

Alfredo Narváez Medécigo

Rule of Law and Fundamental Rights

Critical Comparative Analysis of
Constitutional Review in the United
States, Germany and Mexico

 Springer

Rule of Law and Fundamental Rights

Alfredo Narváez Medécigo

Rule of Law and Fundamental Rights

Critical Comparative Analysis of
Constitutional Review in the United States,
Germany and Mexico

 Springer

Alfredo Narváez Medécigo
Berlin, Germany

The publishing costs were partially covered by the German Academic Exchange Service (DAAD)

ISBN 978-3-319-24561-4 ISBN 978-3-319-24562-1 (eBook)
DOI 10.1007/978-3-319-24562-1

Library of Congress Control Number: 2015955264

Springer Cham Heidelberg New York Dordrecht London
© Springer International Publishing Switzerland 2016

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made.

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media (www.springer.com)

Acknowledgements

This work would not have been possible without the financial support of the Mexican Council for Science and Technology (CONACYT) and the German Academic Exchange Service (DAAD).

I would like to thank very specially Prof. Dr. Gunnar Folke Schuppert for his generous and patient guidance as supervisor of this work. His readiness to help me overcome the many “conceptual crises” in which I fell and keep myself always focused really made the difference. I also remain forever in debt to my mentor and friend Prof. Dr. Alexander Graser. He was willing not only to read the “kopfbelastenden” drafts of mine, but also to invite me to the University of Regensburg to discuss them with him and his team. I thank Prof. Dr. em. Ulrich K. Preuß for his friendship and helpful advice ever since my years at the Hertie School of Governance. Having him as a guest in my Rigorosum at the Humboldt University has been one of the greatest honors I have ever experienced.

I am also very grateful to José de Jesús Orozco, Miguel Sarre, José Roldán Xopa, Gabriela del Valle, Armando Maitret, and Wolfgang Kaleck for their advice before starting this doctoral adventure. I will never forget their encouragement and support.

To my friends Natalia Calero, Graciela Arrington, and José Campos, who generously sponsored my work, I have no words to describe how much your help means to me.

Finally, but most importantly, I would like to mention those who suffered the most during my time in Germany and whose love and support were invaluable for me to complete this task. I thank my parents Cristina and Alfredo, my siblings Cristina and Carlos, and my life partner Sabrina. This book is for them.

Berlin, Germany
31 July 2015

Alfredo Narváez Medécigo

Abbreviations

A B A J	American Bar Association Journal
Am Hist Rev	The American Historical Review
Am J Comp Law	American Journal of Comparative Law
Am J Leg Hist	The American Journal of Legal History
Am L Rev	American Law Review
Am U L Rev	American University Law Review
An Der Const Lat	Yearbook of Latin American Constitutional Law
Annals Am Ac Polit SS	Annals of the American Academy of Political and Social Science
AöR	Archive of Public Law (German Journal)
Ariz J Int'l & Comp L	Arizona Journal for International and Comparative Law
Aut. B-VG	Federal Constitutional Laws of Austria
B C L Rev	Boston College Law Review
B U L Rev	Boston University Law Review
BGBI. I	Official Journal of Germany
BGBI.	Official Journal of Austria
Binn.	Reports of Cases Adjudged in the Supreme Court of Pennsylvania by Horace Binney
BOE	Official Journal of Spain
Bol Mex Der Comp	Mexican Bulletin of Comparative Law
Buffalo L Rev	Buffalo Law Review
BVerfG	German Federal Constitutional Court
BVerfGE	German Federal Constitutional Court Reporter
BVerfGG	German Federal Constitutional Court Act
BVerwG	German Federal Administrative Court
BVerwGE	German Federal Administrative Court Reporter
Cal L Rev	California Law Review
Cal W Int'l L J	California Western International Law Journal
Cardozo L Rev	Cardozo Law Review
Case W Res L Rev	Case Western Reserve Law Review
Clev St L Rev	Cleveland State Law Review

