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ARTICLE

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The Soft Guardrails of Legal Constitutionalism

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Abstract
A major challenge for contemporary legal constitutionalism is a crisis of public ethics that manifests in the lack of mutual toleration and institutional forbearance towards the judiciary. To showcase the importance of these norms in the relationship among co-equal branches of government, I focus on three cases, one where these norms have been present—South Africa—one where they have been absent—Mexico—and one case in between—United States. Until this crisis is addressed, the authority of apex courts will continue to be under threat. The Article suggests that a starting point to address the public ethics deficit may lie in shifting comparative constitutional law scholarly attention to the political sphere.

Keywords: Autocratic legalism; unconstitutional constitutional amendments; abusive constitutionalism; democratic backsliding; democratic erosion; South Africa; Mexico; United States

A. Introduction

In *How Democracies Die*, Steven Levitsky and Daniel Ziblatt argue that the health of democracies largely depends on two unwritten norms that work as soft guardrails of a democratic system of government: Mutual toleration among political parties and institutional forbearance.[1] Mutual toleration "refers to the idea that as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern."[2] Importantly, mutual toleration does not exclude disagreement. Yet, even in disagreement, rivals are always seen as legitimate:

> We may disagree with, and even strongly dislike, our rivals, but we nevertheless accept them as legitimate . . . . It means that even if we believe our opponents' ideas to be foolish or wrong-headed, we do not view them as an existential threat. Nor do we treat them as treasonous, subversive, or otherwise beyond the pale.[3]

Institutional forbearance refers to an attitude of wisdom and restraint by politicians and public office holders. In particular, it is a tendency to avoid actions that, while within their realm of constitutional power, obviously violates the spirit of the law.[4] In other words, institutional

[1] *See generally* Steven Levitsky & Daniel Ziblatt, How Democracies Die 91, 94 (2018).
[2] *Id.* at 91.
[3] *Id.* at 91.
[4] *Id.* at 94.

forbearance requires political actors to avoid what Mark Tushnet calls "constitutional hardball," that is, to behave in a way that is not only within the bounds of the constitution but is consistent with the understandings that make constitutional government possible.[5] The study of institutional forbearance and mutual toleration as "soft guardrails" of constitutional democracy falls into the study of informal institutions. Helmke and Levitsky define informal institutions as "socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels."[6] One of the most striking aspects of Levitsky and Ziblatt's proposition about the fate of constitutional democracies depending on "soft guardrails" is that the observance and enforcement of these unwritten norms depend on the integrity and ethics of those who operate the constitutional system—prominently, political parties, politicians, and public office holders—rather than in the institutional design.

Even though Levitsky and Ziblatt mainly focus on the unwritten norms governing the relationship between political rivals in the executive-legislative sphere, the norms that ensure the good health of constitutional democracy—that is, mutual toleration and institutional forbearance—also apply to the relationship of said branches of government and the judiciary. Mutual toleration would be consistent, for example, with a legislature expressing deep disagreement with a judicial decision striking down a law and declaring that the decision was wrong from a legal perspective. On the contrary, where mutual toleration is absent, arguments, legal or otherwise, and facts become irrelevant: Any decision against the interests of the executive and/or legislative would be weaponized against the court, judge, or judiciary in question, that is, it would be used to attack the integrity or legitimacy of those officials and institutions. Institutional forbearance, in the previous example, would require the legislature to comply with judicial decision even in a context of deep disagreement. Where institutional forbearance is absent, a legislature, or the relevant branch of government, would resort to extreme institutional measures—which may or may not be within the bounds of the constitutional order—to prevent or revert an unwanted outcome or to seek retribution. Note that, while closely interrelated, mutual toleration and institutional forbearance are two distinct norms. If there is mutual toleration, it is likely that institutional forbearance will be present, but that is not necessarily always the case.

These norms work on a bilateral basis. However, it is perhaps the political branches which are more prone to break them. Broadly speaking, courts abide by these norms by providing reasons for their decisions based on the law and the constitution and by deciding the cases brought to them according to the relevant legal framework. By the same token, a court or judge would break the norm of mutual toleration if it decided to publicly disparage a government or a public official because of the enactment of certain policies. A judge or a court would break the norm of institutional forbearance if, for instance, its decisions were not supported by arguments based on the law and the constitution but were simply a reflection of ideological preferences.

Courts are also in a special—vulnerable—position in liberal constitutional democracies because their legitimacy and stability depends on the willingness of other actors to acknowledge their power and authority, both by bringing cases to courts and abiding by their decisions. In this way, the functioning of the liberal constitutional model rests upon the assumption that those putting the system in motion have shared understandings around the value of the institutional

[5]*See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2003) (developing the term "constitutional hardball").

[6]Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, POL. PERSPS. 725, 727 (2004).

structures of the state, including judicial review and the role of courts.[7] That commitment may arise out of liberal democratic values or self-interest.[8]

The relevant political actors are thus assumed and expected to acknowledge the authority and legitimacy of courts and observe their decisions over time. This assumption is so ingrained that works theorizing the ability of courts to slow down, prevent, or reverse democratic erosion and backsliding rest on the idea that judicial authority will be acknowledged and decisions will be observed.[9] In other words, when it comes to the norms governing the relationship between the political branches and the judiciary, mutual toleration and institutional forbearance are largely taken for granted. This is perhaps a good thing in that it might reflect the fact that the soft guardrails of legal constitutionalism are profoundly ingrained in the world of liberal democracies. However, trends of democratic erosion across the world speak suggest otherwise. It is well known that in contexts of democratic erosion or backsliding, mutual toleration and institutional forbearance are acutely scarce and courts are often targets of capture.[10] In an environment where mutual toleration and institutional forbearance are scarce or do not exist, constitutional judging becomes a risky endeavor that can easily create existential threats for the courts. In such contexts, if anything, there is very little apex courts, and the judiciary in general, can do to defend constitutional democracy or to preserve themselves.

Despite their importance, these unwritten rules are also largely taken for granted in the field of comparative constitutional law.[11] To illustrate their importance, this Article offers examples where such norms have been present and an example where they have not. South Africa—discussed in Section B —and Mexico—discussed in Section D —during the periods examined, exemplify the extremes: The presence of mutual toleration and institutional forbearance in the former, its absence in the latter. The United States—discussed in Section C —represents a position in between. The example of Mexico is crucial in that it showcases that institutional forbearance and mutual toleration are the soft guardrails that keep courts and, more broadly, legal

[7]This phenomenon could also be examined from the perspective of the body of literature on norm contestation, robustness, and resilience in international relations and international law. *See, e.g.*, Nicole Deitelhoff & Lisbeth Zimmermann, *Norms Under Challenge: Unpacking the Dynamics of Norm Robustness*, 4 J. GLOB. SEC. STUD. 2 (2019); Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986); Richard Price, *Emerging Customary Norms and Anti-Personnel Landmine*, *in* THE POLITICS OF INTERNATIONAL LAW 106 (Christian Reus-Smit ed., 2004); Richard Price, *Detecting Ideas and Their Effects*, *in* THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS 252 (Robert E. Goodin & Charles Tilly eds., 2008); ANTJE WIENER, THE INVISIBLE CONSTITUTION OF POLITICS (2009).

