Put slightly differently: why do these expensive and apparently endless reforming efforts still lack any visible impact in the Rule-of-Law levels in the country? Is it a problem related to the law at all? In other words, does the Mexican society just need more time and education for these essentially correct legal and institutional changes to have their desired impact (i.e., a time lag)? Or is it instead that the legal reforms themselves have been decided and/or implemented erroneously? If so, how can it be assessed whether the correct reform path was chosen? Is it through its compatibility with the Mexican tradition? Or is it rather through some other standard? Both domestic and foreign scholars have already touched upon this worrisome divorce between the Mexican laws and reality. Their academic works can be roughly classified into two large categories or waves; none of which, however, sufficiently explains this Rule-of-Law breach.

¹² See Inter-American Commission on Human Rights (2013), p. 40 (stating that Mexico led the docket with 660 complaints whereas the second place—Colombia—had 328).

¹³ See European Parliament (2014).

¹⁴ It is in any case ironic that despite these levels of impunity on December 6, 2013, the United Nations granted the Mexican Supreme Court a prize for its engagement in human rights work. The Selection Committee said that the Court “has accomplished very considerable progress in promoting human rights through its interpretations and enforcement of Mexico’s constitution and its obligations under international law. Additionally, [it] has set important human rights standards for Mexico and the Latin-American region.” United Nations (2013). As it is shown below, while there are some scholars that affirm that human rights and the Rule-of-Law are conceptually different, which might justify praising a State power under such impunity conditions, the UN above all believes that human rights are an essential component of the Rule-of-Law concept. See *infra* Chap. 2.

First, like it occurred in other Latin American countries, the analysis of the legal system was dominated by lawyers who limited themselves to the description of legal provisions and their judicial interpretation. This merely descriptive approach, in turn, nullified at the outset any explanatory power that comparative legal studies may have had regarding Rule-of-Law deficit in Mexico. That is, because these efforts confined themselves to the systematic contrast of either whole codes or particular legal clauses,¹⁵ at the most of the legal reasoning followed by the courts of different countries in a similar legal issue,¹⁶ comparative legal research could never reasonably conclude that a system as such was better than other. As the recognized purpose of comparing foreign laws remained the better understanding of the domestic ones,¹⁷ Mexican scholars were careful not to take sides.¹⁸ Nevertheless, if the evident Rule-of-Law deficit could not be explained by the law itself, it had to rest somewhere else. Therefore, such studies frequently emphasized the importance of ‘social context’ and ‘culture’ in determining the effectiveness of the law. They did not deem as their job, however, to explain them any further.

Later, as a reaction to the explanatory limitations of traditional legal research, multidisciplinary approaches took on the analysis of the ineffectiveness of the Mexican legal system.¹⁹ Openly influenced by studies conducted by the World Bank all over Latin America during the 1990s,²⁰ they criticized the fact that traditional studies “excluded other social disciplines”²¹ and thus lacked any empirical basis on the main issues to be tackled through reform. These new approaches assume that many problems with the legal system do not have explanation in the laws, but rather in *practices* deeply rooted in the Mexican legal tradition. An adequate remedy—they affirm—can thus only be devised after an empirical diagnose of the problem. As one can already anticipate, these multidisciplinary studies usually also end up giving great weight to ‘social context’ or ‘tradition’ as an explanation of Rule-of-Law failure. Although this kind of research is certainly useful, it frequently underestimates essential legal-doctrinal aspects that unquestionably affect the effectiveness of the law. Judges, for example, are certainly constrained by doctrinal limits and thus usually banned from adjudicating cases based on their factual consequences.

The common ground of these two lines of research is that one way or another they both put much emphasis on cultural components as explanatory of the Mexican

¹⁵ See, among many, Valadés and Carbonell (2006).

¹⁶ See, among many, García Ramírez and Islas de González Mariscal (2007).

¹⁷ See Fix-Zamudio (1970), pp. 327–328.

¹⁸ See, for instance, Rendón Huerta (1998), p. 591 (“...it is evident that a comparative study should not lead us to conclude simplistically which one is the better law. That would be absurd, because their designs derive from completely different cultural and socioeconomic realities.”) (Author’s translation).

¹⁹ See, for instance, Magaloni and Negrete (2001), Fix-Fierro (2003a), The World Bank (2002), Pásara (2006), and Kossick (2004).

²⁰ See, in general, Buscaglia et al. (1995).

²¹ Magaloni (2007), p. 73 (Author’s translation).