Cód. Pen. N.L.	Criminal Code for the State of Nuevo León
Cód. Pen. Ver.	Criminal Code for the State of Veracruz
Colum L Rev	Columbia Law Review
Cong. Globe	Congressional Globe
Cong Rec	Congressional Record
Conn.	Connecticut Reports
Cornell L Rev	Cornell Law Review
D.O.	Mexican National Official Journal
D.O.F.	Mexican Federal Official Journal
Dall.	Dallas Reports on the U.S. Supreme Court
DDHH	Human Rights
Diario Deb Dip	Journals of the Mexican House of Representatives
Diario Deb Sen	Journals of the Mexican Senate
DÖV	The Public Administration (German Journal)
DRiZ	German Judges Journal
DVBI	German Administrative Gazette (Journal)
El Univ Mex	Newspaper “El Universal”
EuGRZ	Journal of European Fundamental Rights
F. 2d.	Federal Reporter, Second Series
F. 3d.	Federal Reporter, Third Series
F. Cas.	United States Federal Cases
Fr. Const.	French Constitution
Fr. L. Const. Inst. 5°	Constitutional Law to Modernize the Institutions of the
Rep.	5th French Republic
Gac. Parl.	Mexican Parliamentary Gazette
Gac. Sen.	Mexican Senate’s Gazette
Ger. BGB	German Civil Code
Ger. FGO	German Finance Courts Regulation
Ger. GG	German Basic Law
Ger. GVG	German Judiciary Act
Ger L J	German Law Journal
Ger. SGG	German Social Courts Act
Ger. StPO	German Rules of Criminal Procedure
Ger. VwGO	German Administrative Judiciary Act
Ger. ZPO	German Rules of Civil Procedure
Halst. N.J. Sup. Ct.	Reports of Cases Argued and Determined in the Superior Court of Judicature of the State of New Jersey by William Halsted
Harv C R-C L L Rev	Harvard Civil Rights-Civil Liberties Law Review
Harv L Rev	Harvard Law Review
Hast Const L Q	Hastings Constitutional Law Quarterly
Hast L J	Hastings Law Journal
Ind L J	Indiana Law Journal
Mex. Inic. L. Cont. Dif.	Mexican Bill on Diffused Control

Int Comp L Q	International and Comparative Law Quarterly
Inter-Am. Ct. H.R.	Inter-American Court of Human Rights
Int'l J Const L	International Journal of Constitutional Law
J Sup Ct Hist	Journal of Supreme Court History
Johns. N.Y. Sup. Ct.	Reports of Cases Adjudged in the Supreme Court of Judicature of the State of New York by William Johnson
JöR	Yearbook of Public Law (German Journal)
JORF	Official Journal of the French Republic
JuS	Legal Scholarship (German Journal)
JZ	German Lawyer Journal
Law & Hist Rev	Law and History Review
Law & Soc Inquiry	Law and Social Inquiry
Mass.	Supreme Court of Massachusetts Reports
Mass. Const.	Constitution of Massachusetts
Mass. Sup. Ct. Quincy Reports	Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay
Mex. Const.	Mexican Constitution
Mex. Decr. ref.	Mexican Decree on Statutory Amendments
Mex. Decr. ref. Const.	Mexican Decree on Constitutional Amendments
Mex. Dict. ref. Const.	Mexican Opinion on Constitutional Amendments
Mex.L.Reg.§§ I&II art.105 Const.	Implementing Legislation Regarding Article 105, Sections I and II, of the Mexican Constitution
Mex L Rev	Mexican Law Review
Mex L Rev NS	Mexican Law Review—New Series
Mex. L.A.	Mexican Amparo Law
Mex. Pres. Egr. Fed	Mexican Federal Budget
Mex. Proy. Const.	Mexican Draft of Political Constitution
Mex. Sup. Ct.	Mexican Supreme Court
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
N.C.	North Carolina Reports
N C L Rev	North Carolina Law Review
N.H.	Superior Court of Judicature of New Hampshire
N.H. Const.	Constitution of New Hampshire
N.J. Sup. Ct.	Supreme Court of New Jersey
N.L.	Nuevo León
N.Y. Const.	Constitution of New York
N Y U L Rev	New York University Law Review
NJW	New Legal Weekly (German Journal)
Notre Dame J L Ethics & Pub Pol'y	Notre Dame Journal of Law, Ethics, and Public Policy
Pa.	Supreme Court of Pennsylvania Reports