[8]*See generally* Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOB. LEGAL STUD. 71 (2004); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

[9]*See* Mariana Velasco-Rivera, *On Dixon's Responsive Theory of Judicial Review: How Responsive Can the Responsive Model Be?*, 34 NAT'L L. SCH. INDIA REV. 61 (2022) (discussing this point). *See generally* ROSALIND DIXON, RESPONSIVE JUDICIAL REVIEW: DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE (2023).

[10]*See, e.g.*, David Landau, *Abusive Constitutionalism*, 47 U.C.D. L. REV. 189 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018); Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 51 (2014); WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*, 56 ISR. L. REV. 502 (2023).

[11]*See, e.g.*, Kim Lane Scheppele, *Rights into Structures: Judging in a Time of Democratic Backsliding*, 26 GERMAN L.J. 255 (2025) (in this same Special Issue); David Kosař, *Embedding Strategies of the European Apex Courts: Why Court Communication with All Segments of Society Matters*, 26 GERMAN L.J. 274 (2025) (in this same Special Issue). On the one hand, Scheppele explores the potential of International Human Rights Courts' jurisprudence that ties the vindication of individual rights to the maintainance of democratic structures to prevent democratic backsliding and/or serve as democratic reform guidelines for new democrats seeking to restore constitutional institutions. The assumption is that those actors who are supposed to abide by the relevant rulings will indeed do so. Kosař, on the other hand, argues that apex courts would be more resilient to democratic backsliding if implementing communication strategies to connect with ordinary citizens to increase public trust in courts—the assumption being that in the face of court-curbing measures the public will resist them. However, arguably, Mexico's Supreme Court checks most, if not all of the four the strategies that Kosař proposes, yet the government was able to swiftly overhaul the judiciary as described in Section D.

constitutionalism, safe. Finally, Section E concludes with a reflection on why the rejection of the soft guardrails of legal constitutionalism represents a crisis of public ethics and what courts, if anything, can do in such a context.

B. South Africa: Mandela and the New Constitutional Court

Where mutual toleration and institutional forbearance are present in the relationship between the executive-judiciary and legislative-judiciary, court decisions are respected and observed even when the political branches, through their officials, may fundamentally and outspokenly disagree with them. South Africa during the presidency of Nelson Mandela offers an instructive example. Two episodes in Mandela's presidency shed light on the importance of mutual toleration and institutional forbearance for the consolidation of the legitimacy of apex courts. The first instance took place in the occasion of a constitutional challenge to the Transitional Government Act that was issued in preparation for the first post-apartheid elections. The Act included a clause that gave President Mandela the power to amend the Act itself. Exercising such power, he made changes that transferred the power to determine the membership of local government demarcations committees from the provincial to the national government.[12] In his words:

> During my presidency, Parliament authorised me to issue two proclamations dealing with the elections in the Western Cape Province. That provincial government took me to the Constitutional Court which overruled me in a unanimous judgement. As soon as I was informed of the judgment, I called a press conference and appealed to the general public to respect the decision of the highest court in the land on constitutional matters.[13]

According to the Nelson Mandela Foundation's project "The Presidential Years," the public acceptance of the ruling by the President was done within an hour of the court delivering it.[14] Notably, Frene Ginwala, the Speaker of Parliament of the time, points out that in discussing the time that it would take to amend the Act in question, President Mandela expressed that no matter what the decision of the Constitutional Court should be observed: "But the one thing is this, we must respect the decision of the Constitutional Court, there can be no question of denying or in any way rejecting that."[15] President Mandela could have instead chosen to criticize the decision, frame it as an obstacle for the upcoming electoral process to take place according to plan—or, worse, as a threat to the peaceful transition to democracy—and to present the judges who made them as misguided or politically compromised officials acting contrary to the common good. Moreover, given his popularity and political legitimacy, he could have also announced a plan to take swift action in overriding the effects of the decision. In other words, he could have failed to respect both the norms of mutual toleration and institutional forbearance. Instead, he was resolute in giving a swift response, and in recognizing the authority of the court to settle constitutional disputes.

A second example is President Mandela's reaction to a court order issued by the High Court of Pretoria. After the 1995 Rugby World Cup and in light of reports of mismanagement and racism in the governing body of the South African Rugby Football Union ("SARFU"), President Mandela

[12]Nelson Mandela Found., *6.3 Relationship between the Executive and the Judiciary*, Nelson Mandela: Presidential Years, https://tpy.nelsonmandela.org/pages/part-ii-governing/theme-6-the-president-and-the-constitution/6-3-relationship-between-the-executive-and-the-judiciary (last visited Jan. 18, 2024).

[13]Nelson Mandela Found., *264 – NM, "The Presidential Years," p. 29, NMF, Johannesburg – The Presidential Years*, Nelson Mandela: Presidential Years, https://tpy.nelsonmandela.org/footnotes/264-nm-the-presidential-years-p-29-nmf-johannesburg (last visited Dec. 18, 2024).

[14]*Id.*

[15]Nelson Mandela Found., *supra* note 12.

appointed a commission of inquiry to look into the entity's affairs.[16] SARFU challenged President Mandela's action at the High Court of Pretoria. President Mandela was subpoenaed to appear in court to justify his decision of appointing a commission of inquiry. Even though his closest aides and legal advisors advised him to challenge it due to concerns that the judge's aim was to humiliate President Mandela, and that, in his words, having to testify in court "made his blood boil," he abided by the court order.[17] In Mandela's words:

> I felt that at that stage in the transformation of our country, the President had certain obligations to fulfill . . . . I wanted the whole dispute to be resolved solely by the judiciary. This, in my opinion, was another way of promoting respect for law and order and once again, of the courts of the country.[18]

The High Court of Pretoria eventually ruled in SARFU's favor. President Mandela stated that he would:

> [A]bide by the decisions of our courts; and that all South Africans should likewise accept their rulings. The independence of the judiciary is one important pillar of our democracy.[19]

Later, in a speech he gave on the occasion of the President's Budget Debate in the National Assembly in 1998, referring to that case he added:

> [E]qually fundamental [to judicial independence] is the commitment to abide by the decisions of the courts, whether they are in one's favour or not.
>
> I wished by example to support that principle by obeying the summons to appear in court, despite the misgivings of my legal advisors. I appreciate the widespread support I received in this decision, and I take it as a sign of the strength with which the commitment to our constitution is entrenching itself in our nation.
>
> I trust that all those who approved of my doing so will be equally strong in urging others to respect the law at all times. [20]

Note that in this second episode, President Mandela could have chosen to follow his legal advisor's suggestion and challenge the subpoena but instead, he acted consistently with the norm of institutional forbearance by appearing in court and with the norm of mutual toleration by promoting respect for the judiciary.