Rule-of-Law breach. To put it differently, there is an extended view among academia that Mexican laws and legal institutions have not been working either because they have not been adequately adapted to the nation's social context or—just the other side of the same coin—because of prevailing cultural differences with the systems where these laws do work. They might be partly right, of course. But, can 'culture' by itself account for all of this Rule-of-Law ineffectiveness? As cultural differences become a "hotchpotch" of explanations, analytically the law as such loses explanatory power on Rule-of-Law achievement and, therefore, is taken less into account as a serious element for guiding reforms. None of the referred approaches, however, has rigorously answered—not even asked—if the Mexican laws by themselves are generally contributing or not to their effectiveness. There are, in other words, no academic studies that systematically explain whether the Mexican legal system *per se* has been suitable to foster the Rule-of-Law. That is the gap this study intends to fill.

1.3 Methodology: A Critical Comparative Legal Analysis

In order to find out whether the law as such has something to do with the Mexican Rule-of-Law deficit, the law itself must be analyzed *critically*. Only if one goes beyond a purely descriptive approach and issues value judgments on the correctness of legal norms it can be determined whether cultural components (i.e., social context, tradition, and etcetera) are in fact being overrated as an explanatory source. To carry out serious and meaningful critique of anything, however, a standard is required. Put slightly differently, something is 'right' or 'wrong' only because it corresponds or not to the standard that determines 'rightness'. If there is no sound standard with which the object of study can be confronted, any value judgment formulated on its regard is pure absurdity. Equally, to properly assess whether the Mexican legal system as a whole is 'right' or 'wrong'—in the sense of fostering Rule-of-Law achievement or not—a standard with which its laws can be confronted and thereby criticized becomes indispensable.

Now, how should that standard be determined? Should one just pick the legal system of a consolidated Rule-of-Law country (e.g., United States or Germany) and directly confront it to the legal system in question (i.e., Mexico)? There are more than enough works in that sense already.²² The main problem with such an approach is that one cannot reasonably conclude that an element subject to analysis is 'wrong' just because that same element does not exist somewhere else. This might be the consequence, of course, but never the reason. Actually, to follow that method would be to incur in a sort of academic imperialism which traditional comparative scholarship has carefully avoided by not taking sides. Yet if any kind of critique is to be exercised, it has to be conducted on the basis of a theoretical

²² See, for instance, Mireku (2000) and García Sarubbi (2011).

model. Indeed, whereas comparing legal systems descriptively is valid but not very interesting, comparing them critically without a sound theoretical framework is arbitrary and thus not very useful. This study carries out critical *comparative* analysis of different legal systems, but only insofar as it confronts each one of them with a theoretical model that explains the role of certain laws in Rule-of-Law achievement. The model serves, figuratively speaking, as a “lens” that allows comparison between objects of different size.

Just like any other theory with some aspiration of general applicability, the theoretical framework that enables this critical comparative analysis is in the end constructed from reality; from actual normative elements (i.e., legal rules) that have been devised to guarantee the Rule-of-Law in existing legal systems. Put in technocratic jargon, the theoretical model originates from accepted “best practices” and thus applies to systems following diverse legal traditions. Accordingly, this work first analyzes on a theoretical level how certain normative elements interplay in the achievement of Rule-of-Law of any legal system regardless of its tradition. Then, it evaluates concretely whether each of the specific legal systems subject to scrutiny—the United States, Germany, and Mexico—corresponds or not to the model. Because these normative elements, however, are basically also the legal mechanisms provided for modern constitutions to prevail, this dissertation is essentially a critical comparative analysis of different systems of constitutional review. This means, obviously, that it fundamentally performs *legal* analysis. The study closely examines constitutional and statutory provisions, jurisprudence, and legal doctrine. History, politics, or economics, on the other hand, are considered here only inasmuch as they shaped the laws and jurisprudence of the particular legal systems under scrutiny.

Finally, is it fair to compare critically the Mexican system of constitutional review with those of the United States and Germany, that is, with the two “champions” of democratic constitutionalism? Can two legal systems be reasonably confronted without taking their particular cultural circumstances into account? Not only can this be done objectively; it is also the best available way to find out if the law as such has any say in Rule-of-Law achievement. On the one hand, if one carries out the comparison through the lens of a common theoretical model, one can objectively identify general trends, common features, and—most importantly—flaws of *any* legal system. The “champions” will most likely correspond to the model now, of course. Nevertheless, because they are not static systems, this does not mean they always did. This research shows how they got there. On the other hand, it is not assumed here that the law is the only factor determining human behavior, which would be absurd. Still, if the law for itself can influence Rule-of-Law achievement at all, it is important to see how. If it is instead the case that the Mexican legal system generally corresponds to the theoretical model and, therefore, that it is mostly ‘culture’ that prevents Rule-of-Law compliance, one can start to inquire on cultural differences. If it does not, however, it makes better sense to see what legal elements have been missing.