Pa. Const.	Pennsylvania Constitution
Pick. Mass. Sup. Ct.	Reports of Cases Argued and Determined in the Supreme Judicial Court of Massachusetts by Pickering
Publius J Federalism	Publius: The Journal of Federalism
R.I. Sup. Ct.	Rhode Island Supreme Court
Rg.	Legal History (German Journal)
Root	Reports of Cases Adjudged in the Superior Court and Supreme Court of Errors of Connecticut by Jessee Root
ROP	The Review of Politics
Rutg L Rev	Rutgers Law Review
Serg. & Rawle	Reports of Cases Adjudged in the Supreme Court of Pennsylvania by Thomas Sergeant and William Rawle
South. N.J. Sup. Ct.	Reports of Cases Argued and Determined in the Superior Court of Judicature of the State of New Jersey by Samuel L. Southard
Spa. Const.	Spanish Constitution
Spa. LOPJ	Spanish Organic Law for the Judicial Power
Stan L Rev	Stanford Law Review
Stat.	United States Statutes at Large
Sup. Ct. Conn.	Superior Court of Connecticut
Sup. Ct. Err. Conn.	Supreme Court of Errors of Connecticut
Sup. Ct. Jud. Mass.	Superior Court of Judicature of the Province of Massachusetts Bay
Sup. Ct. Jud. N.H.	Superior Court of Judicature of New Hampshire
Sup. Ct. Jud. N.J.	Supreme Court of Judicature of New Jersey
Sup. Ct. Jud. N.Y.	Supreme Court of Judicature of New York
Sup. Ct. Mass.	Supreme Court of Massachusetts
Sup. Ct. N.C.	Supreme Court of North Carolina
Sup. Ct. Pa.	Supreme Court of Pennsylvania
Sup. Ct. Rev.	Supreme Court Review
Sup. Ct. Wisc.	Supreme Court of Wisconsin
Touro L Rev	Touro Law Review
U Chi L Rev	University of Chicago Law Review
U Miami L Rev	University of Miami Law Review
U Penn L Rev	University of Pennsylvania Law Review
U Rich L Rev	University of Richmond Law Review
U C Davis L Rev	University of California Davis Law Review
U C LA L Rev	University of California Los Angeles Law Review
U.S.	United States Reports
U.S. Sup. Ct.	Supreme Court of the United States
U.S. Sup. Ct. Rules	Rules of the Supreme Court of the United States
U.S.C.	United States Code
Va. Cas.	Virginia Cases
Va. Const.	Constitution of Virginia

Va L Rev	Virginia Law Review
Wash & Lee L Rev	Washington and Lee Law Review
West Eur Polit	West European Politics
Whitehead J Dipl & Int'l Rel	The Whitehead Journal of Diplomacy and International Relations
Wis.	Wisconsin Reports
Wis L Rev	Wisconsin Law Review
Yale J Law & Humanities	Yale Journal of Law and Humanities
Yale L J	The Yale Law Journal
ZaöRV	Journal of Foreign Public Law and International Law

Contents

1	General Introduction	1
1.1	Background: Ineffective Rule-of-Law Reforms in Mexico	1
1.2	The Research Gap: ‘Culture’ as the Miscellaneous Explanation	3
1.3	Methodology: A Critical Comparative Legal Analysis	5
1.4	Overview of the Study	7
	References	8
2	Rule-of-Law and Judicial Federalism: The Role of Ordinary Courts in the Enforcement of Fundamental Rights	11
2.1	The Rule-of-Law Concept Revisited: The Rule-of-the-Constitution	13
2.1.1	A Concept Within Two Debates	13
2.1.2	A Matter of Predictability	17
2.1.3	Constitutional Supremacy and Fundamental Rights	21
2.2	Constitutional Scrutiny as Judicial Review	24
2.2.1	Constitutional Review, the Courts, and the Individual	24
2.2.2	Fundamental Political Decisions and Constitutional Review	28
2.2.3	Horizontal Separation of Powers and Constitutional (Judicial) Review	32
2.3	Judicial Review and Judicial Federalism	37
2.3.1	Vertical Separation of Powers and Judicial Review	37
2.3.2	“American” Judicial Federalism	39
2.3.3	“European” Judicial Federalism	42
2.3.4	Constitutional (Judicial) Review of Judicial Action	45
2.4	Ordinary Courts and the Realization of Fundamental Rights: Towards an Adequate Functional Division in Constitutional Review	49
2.4.1	Two Dimensions of Constitutional Scrutiny (Rights)	49
2.4.2	Towards an Adequate Division of Tasks in Constitutional Scrutiny	54