In his book, *Dare Not to Linger: The Presidential Years*,[21] we learn about the logic behind his actions and his view on the importance of the judiciary for the good health of a constitutional democracy and the role that respect among co-equal branches of government has in it. Mandela seems to have understood his role as a leader as a means to set the standard of public ethics in post-apartheid South Africa:

[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Nelson Mandela Found., *272 – Statement by the Office of the President on the SARFU case ruling, 17 April 1998 – The Presidential Years*, Nelson Mandela: Presidential Years https://tpy.nelsonmandela.org/footnotes/272-statement-by-the-office-of-the-president-on-the-sarfu-case-ruling-17-april-1998 (last visited Jan 18, 2024).
[20] Nelson Mandela Found., *supra* note 12.
[21] *See generally* Nelson Mandela & Mandla Langa, Dare Not Linger: The Presidential Years (2017).

> The apartheid regime had put law and order in disrepute. Human rights were ruthlessly suppressed, there was detention without trial, torture, and murder of political activists, open vilification of Appeal Court judges who were independent and gave judgements against the regime, and the packing of the judiciary with conservative and pliant judges . . . . Because of this crude practice, and out of my convictions, *I exploited every opportunity to promote respect for law and order and for the judiciary*.[22]

Pointing out the open vilification of independent judges as a problematic practice that contributed to the erosion of the rule of law, suggests that President Mandela was conscious about the importance of mutual toleration. He seems to have understood that his behavior would contribute to the construction of new shared codes of behavior among public officers in the constitutional democracy that was emerging. It is clear that President Mandela was aware of the different avenues he could have taken regarding court decisions he was outspokenly in disagreement with. Yet, he chose to lead by example in the hope of a cultural shift from a situation where, among other things, open vilification of independent judges was normalized to one where the soft guardrails of legal constitutionalism became entrenched.

C. The United States: Biden and the Conservative Supreme Court of the United States

The reaction of U.S. President Joseph R. Biden Jr. to the overturning of *Roe v. Wade*[23] in *Dobbs v. Jackson Women's Health Organization*[24] in 2022 offers an example of mutual toleration and institutional forbearance in the context of deep disagreement with the United States Supreme Court. In the wake of the decision, President Biden did not shy away from stating his fundamental disagreement with the judgment. He went as far as describing the decision as "a realization of extreme ideology" and a "tragic error."[25] He also critically pointed out that the core of the decision was made by the three Justices appointed by President Trump. Though deeply critical, President Biden never questioned the authority of the Supreme Court to issue the decision:

> Make no mistake: This decision is the culmination of a deliberate effort over decades to upset the balance of our law. It's a realization of an extreme ideology and a tragic error by the Supreme Court, in my view . . . . The Court has done what it has never done before: expressly take away a constitutional right that is so fundamental to so many Americans that had already been recognized . . . . With this decision, the conservative majority of the Supreme Court shows how extreme it is, how far removed they are from the majority of this country. They have made the United States an outlier among developed nations in the world. But this decision must not be the final word.[26]

Even though President Biden explicitly said he would do everything in his power to protect women's rights, the binding character of the Court's decision was never put into question—as it follows from President Biden's remarks about the decision's effects: "The Court's decision . . . will have real and immediate consequences. State laws banning abortion are automatically taking effect

[22] *Id.* at 29 (emphasis added).

[23] Roe v. Wade, 410 U.S. 113 (1973).

[24] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

[25] Joan E. Greve, *Biden Condemns U.S. Supreme Court's 'Tragic Error' of Overturning Roe v. Wade*, GUARDIAN (June 24, 2022, 2:20 PM), https://www.theguardian.com/us-news/2022/jun/24/biden-condemns-supreme-court-dobbs-jackson; *President Biden Reacts to Supreme Court Decision Overturning Roe v. Wade*, C-SPAN (June 24, 2022), https://www.c-span.org/video/?521322-1/president-biden-reacts-supreme-court-decision-overturning-roe-v-wade.

[26] *President Biden Reacts to Supreme Court Decision*, *supra* note 25.

today, jeopardizing the health of millions of women, some without exceptions."[27] Moreover, it is clear that President Biden disagreed with the decision and wanted it to change. Yet, that change would be pushed for through the appropriate means: "My administration will use all of its appropriate lawful powers. But Congress must act. And with your vote, you can act. You can have the final word. This is not over."[28]

Based on these examples, one may be forgiven for thinking that mutual toleration and institutional forbearance are basic rules of civility among the U.S. judiciary and executive and, therefore, take them for granted as part of the ordinary workings of a constitutional system. However, their value and centrality for the good health of democracy should not be underestimated. As Levitsky and Ziblatt argue, because these norms are unwritten, they are hard to see, particularly when they are functioning well.[29] Their importance is best revealed when they are absent. In contexts of lack of mutual toleration and institutional forbearance, court decisions that are against the government's interests and agenda become an excuse for the political branches to attack and question the legitimacy of the apex court involved and/or the judiciary in general.

In 2024, *Trump v. United States*[30] moved President Biden closer to this situation. In that decision, the Supreme Court granted former presidents criminal immunity putting them, for key practical purposes, above the law.[31] In response to that decision and as part of a wider debate of an increasingly ideological and non-independent court, President Biden proposed the introduction of eighteen-year term limits for Justices, an enforceable code of conduct for the Supreme Court, and a constitutional amendment to overrule *Trump v. United States*.[32] These measures were presented as a move to "empower the American people to prevent the abuse of Presidential power, restore faith in the Supreme Court, and strengthen the guardrails of democracy."[33] While these measures may be a reasonable and justifiable response in the U.S. context, at face value they are in tension with the norm of institutional forbearance. To be sure, institutional changes that are problematic from the perspective of institutional forbearance may sometimes be necessary measures to correct constitutional malfunctions. However, it would seem that in those cases, the need for change must be apparent, clearly reasoned and, factually supported by the relevant actors. Determining whether President Biden's proposal is appropriate is out of the scope of this Article. However, the example is useful to illustrate that the observance of the soft guardrails of legal constitutionalism is not clear-cut but something that happens in a spectrum. This is perhaps why it is difficult to determine *when* the alarms should sound.[34]

D. The Rapid Demise of the Soft Guardrails of Legal Constitutionalism in Mexico 2018–24

The presidency of Andrés Manuel López Obrador ("AMLO") from 2018 through 2024 offers an example of a process of collapse of the soft guardrails of legal constitutionalism when it comes to the norms governing the relationship between executive-judiciary and legislative-judiciary. Its result was the adoption of a constitutional amendment that, for all practical purposes, ends the institutional independence of Mexico's federal and state judicial branches and, therefore, upends

[27] *Id.*

[28] *Id.*

[29] Levitsky & Ziblatt, *supra* note 1, at 90.