1.4 Overview of the Study

While each of the chapters of this work has been written so that it can stand on its own, they are thought as the pieces of a larger general inquiry on whether the system of constitutional review—and thus the law as such—is a determinant of Rule-of-Law achievement.

Chapter 2 develops a theoretical framework to fill the research gap. It basically elaborates a model or standard with which concrete legal systems can be confronted later. The chapter shows first the necessary theoretical connection—built upon the notion of predictability—between fundamental rights and the Rule-of-Law concept. It then explains the differentiated yet complementary functions that in Rule-of-Law systems ordinary and constitutional jurisdictions should play in the enforcement of those rights. Specifically, a legal system can only match the Rule-of-Law ideal if its rules of constitutional review foster that the bulk of fundamental rights cases is solved by ordinary courts empowered to provide a remedy. At the same time, these rules must also guarantee that the few cases reaching the constitutional jurisdiction impact the rest of the legal system. This law-created balance between ordinary and constitutional jurisdictions vis-à-vis the enforcement of fundamental rights is evidenced as a Rule-of-Law necessity.

Chapter 3 analyzes the evolution of constitutional review in the United States of America; until a few decades ago the most popular system in the world. The chapter clarifies several misconstructions built upon the American system by foreign scholars. It shows how even though judicial review developed as a highly decentralized activity that is carried out jointly by state and federal courts, it entailed from the very beginning some degree of centralization. The chapter also explains how the American legal system—relying on the notion of judicial parity—reacted in recent years to achieve a meaningful balance between state and federal courts vis-à-vis the implementation of federal constitutional rights. On one side, the system gives a key role to state courts in the comprehensive implementation of federal constitutional rights. On the other, the review of state court decisions by the federal judiciary plays mostly an exemplary function in the interpretation of federal law. Even though it usually results from individual complaints, it hardly does anything for individual justice anymore.

Chapter 4 analyzes constitutional review in the Federal Republic of Germany; the new “world favorite” of democratic constitutionalism. This chapter explains how the German system has made of fundamental rights an essential element of the *Rechtsstaat* principle—Germany’s own version of the Rule-of-Law—and, furthermore, an “objective system of values” that governs the activity of individuals vis-à-vis other individuals horizontally. It then shows how the German legal system allocates judicial review duties functionally among the different kinds of courts of the land to guarantee the comprehensive and consistent enforcement of fundamental rights. The German system gives—in fact as much as the American system does—a key role to ordinary courts (*Fachgerichte*) in the enforcement of the constitutional provisions that entail fundamental rights. Correspondingly, the

specialized constitutional court (BVerfG) plays predominantly an exemplary or educational function in the interpretation of the constitutional provisions regarding basic rights. This analysis demonstrates that the characterization of the BVerfG as a “citizen’s court” is somewhat outdated.

Chapter 5²³ represents perhaps the most revealing outcome of this study. It analyzes the evolution of constitutional review within the Mexican legal system. The chapter identifies several normative elements that have been missing for Rule-of-Law achievement and makes some proposals to rectify. It shows that the Mexican system of constitutional review has historically fluctuated between what it erroneously assumed as the American and continental European models. Mexico has, nevertheless, completely disregarded an essential premise that is strongly embedded in both of them and that is crucial for Rule-of-Law achievement. Namely, the Mexican legal system has systematically neglected the role of ordinary courts in the enforcement of fundamental rights. Instead, the Mexican rules of constitutional scrutiny have fostered excessive dependency on the constitutional jurisdiction and, furthermore, they have weakened through artificial differentiations the guiding role of constitutional interpretation. This situation results in an intricate system of constitutional review that is neither effective in making the constitutional rules guide conduct nor in enforcing fundamental rights comprehensively.

Finally, Chap. 6 wraps up this study’s major findings and hints towards new fields of research. In a sentence, it concludes that whereas the lack of effectiveness in Mexican Rule-of-Law reforms might not only be a matter of laws, it is for sure also a matter of laws. These normative elements are needed in every legal system that aspires to comply with the Rule-of-Law regardless of any cultural differences to the contrary. Their incorporation to the Mexican legal system should become priority.

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²³ A preliminary version of this chapter has been recently published as Narváez Medécigo (2013). Key parts of that text are reproduced here with written authorization of the Mexican Law Review’s editor in chief.

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