- 2.4.3 The Role of Ordinary Courts in Fundamental Rights Issues: The ‘Direct Effect of the Constitution’ 58
- 2.4.4 The Guiding Role of Constitutional Jurisdiction 60
- 2.5 Chapter Conclusions 66
- References 67
- 3 Constitutional Review in the United States of America: Does “Diffused” Mean Complete Decentralization? 71**
 - 3.1 Basic Rights Enforcement Before the Civil War (1776–1860) 76
 - 3.1.1 The Federal Bill of Rights as a Guarantee *for* the States . . . 76
 - 3.1.2 Judicial Enforcement of Fundamental Rights in the Antebellum 87
 - 3.2 Postwar Increase on Federal Oversight: The Blurring of Boundaries Between State and Federal Jurisdiction (1865–1988) . . . 96
 - 3.2.1 Reconstruction: The Federal Bill of Rights as a Guarantee *Against* the States 96
 - 3.2.2 The “Due Process Revolution” and the Maximization of Federal Judicial Power over the States 105
 - 3.3 American State Courts as Primary Guarantors of Fundamental Rights 116
 - 3.3.1 The Assumption of Judicial Parity and Its Limits: Exclusive Federal Court Jurisdiction 116
 - 3.3.2 Fostering Federalism: Concurrent Jurisdiction with State Courts 122
 - 3.4 The Guiding Function of the Federal Judicial Review of State Court Judgments 129
 - 3.4.1 Lower Federal Court Collateral Relief Through Habeas Corpus: A ‘Right’ to Federal Review of a State Court Decision? 129
 - 3.4.2 Supreme Court Appellate Review via Writ of Certiorari . . . 139
 - 3.5 Chapter Conclusions 145
 - References 148
- 4 The German System of Constitutional Review: Prototype of a Concentrated Model? 155**
 - 4.1 Basic Rights as a Core Element of the German *Rechtsstaat* 158
 - 4.1.1 Formal Versus Material *Rechtsstaat* 158
 - 4.1.2 Concretizing the ‘Basic Rights *Rechtsstaat*’ 164
 - 4.2 The Blurring of Boundaries Between Ordinary and Constitutional Judicial Review 170
 - 4.2.1 The Need for a Specialized Constitutional Jurisdiction . . . 170
 - 4.2.2 The Jurisprudential Expansion of the Constitutional Jurisdiction 174
 - 4.3 Ordinary German Courts as the Main Protectors of Basic Rights . . . 181