[30] Trump v. United States, 603 U.S. 593 (2024).

[31] Trump v. United States, 603 U.S. 593, 657 (Sotomayor, J., dissenting) (saying that the majority opinion "makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law").

[32] *FACT SHEET: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, The White House (July 29, 2024).

[33] *Id.*

[34] *See* Scheppele, *Autocratic Legalism*, *supra* note 10 (discussing how to identify "autocratic legalists").

constitutional democracy in that country. In what follows I illustrate the process of collapse of both mutual toleration and institutional forbearance by focusing on statements and actions by the President and his enablers—that is, governors and legislators—vis-à-vis the judiciary; as well as the attempts of pushback against the overhaul of the judiciary mainly via constitutional challenges. In so doing, the very limited room apex courts have to prevent or resist the damage when their co-equal branches of government question or outright reject their authority becomes apparent.

Established as a constitutional tribunal in 1994, the authority and legitimacy of the Supreme Court slowly but surely consolidated in the last three decades, after Mexico transitioned to democracy at the turn of the century. The consolidation of the legitimacy of the Supreme Court was, of course, not straightforward, but generally speaking, mutual toleration and institutional forbearance governed the relationship between executive-judiciary and legislative-judiciary during that period.[35] After winning a historic landslide election and being the most-voted President in the history of the country, AMLO was not prepared to deal with pushback to his agenda. In Mexico, like in many other countries that follow the model of legal constitutionalism, constitutional judicial review acquired a central role in the settlement of constitutional controversies. Once in power, AMLO seemed to have not been prepared to play by the rules of the game. The more pushback he encountered to questionable policy decisions through constitutional litigation, the more he was ready to break the soft guardrails of legal constitutionalism to bring his preferred policies forward.

I. Breaking with Mutual Toleration

Very early in his presidency, AMLO strongly rejected mutual toleration across the board: From attacking political opponents to independent government bodies such as the *Instituto Nacional Electoral*—that is, the electoral watchdog—and the Supreme Court.[36] Attacks went from institutional—for example, describing democratic institutions such as the electoral watchdog and the Supreme Court as useless, a waste of taxpayer money and as institutions whose only purpose was to protect a corrupt elite to the detriment of ordinary citizens—to personal—for example, making baseless accusations of judicial corruption for decisions he did not like or doxing judges.

For the first time since 1994, the legitimacy and authority of the Supreme Court—and the judiciary at large—was constantly put into question and undermined by the federal government, in particular by the President. Open vilification of judges and the judiciary became a feature of his communication strategy, particularly in his daily morning press conferences known as *mañaneras*. AMLO used the bully pulpit to put pressure on the Supreme Court to influence the outcome of high-profile cases. He would also regularly target Justices whenever ruling outcomes were against his administration or when outcomes allowed him to smear the judiciary and judges alike. His tactics included characterizing judges as corrupt for issuing injunctions in high-profile criminal cases.[37]

The outright rejection of mutual toleration described above by the President and his party, MORENA, did not take too long to translate into unprecedented expressions of violence both on

[35]*See generally* Mariana Velasco-Rivera, La facultad de averiguación: lo que perdió la Suprema Corte de Justicia de la Nación para el análisis estructural de políticas públicas (2014) (discussing a case of jurisdiction stripping in Mexico).

[36]*See, e.g.*, Mariana Velasco-Rivera, *Mexican Democracy (and the Supreme Court) at a Crossroads*, Verfassungsblog (Mar. 5, 2023), https://verfassungsblog.de/mexican-democracy-and-the-supreme-court-at-a-crossroads/; Mariana Velasco-Rivera, *Can the Mexican Supreme Court Save Constitutional Democracy?*, Verfassungsblog (May 12, 2023), https://verfassungsblog.de/can-the-mexican-supreme-court-save-constitutional-democracy/.

[37]*See, e.g.*, Zedryk Raziel & Carmen Morán Breña, *López Obrador arremete contra el Poder Judicial en su quinto informe de Gobierno: "Tienen convivencias inconfesables"*, El País (Sept. 1, 2023), https://elpais.com/mexico/2023-09-01/lopez-obrador-arremete-contra-el-poder-judicial-en-su-quinto-informe-de-gobierno-tienen-convivencias-inconfesables.html.

and offline against members of the Supreme Court, in particular against the first female Chief Justice Norma Piña, appointed in January 2023—including threats to her physical integrity.[38]

II. Breaking with Institutional Forbearance

The attacks on the judiciary did not stop at the rhetorical level by rejecting mutual toleration. Breaking with institutional forbearance also played a central role. Very early on in his presidency, AMLO gave signs of his wishes to take action to undermine the institutional independence of the Supreme Court. The first sign was a proposal by MORENA Senator Ricardo Monreal to pack the Court with five additional members in 2019.[39] The measure was widely criticized in the media and did not gain traction as Senator Monreal seemed to have let the idea go relatively quickly. The proposal was not even put to the consideration Congress. The second warning sign took place in the context of the 2021 judicial reform that was supposed to tackle nepotism within the judiciary while failing to introduce specific measures to that end. With few exceptions, the judicial reform of 2021 was passed widely uncriticized.[40] The hidden agenda, however, revealed itself when the secondary legislation to implement the constitutional amendment was adopted. A sunset provision extending the term of Arturo Zaldívar as Chief Justice ("CJ"), who in his tenure as CJ revealed himself to be subservient to the government,[41] was hastily included—in violation of the applicable procedural rules—to the piece of legislation being considered by the Senate.[42] The argument that the government used to justify this measure was that without Zaldívar as CJ, the recently adopted constitutional amendment would be "dead-letter."[43] The lengths to which the party in government went to defend this measure speaks volumes of how useful he had been for the government.[44] Despite significant negative media coverage and pushback by the political opposition and the legal community, the government did not seem to relent on defending the measure. Opposition parties brought constitutional challenges against it. Eventually, the Supreme Court struck it down on the basis that the provision extending the CJ's term was in breach of the four-year term established in the constitution.[45]

[38]Fátima Chávez, *Amenazan de muerte a ministra Norma Piña; jueces condenan violencia*, Radio Fórmula (Mar. 2, 2023, 10:38 AM), https://www.radioformula.com.mx/nacional/2023/3/2/amenazan-de-muerte-ministra-norma-pina-jueces-condenan-violencia-751192.html.