- 4.3.1 Ordinary Court Empowerment to Review the Constitutionality of Legislation: An Invalidation Monopoly? 181
- 4.3.2 Recourse Against Basic Rights Violations due to the Incorrect Interpretation and Application of ‘the Law’ 187
- 4.4 The Federal Constitutional Court as a Lighthouse 195
 - 4.4.1 An Individual’s Way to the BVerfG: A “Citizens’ Court”?. 195
 - 4.4.2 Constitutional Judgments on the Merits: The BVerfG’s Deference to German Ordinary Courts 200
- 4.5 Chapter Conclusions 206
- References 207
- 5 Constitutional Review in Mexico: A Best of All Worlds Solution? . . . 213**
 - 5.1 A Brief Recap on the Leading Systems of Constitutional Review and Fundamental Rights 218
 - 5.1.1 The American and the European “Models” Prima Facie . . . 218
 - 5.1.2 The “Models” and Fundamental Rights Enforcement 220
 - 5.2 The Mexican System Between Two Models (1847–2011) 224
 - 5.2.1 American Influence in Mexican Judicial Review (1847–1987) 224
 - 5.2.2 A “Turn” Towards Continental Europe (1987–2011) 231
 - 5.3 The *Expediente Varios 912/2010* and the Incorporation of Diffused Constitutional Review in Mexico 237
 - 5.3.1 The “Judicial” Incorporation of Diffused Review 238
 - 5.3.2 The *Nuevo León* Judgment and the Bills on Diffused Control 242
 - 5.4 Qualified Majorities in the Supreme Court as a Rule-of-Law Distortion 246
 - 5.4.1 What the Constitution Says 246
 - 5.4.2 What the Supreme Court Does 249
 - 5.5 Some Urgent Reforms 250
 - 5.5.1 Real Empowerment for the Ordinary Courts 250
 - 5.5.2 Let the Supreme Court Be Supreme: Exemplary Function of the Constitutional Jurisdiction 251
 - 5.6 Chapter Conclusions 253
 - References 256
- 6 General Conclusions 259**
 - 6.1 Theoretical Legal Requirements for Rule-of-Law Achievement . . . 259
 - 6.2 Current American Constitutional Review Matches the Model 260
 - 6.3 Present-Day German Constitutional Review Matches the Model . . . 261
 - 6.4 Mexican Constitutional Review Does Not Match the Model 262

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 insofar 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.

References

- Buscaglia E, Dakolias M, Ratliff WE (1995) *Judicial reform in Latin America: a framework for national development. Essays in public policy.* Stanford University Press, Stanford
- Campos R (2014) México: Confianza en las Instituciones (Survey). http://consulta.mx/web/images/MexicoOpina/2014/20140211_NA_CONFIANZA%20EN%20INSTITUCIONES.pdf
- Carothers T (2006) The rule of law revival. In: Carothers T (ed) *Promoting the rule of law abroad: in search of knowledge.* Carnegie Endowment for International Peace, Washington, pp 3–13
- Dakolias M, Freestone D, Kyle P (2003) *Legal and judicial reform: strategic directions.* Washington
- European Parliament (2014) Resolution of 23 October 2014 on the disappearance of 43 teaching students in Mexico. P8_TA(2014)0041. <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2014-0041>. Accessed 12 Nov 2014

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.