[39]Rolando Ramos, *Quiere Monreal sala anticorrupción en la Suprema Corte*, El Economista (Apr. 5, 2019), https://www.eleconomista.com.mx/politica/Quiere-Monreal-sala-anticorrupcion-en-la-Suprema-Corte-20190404-0162.html; Martin Vivanco, *¿Una sala anticorrupción en la Suprema Corte? Una mala y peligrosa idea*, NEXOS: El Juego de la Suprema Corte (Apr. 8, 2019), https://eljuegodelacorte.nexos.com.mx/una-sala-anticorrupcion-en-la-suprema-corte-una-mala-y-peligrosa-idea/; Juan J. Garza Onofre, *Tonterías relevantes*, Reforma (Apr. 10, 2019), https://www.reforma.com/aplicaciones/editoriales/editorial.aspx?id=154395.

[40]Mariana Velasco-Rivera, *La reforma judicial que no necesitamos*, Animal Político (Sept. 1, 2020), https://animalpolitico.com/analisis/invitades/la-reforma-judicial-que-no-necesitamos.

[41]*See, e.g.*, Mariana Velasco-Rivera, *When Judges Threaten Constitutional Governance: Evidence from Mexico*, I·CONnect (June 16, 2022), https://www.iconnectblog.com/when-judges-threaten-constitutional-governance-evidence-from-mexico/.

[42]*See* Mariana Velasco-Rivera, *Reformas Constitucionales Arbitrarias*, *in* El Estado de Derecho en el México Contemporáneo 51 (José Ramón Cossío Díaz & Vicente Ugalde eds., 2023) (discussing the adoption of both the constitutional amendment to the judiciary and the hasty inclusion of Chief Justice Zaldivar term extension).

[43]Pedro Domínguez, *Sin Arturo Zaldívar, reforma al Poder Judicial será letra muerta: AMLO*, Milenio (Apr. 20, 2021), https://www.milenio.com/politica/arturo-zaldivar-reforma-judicial-letra-muerta-amlo.

[44]*See* Mariana Velasco-Rivera, *¿Qué Pasó Con El Transitorio Que Busca Extender La Presidencia de Zaldívar?*, NEXOS: El Juego de la Suprema Corte (June 1, 2021), https://eljuegodelacorte.nexos.com.mx/que-paso-con-el-transitorio-que-busca-extender-la-presidencia-de-zaldivar/; Mariana Velasco-Rivera, *La consulta extraordinaria sobre la extensión de la presidencia de Zaldívar: ¿Es la vía idónea?*, NEXOS: El Juego de la Suprema Corte (June 11, 2021), https://eljuegodelacorte.nexos.com.mx/la-consulta-extraordinaria-sobre-la-extension-de-la-presidencia-de-zaldivar-es-la-via-idonea/.

[45]Mariana Velasco-Rivera, *La (no) extensión de la presidencia de Zaldívar: lo bueno, lo malo y lo feo*, NEXOS: El Juego de la Suprema Corte (Nov. 18, 2021), https://eljuegodelacorte.nexos.com.mx/la-no-extension-de-la-presidencia-de-zaldivar-lo-bueno-lo-malo-y-lo-feo/.

After the failed attempt to extend the tenure of Zaldívar as CJ, the election of CJ went ahead as required by the constitution and so the attacks against the judiciary intensified. On January 2023, Justice Norma Piña became the first woman in Mexico's history to be elected by her peers as CJ of the Supreme Court. With it, the government attacks against the judiciary reached unprecedented intensity. Such intensity is, of course, multifactorial. In addition to having struck down the extension of the CJ term, the Supreme Court was also set to decide on the constitutionality of a series of amendments to electoral law that aimed at undermining the electoral watchdog—which came to be known as Plan B after the government failed to implement Plan A: Adopting similar changes but through a constitutional amendment.[46] The set of legislative amendments were adopted in gross violation of legislative procedural rules and were about to be reviewed, and eventually struck down, by the Supreme Court.[47]

As noted, attacking and disinforming about the judiciary became a feature of AMLO's presidency. In this particular instance, one week after the passage of Plan B and in the context of two injunctions in two separate high-profile criminal cases, AMLO personally blamed CJ Piña, who had been in her new role for two months, for the "corrupt" behavior of the respective judges in each of the cases. In his daily press conference, he thus stated:

> As soon as the new CJ arrived a wave of decisions in favor of alleged criminals unleashed.
>
> . . .
>
> Before, when Arturo Zaldívar [was CJ] there was a little bit more supervision (*vigilancia*) of judges (. . .)
>
> that body [the judicial council] is a flower vase, it is an ornament (. . .)[48]

In that same press conference, AMLO resorted to the traditional talking points of his disinformation campaign consisting of calling the judiciary a decadent and corrupt power that is full of unjustifiable economic privileges, designed to protect the corrupt, economic and political elite of the "old regime."[49]

III. The Enablers

President López Obrador rejected mutual toleration and institutional forbearance against constitutional checks, including the judiciary, without encountering any relevant pushback. That is to say, while there were critical voices, for instance from the civil society, legal scholars and the political opposition, no single individual from his party questioned his behavior. Quite the opposite. The President's contempt against the soft guardrails of legal constitutionalism was met by enablers that, time and again, supported and replicated his rhetoric. In the case of the judiciary, even then sitting Justice Zaldívar joined by actively participating in the smear campaign against

[46]The Plan B legislative amendments were pursued as the second-best option to overhaul the electoral watchdog after MORENA failed to pass introduce them as a constitutional amendment due to the refusal of the—once hegemonic—Partido Revolucionario Institucional ("PRI") to partner with the government to push the reform through Congress. *See* Velasco-Rivera, *Mexican Democracy (and the Supreme Court) at a Crossroads*, *supra* note 36.

[47]Among other things, these amendments slashed the size of the agency's civil service by eighty-five percent, putting into question the capacity of the agency to guarantee the organization of free and fair elections in 2024. *See id. See also* Zedryk Raziel, *La Suprema Corte asesta el golpe final y anula por completo el "Plan B" electoral de López Obrador*, El País (June 22, 2023), Ghttps://elpais.com/mexico/2023-06-22/el-supremo-asesta-el-golpe-final-y-anula-por-completo-el-plan-b-electoral-de-lopez-obrador.html.

[48]Beatriz Guillén, *López Obrador se lanza contra Norma Piña: "Apenas llegó se desató una ola de resoluciones a favor de presuntos delincuentes,"* El País (Mar. 1, 2023), https://elpais.com/mexico/2023-03-01/lopez-obrador-se-lanza-contra-norma-pina-apenas-llego-se-desato-una-ola-de-resoluciones-a-favor-de-presuntos-delincuentes.html.

[49]*Id.*

the judiciary. Among other things, he appeared in a state media television program replicating the federal government's disinformation campaign.[50]

The day before the Supreme Court was set to decide on the first set of constitutional challenges to Plan B, the federal government issued a press release—published through the official *X* government handle—directly questioning the authority the Supreme Court to adjudicate the case. The press release stated that should the Supreme Court decide to invalidate the legislative process through which the changes to electoral law were adopted, the court would effectively and illegitimately be replacing the legislative branch.[51] As soon as the Supreme Court declared the unconstitutionality of Plan B due to gross violations of the legislative process in the first set of cases brought by the opposition, the smear campaign doubled down by a host of coordinated enablers.[52] Governors,[53] Senators,[54] House Representatives,[55] and Cabinet members[56] were quick to react on social media to discredit the Court's decision, claiming that it responded to private and corrupt interests while overlooking the popular will expressed through popularly elected representatives.

A day after the judgment was handed down, President López Obrador announced a clear objective for the general election in 2024: Get a qualified majority in Congress to amend the constitution to overhaul the judiciary and replace all sitting Justices and judges for popularly elected ones. Once again, the President's idea was met with full support from and coordination by his enablers. That same day, the permanent legislative commission in the Federal Congress dedicated three hours to discuss the *golpismo*—which roughly means to have a *coup d'état* attitude—of the Supreme Court and the need to reform the judiciary.[57] Moreover, a public statement endorsed by twenty-two MORENA governors issued two days after the decision reads:

> The justices that decided to strike down the Plan B, decided to continue privileging the interests of the old regime instead of respecting the voice of the people represented by the chambers [of Congress] . . . . Because of this, we stand behind the President's proposal to amend the constitution to reform the judiciary to establish the popular election of Justices . . . in order to guarantee the Court truly represents the people.[58]

In less than forty-eight hours, putting the constitution on its head to abolish the Court as we knew it became an electoral promise. Legislators, governors, and MORENA sympathizers questioned the legitimacy of the Supreme Court and openly called for votes to amass the required qualified majority in Congress to amend the Constitution to fulfill such a promise—at that point, MORENA already controlled more than half of state legislatures. Things only got worse for the Supreme Court as it adjudicated the second set of challenges to the Plan B a month later.[59] One of the main talking points of the smear campaign against the judiciary throughout AMLO's presidency, but in particular after the Court decisions on the Plan B, was that Justices were part of

[50]Canal 22, *Chamuco TV. Arturo Zaldívar*, YouTube (Mar. 12, 2023), https://www.youtube.com/watch?v=3kHQUBHkklA.

[51]@GobiernoMX, X (May 7, 2023, 12:33 PM), https://x.com/GobiernoMX/status/1655249540121755648.

[52]On May 8, 2023, in a 9–2 decision, the Supreme Court struck down one of two parts of the Plan B on the grounds of violations of procedural rules of the legislative process only. In the view of the Court, such violations amounted to a breach of the constitutional principles of deliberative democracy and due legislative process. *See* Velasco-Rivera, *Mexican Democracy (and the Supreme Court) at a Crossroads*, *supra* note 36.

[53]@CuitlahuacGJ, X (May 8, 2023, 5:09 PM), https://x.com/CuitlahuacGJ/status/1655681401960771584.

[54]@armentapuebla_, X (May 9, 2023, 12:54 AM), https://x.com/armentapuebla_/status/1655798407821131776.

[55]@mario_delgado, X (May 8, 2023, 6:49 PM), https://x.com/mario_delgado/status/1655706622923030528.

[56]@adan_augusto, X (May 8, 2023, 5:12 PM), https://x.com/adan_augusto/status/1655682006355972098.

[57]Senado de México, *Sesión de la Comisión Permanente del Congreso de la Unión, del 9 de mayo de 2023*, YouTube (May 9, 2023), https://www.youtube.com/watch?v=upvSv859iSE.

[58]@Claudiashein, X (May 10, 2023, 12:04 PM), https://x.com/Claudiashein/status/1656329269113659392.

[59]Raziel, *supra* note 47.

a "golden bureaucracy"—that is, referring to, among other things, to unjustifiable high wages and privileges at the cost of public money. In other words, the Supreme Court, and the judiciary at large, were portrayed as "detached from the ordinary people, protecting mainly their own interests"[60] and those of a corrupt elite and, more generally, as the enemy of the people.[61] Any opportunity to portray the Court as self-interested and elitist was taken to peddle such narrative. The decision(s) on the Plan B were not the exception. In addition to statements by the President, the federal government took the opportunity to accuse the Justices of the Supreme Court, through official social media channels via misleading infographics, of being actively resisting cutting down their "privileges" and of not defending democracy but their own economic interests.[62] Retaliation against the Court first materialized in a blow against its budget. Unsurprisingly, shortly after and in the context of the 2024 federal budget preparations, the parliamentary group coordinator of MORENA, Ignacio Mier Velazco, tabled a proposal in the Chamber of Deputies to dismantle, among other things, part of the judiciary's system of compensation—affecting 89.6 %[63] of employees in the judicial branch.[64] The proposal was justified as a measure to end the privileges of the Justices even though in reality it did not affect them directly.[65]

In a context where mutual toleration was completely absent—where dissent or pushback be it from civil society, the opposition or the judiciary, was met with vilification and ostracism—but institutional forbearance was to some extent still present, the judiciary was one of the few institutions that time and again halted the government's constitutionally questionable policymaking decisions.[66] In addition to the set of cases dealing with the Plan B described above, another prime example showing how inconvenient the judiciary became for the government was the attempt to give full control of the *Guardia Nacional*—the institution in charge of public safety at the federal level which on paper was civil in nature by constitutional mandate—to the military. Such an attempt was also struck down by the Supreme Court for going against the constitutional mandate that establishes that public safety institutions should be civil in nature.[67] The fact that the judiciary became one of the few roadblocks to the government's agenda is precisely why the President and his party focused on delegitimizing and trying to capture one of the few institutions able to hold them accountable.

[60]Kosař, *supra* note 11, at 281.

[61]*See, e.g.*, @GobiernoMX, X (June 23, 2023, 8:02 PM), https://x.com/GobiernoMX/status/1672394644175613952.