- Fix-Fierro H (2003a) Courts, justice and efficiency: a socio-legal study of economic rationality in adjudication. Hart, Oxford
- Fix-Fierro H (2003b) Judicial reform in Mexico: what next? In: Jensen EG, Heller TC (eds) Beyond common knowledge: empirical approaches to the rule of law. Stanford University Press, Stanford, pp 240–289
- Fix-Zamudio H (1970) Derecho comparado y derecho de amparo. *Bol Mex Der Comp* 8:327–348
- Freedom House (2015) Freedom in the world 2015: individual country ratings and status. <https://www.freedomhouse.org/sites/default/files/Individual%20Country%20Ratings%20and%20Status%2C%201973-2015%20%28FINAL%29.xls>. Accessed 20 Apr 2015
- García Ramírez S, Islas de González Mariscal O (eds) (2007) Panorama internacional sobre justicia penal: proceso penal y justicia penal internacional. *Culturas y sistemas jurídicos comparados. Serie Doctrina jurídica*, núm. 393, 394, 395. Universidad Nacional Autónoma de México, México
- García Sarubbi D (2011) Federalism and constitutional review in Mexico and the United States: a normative assessment of two different jurisdictional schemes. *Mex L Rev NS* 4(1):35–58
- Hammergren L (2008) Twenty-five years of Latin American judicial reforms: achievements, disappointments, and emerging issues. *Whitehead J Dipl & Int'l Rel* 9(1):89–104
- Humphreys S (2010) *Theatre of the rule of law: transnational legal intervention in theory and practice*. Cambridge University Press, Cambridge
- Inter-American Commission on Human Rights (2013) Annual Report 2013, Washington
- Kossick R (2004) Rule of law and development in Mexico. *Ariz J Int'l & Comp L* 21(3):715–834
- Magaloni AL (2007) La reforma judicial: diagnósticos empíricos vs. recetas legislativas. *Reforma Judicial Revista Mexicana de Justicia* 10:61–74
- Magaloni AL, Negrete L (2001) El poder judicial y su política de decidir sin resolver. *Documentos de Trabajo de la División de Estudios Jurídicos del CIDE*, vol 1, México, D.F.
- Mexican Congress (2013) Presupuesto de Egresos de la Federación para 2014, *Diario Oficial de la Federación*, DCCXXIII (2):1–96
- Mireku O (2000) Constitutional review in federalised systems of government: a comparison of Germany and South Africa. *Schriftenreihe Recht und Verfassung in Südafrika*, Bd. 10. Nomos, Baden-Baden
- Narváez Medécigo A (2013) Enforcement of fundamental rights by lower courts: towards a coherent system of constitutional review in Mexico. *Mex L Rev NS* 6(1):3–44
- Pásara L (2006) Cómo sentencian los jueces del Distrito Federal en materia penal. *Serie Estudios Jurídicos*, núm. 89. Universidad Nacional Autónoma de México, México, D.F.
- Pásara L (2012) International support for justice reform in Latin America: worthwhile or worthless? Woodrow Wilson International Center for Scholars, Washington
- Ray J (2008) Mexico's citizens ready for improved justice system: slightly more than a third express confidence in judicial system and courts. Survey. <http://www.highbeam.com/doc/1G1-185627986.html>. Accessed 12 Nov 2014
- Rendón Huerta T (1998) Derecho penal comparado en materia autoral: México y Alemania. In: Bono M (ed) *Liber ad honorem Sergio García Ramírez*, vol 1. Universidad Nacional Autónoma de México, México, pp 579–593
- Santos A (2006) The World Bank's uses of the "Rule of Law" promise in economic development. In: Trubek DM, Santos A (eds) *The new law and economic development: a critical appraisal*. Cambridge University Press, Cambridge, pp 253–300
- Secretary General of the United Nations (2004) The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary General to the Security Council, S/2004/616
- Shirk DA (2011) Criminal justice reform in Mexico: an overview. *Mex L Rev NS* 3(2):189–228
- The World Bank (2002) The Juicio Ejecutivo Mercantil in the Federal District Courts of Mexico: a study of the uses and users of justice and their implications for judicial reform. Report no. 22635-ME. http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/09/07/000094946_02082104031164/Rendered/PDF/multi0page.pdf. Accessed 20 Apr 2015

- The World Bank (2014) Worldwide governance indicators: country data report for Mexico, 1996–2013. <http://info.worldbank.org/governance/wgi/index.aspx#countryReports>. Accessed 11 Nov 2014
- U.S. Department of State (2014) Merida initiative. <http://www.state.gov/j/inl/merida/>. Accessed 11 Nov 2014
- United Nations (2013) Winners of the United Nations Human Rights Prize for 2013 announced. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14069&Lan>. Accessed 12 Nov 2014
- Valadés D, Carbonell M (eds) (2006) El estado constitucional contemporáneo: Culturas y sistemas jurídicos comparados. Serie Doctrina jurídica, no. 356–357. Universidad Nacional Autónoma de México, México

Chapter 2

Rule-of-Law and Judicial Federalism: The Role of Ordinary Courts in the Enforcement of Fundamental Rights

In order to find out whether the law of a given country has any say in Rule-of-Law achievement—or failure—it is first necessary to establish on a theoretical level what Rule-of-Law means. Indeed, only a critical legal approach (i.e., not merely descriptive) can shed light on whether the law per se is a determinant of Rule-of-Law realization and, therefore, on whether cultural components have been thus far overrated as the explanation for Rule-of-Law failure in certain contexts. On the other hand, critique of a specific legal system can only be meaningful if it is based on an objective standard, that is, on legal norms that objectively correspond to the Rule-of-Law ideal. The first evident problem is that even though the concept *Rule-of-Law* has consolidated as the overarching objective guiding almost every reform effort all over the world,¹ there is hardly any consensus on what it concretely stands for.² Despite the overwhelming agreement worldwide on the Rule-of-Law as a desirable goal and as a good idea for every society,³ the debate concerning the concept's scope and meaning is far from over, particularly when taking into account the usual tensions—when not contradictions—faced by practitioners with diverging views on the topic.⁴ The classic theoretical inquiries on whether the Rule-of-Law represents merely the establishment of law and order in a given territory or rather includes democratic procedures that legitimize government decisions are by no

¹ See Carothers (2006a, b), pp. 3–4.

² See Stromseth et al. (2006a, b), p. 56; and Kleinfeld (2006), p. 32.

³ See Carothers (2008), p. 52.

⁴ See Kleinfeld (2006), pp. 33–35. She claims that the Rule-of-Law as a concept includes different ends and not infrequently those ends are incompatible with each other. This happens, for instance, with the implementation of *law and order* and *human rights* in some contexts. Similarly Carothers (2008), p. 50, points out: “. . . when diverse national and international actors gather and agree that they are all committed to helping build the rule of law in a particular country or context, they usually agree on much less than it initially appears. They may all proceed with a putatively common rule-of-law agenda but in practice pursue quite different preoccupations, either in relative isolation from one another or sometimes at cross purposes.”

means resolved.⁵ Quite the opposite: there is still much disagreement on whether Rule-of-Law denotes merely the predictability provided by limited government or instead comprises also a substantive character which involves the effectiveness of certain rights and/or the existence of some sort of social justice.⁶ These theoretical discussions intensified with the growing inclusion of the term Rule-of-Law in the political agenda and its indiscriminate use to justify any transformation of a legal or judicial institution worldwide.⁷ If there is not a fairly clear Rule-of-Law concept at hand, however, any value judgment issued with regard to a specific legal system's suitability to achieve the Rule-of-Law will be arbitrary and, consequently, any conclusion based on that critique will be meaningless.

This chapter's main objective is to develop a theoretical framework to fill that gap. It develops a model or theoretical standard with which the Rule-of-Law suitability of concrete legal systems can be assessed objectively. This chapter shows, in short, that adequate constitutional procedural rules regarding the protection of basic rights are crucial for any legal system to be consistent with the Rule-of-Law ideal. When the constitutional procedural law of a given legal system does include mechanisms that enable individuals to challenge the constitutionality of judicial acts of authority for alleged violations of basic rights, such system can only correspond to the Rule-of-Law if the law establishes a clear *functional distinction* between constitutional and ordinary courts. A legal system will only match the Rule-of-Law—provided it has succeeded in fulfilling the concept's additional dimensions⁸—if its constitutional procedural rules take into account that the bulk of basic rights cases must be solved by ordinary courts empowered to provide a remedy and (at least formally) have to be left out of the constitutional jurisdiction. 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

⁵ See Raz (2009b), p. 211, who considers Rule-of-Law and democracy as two very different things.

⁶ See Dworkin (1985), pp. 11–12, who argues against the “Rule book conceptions” of the Rule-of-Law. These are not sufficient for a just society, he claims, when one considers the different theories of adjudication they recommend.

⁷ See Carothers (2008), p. 50. On the negative impact of poor Rule-of-Law definitions see Kleinfeld (2006), p. 50.

⁸ See, for instance, Bumke and Voßkuhle (2008), pp. 294–312. Referring to the German context, they point out that some other key elements include the principle of separation of powers, the lawfulness of the administration, the principle of proportionality, the binding effect of law and justice on the judiciary, the principle of legal certainty, legal protection against violation of the law by public authorities, and due process principles in criminal and criminal procedural law. Curiously enough, however, many of these elements can also be seen as basic rights for individuals provided they are considered as such by a constitution (or by a constitutional court) and there is the mechanism to enforce them judicially. One good example of this is how the German Federal Constitutional Court (BVerfG) has considered that every statute contrary to the constitution violates the general freedom of action (*allgemeine Handlungsfreiheit*) granted by German Basic Law (Ger. GG) (1949), art. 2, cl. 1, published in *Bundesgesetzblatt Teil I* 1949:1–19, and entitles the individual to challenge the measure through a constitutional complaint. See *Elfes*, BVerfGE 6, 32 (1957), p. 41, and its implications in *infra* Chap. 4.