[62]*See, e.g.*, @GobiernoMX, X (May 12, 2023, 5:46 PM), https://x.com/GobiernoMX/status/1657140220238913537; @GobiernoMX, X (May 12, 2023, 8:00 PM), https://x.com/GobiernoMX/status/1657173811777904641; @GobiernoMX, X (May 12, 2023, 12:00 PM), https://x.com/GobiernoMX/status/1657060569432879106.

[63]Enrique Quintana, *Cinco Preguntas Sobre El Poder Judicial y Sus Fideicomisos*, El Financiero (Oct. 23, 2023, 5:55 AM), https://www.elfinanciero.com.mx/opinion/enrique-quintana/2023/10/23/cinco-preguntas-sobre-el-poder-judicial-y-sus-fideicomisos/.

[64]Daniel Bertram & Laura Higuera Sánchez, *The Mexican Standoff: AMLO vs. the Judiciary*, Verfassungsblog (Oct. 25, 2023), https://verfassungsblog.de/the-mexican-standoff/.

[65]The proposal to extinguish thirteen out of fourteen trust funds destined to finance, among other things, the implementation of constitutional amendments regarding the federal justice system, and schemes of pensions a retirement benefits funded by judiciary workers themselves—applicable to workers across the judiciary except Supreme Court employees—was passed in October 2023. *See* Leonardo Nuñez, *Los datos duros de los (extintos) fideicomisos del Poder Judicial y las mentiras del presidente López Obrador*, NEXOS: El Juego de la Suprema Corte (Oct. 30, 2023), https://eljuegodelacorte.nexos.com.mx/los-datos-duros-de-los-extintos-fideicomisos-del-poder-judicial-y-las-mentiras-del-presidente-lopez-obrador/; Brenda Yañez, *Jueza otorga suspensión definitiva contra la extinción de fideicomisos del PJF*, Expansión Político (Nov. 27, 2023, 11:36 AM), https://politica.expansion.mx/mexico/2023/11/27/jueza-otorga-suspension-definitiva-contra-la-extincion-de-fideicomisos-del-pjf.

[66]Mariana Velasco Rivera, *A Democratic Mandate to Overhaul Mexico's Judiciary?*, Verfassungsblog (July 24, 2024), https://verfassungsblog.de/a-democratic-mandate-to-overhaul-mexicos-judiciary/.

[67]Acción de inconstitucionalidad 137/2022. Diversas Senadores y Senadores integrantes del Congreso de la Unión, Pleno de la Suprema Corte de Justicia [SCJN], Gaceta Semanario Judicial de la Federación, Undécima Época, Tomo I, Enero de 2024, página 283 (Mex.).

IV. Fulfilling Promises by Any Means

Against this backdrop, in February 2024, right before the start of the presidential campaign for the general election of that year, picking up on the idea of the popular election of judges that came to be amid the Plan B court decisions, President López Obrador presented a set of constitutional amendment proposals to, among other things, overhaul the judiciary, eliminate proportional representation in the electoral system, and dissolve independent agencies.[68] Once again, the President's proposals were met with full support and coordination by his enablers before and after the general election. At the start of the presidential campaign, MORENA's presidential candidate, Claudia Sheinbaum, required all congressional candidates of her electoral coalition—that is, MORENA, Partido Verde Ecologista de México ("PVEM"), and Partido del Trabajo ("PT")—to sign a letter vowing to pass AMLO's amendment proposals without reservations.[69] After a landslide victory in June 2024, MORENA and its allies almost amassed the required majorities in Congress and State Legislatures to amend the Constitution.[70]

The constitutional amendment rule requires a qualified majority in each of the chambers of the bicameral Congress and half of the thirty-two State Legislatures.[71] MORENA's coalition already controlled twenty-seven state legislatures, and 364 out of 500 seats in the Chamber of Deputies but was short by three votes in the Senate.[72] Yet, it did not have much trouble finding sellouts in the opposition: Partido de la Revolución Democrática ("PRD") Senators José Sabino Herrera and Araceli Saucedo, who won their seats as part of the opposition coalition, inexplicably switched teams to MORENA in late August 2024.[73] This meant that the ruling coalition was now only one vote short of the required eighty-six out of 128 votes to meet the qualified majority threshold in the Senate. Amidst reports by members of the opposition alleging intimidation to vote for the overhaul, and after days of uncertainty as to whether MORENA and its allies were going to be able to find that missing vote to pass the President's proposal, and even floating the idea of passing the amendment with only eighty–five votes, the missing vote came from the Yunes–Partido Acción Nacional ("PAN") political dynasty and long-time adversary of AMLO. Members of the Yunes family, including Senator Miguel Ángel Yunes Márquez and his father, Senator substitute, Miguel Ángel Yunes Linares, former governor of the State of Veracruz, had been criminally indicted for public corruption acts as well as other serious crimes—which they had denounced as a witch hunt by MORENA's governor of Veracruz up until the day they announced their support of the reform. Allegedly, the sudden change of heart of the Yunes family as members of the opposition came after trading their vote for impunity.[74] These questionable tactics allowed MORENA's coalition to ram

[68]Julio Rios-Figueroa, *Mexico 2024: The Battle for the Constitution*, ConstitutionNet (Feb. 29, 2024), http://constitutionnet.org/news/voices/mexico-2024-battle-constitution.

[69]Zedryk Raziel, *Sheinbaum instruye a los candidatos al Congreso a aprobar "sin reservas" las reformas de López Obrador*, El País (Mar. 4, 2024, 11:30 PM), https://elpais.com/mexico/elecciones-mexicanas/2024-03-05/sheinbaum-instruye-a-los-candidatos-al-congreso-a-aprobar-sin-reservas-las-reformas-de-lopez-obrador.html.

[70]Thomas Graham, *Mexico Elects Claudia Sheinbaum as its First Female President in Landslide Victory*, Guardian (June 3, 2024), https://www.theguardian.com/world/article/2024/jun/02/mexico-elections-first-female-president-violence. *See* Javier Martin Reyes & Juan J. Garza Onofre, *El verdadero fraude: la sobrerrepresentación en el Congreso*, NEXOS: El Juego de la Suprema Corte (July 18, 2024), https://eljuegodelacorte.nexos.com.mx/el-verdadero-fraude-la-sobrerrepresentacion-en-el-congreso/ (discussing the controversial allocation of seats in Congress granting a lesgislative over-representation to the winning coalition).

[71]Constitución Política de los Estados Unidos Mexicanos, CP, art. 135, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 29-01-2016 (Mex.).

[72]*Id.*

[73]Zedryk Raziel, *Morena quita al PRD sus dos senadores y se queda a un voto de tener mayoría calificada en la Cámara alta*, El País (Aug. 28, 2024), https://elpais.com/mexico/2024-08-28/morena-quita-al-prd-dos-senadores-y-se-queda-a-un-voto-de-tener-mayoria-calificada-en-la-camara-alta.html.

[74]Israel Aguilar Esquivel, *Orden de arresto contra Miguel Ángel Yunes fue retirada un día antes de discutir reforma al Poder Judicial*, Infobae (Nov. 30, 2024, 1:42 PM), https://www.infobae.com/mexico/2024/11/30/orden-de-arresto-contra-miguel-angel-yunes-fue-retirada-un-dia-antes-de-discutir-reforma-al-poder-judicial/.

the judicial overhaul through. The overhaul to the judiciary was approved by the Chamber of Deputies and the Senate in two separate overnight sessions, and ratified by seventeen out of thirty-two state legislatures in less than twenty-four hours.[75] It was enacted on September 15, 2024.[76]

The changes introduced by the judicial overhaul undo the judicial reform of 1994 that sought to consolidate the Supreme Court as a constitutional tribunal and created the Judicial Council, the body in charge of overseeing federal judges to guarantee judicial independence. President López Obrador's proposal introduced the popular election of all judges across the judiciary at the federal and local level, including Supreme Court Justices. The constitutional amendment affected about 1,600 sitting federal judges. The amendment also reduced the Supreme Court membership from eleven to nine Justices, abolished the Judicial Council, and replaced it with a judicial administration body and a *Tribunal de Disciplina Judicial* (Judicial Discipline Tribunal). That body will be in charge of overseeing and sanctioning judges, including removing them from office for unspecified behaviors such as "going against the public interest"[77] and filing criminal proceedings against those suspected of "being complicit [in crimes] or of covering up criminals."[78] The decisions of said tribunal are not subject to appeal. The same model is to be replicated at the state level. With this amendment, the professionalized bureaucratic apparatus that was slowly built across the span of three decades was put on its head in what looked more like political revenge than carefully considered measures to address real needs.

V. Hopeless Pushback

There was of course pushback to the judicial overhaul. For instance, students and judges across the country took to the streets, members of the judiciary went on partial strike for over two months.[79] Multiple legal challenges against the judicial overhaul were also brought to the courts by human rights organizations and affected judges as individual constitutional complaints and by the political parties in opposition via abstract review. However, even though the judiciary, and in particular apex courts, have been portrayed as the central actors when it comes to respond to threats constitutional democracy,[80] it is when they were needed the most in Mexico that they were most limited to respond. By the time the different constitutional challenges were brought to courts, institutional forbearance had already evaporated within the governing elite and replaced by unprincipled pragmatism. For instance, when questioned about MORENA's decision to collaborate with the Yunes, who represent everything that President López Obrador in theory despised—that is, the political past of public criminal corruption his self-proclaimed transformation movement wanted to do away with—the latter said: "[I]n politics one has to

[75] *Reforma al Poder Judicial Será Ley: Es Aprobada Por 17 Congresos, ¿qué Estados la Aprobaron?*, El Financiero (Sept. 12, 2024), https://www.elfinanciero.com.mx/nacional/2024/09/11/reforma-judicial-aprobacion-en-congresos-de-los-estados-cuales-votaron-a-favor-en-vivo/.

[76] Constitución Política de los Estados Unidos Mexicanos, CP, arts. 17, 20, 76, 89, 94, 95, 97, 97, 98, 99, 100, 101, 105, 107, 110, 111, 113, 116, 122, 123, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 15-09-2024 (Mex.).

[77] Rios-Figueroa, *Mexico 2024: The Battle for the Constitution*, *supra* note 68.

[78] Andrés Manuel López Obrador, Iniciativa Del Ejecutivo Federal Con Proyecto de Decreto, Por El Que Se Reforman, Adicionan y Derogan Diversas Disposiciones de La Constitución Política de Los Estados Unidos Mexicanos, En Materia de Reforma Del Poder Judicial (2024).

[79] Elia Castillo Jiménez, *Los trabajadores del Poder Judicial mantienen su huelga en contra de la orden de la Judicatura: "No se para una protesta por decreto,"* El País (Oct. 29, 2024), https://elpais.com/mexico/2024-10-29/los-trabajadores-del-poder-judicial-mantienen-su-huelga-en-contra-de-la-orden-de-la-judicatura-no-se-para-una-protesta-por-decreto.html; César Arellano García, *Levantan paro en el Poder Judicial*, La Jornada (Nov. 12, 2024), https://www.jornada.com.mx/noticia/2024/11/12/politica/levantan-paro-en-el-poder-judicial-3079.

[80] *See, e.g.*, Dixon, *supra* note 9; Laura Gamboa, Benjamín García-Holgado & Ezequiel González-Ocantos, *Courts Against Backsliding: Lessons from Latin America*, 46 Law & Pol'y 358 (2024).

choose among inconveniences. It's about finding the equilibrium between efficacy and principles."[81] In other words, for President López Obrador, the means justified the ends.

Multiple injunctions ordering to stay legislative proceedings regarding the judicial overhaul were ignored under the argument that what legislators were passing was responding to the will of the people. The executive legal advisor, Ernestina Godoy, did not shy away from intimidating judges who had issued the injunctions with disciplinary proceedings in the judicial council and impeachment threats.[82] Perhaps one of the most stark examples of how institutional forbearance was rejected is that, in the midst of the multiple legal challenges brought by affected parties, MORENA's coalition chose to pass yet another constitutional amendment to shield the judicial overhaul from judicial review just days before the Supreme Court was scheduled to hear the case brought by the political parties in the opposition in abstract review.[83] Like the judicial overhaul, the amendment was rammed through Congress and State Legislatures. Each of the floors of the Senate and the Chamber of Deputies "deliberated" it in one session, and was ratified by twenty-three out of thirty-two state legislatures in less than twenty-four hours.[84] The amendment decree included a sunset clause explicitly ordering the judiciary to decide all pending cases according to newly introduced judicial review blanket ban.

As the hearing day approached, intimidation against the Justices doubled down. For example, the members of Partido del Trabajo[85] caucus in the Chamber of Deputies made the initial filing to start impeachment proceedings against the eight Justices who were not government loyalists.[86] Rejecting mutual toleration and institutional forbearance, the choice made by the members of PT was to vilify the Justices of the Supreme Court as the enemies of the people as well as using institutional mechanisms for intimidation and retribution purposes. In the press conference informing about the impeachment filing, PT Deputy Ricardo Mejía said: "This is against the eight Justices that are failing to observe and are rebelling against the constitution. They are the visible heads of the lawfare being faced by the Executive and Legislative Powers and, in general, by all the Mexican people."[87] Some legislators went as far as saying that an attempting to strike down the judicial overhaul would amount to treason.[88]

The invalidation of the judicial overhaul in abstract review seemed likely in the days before the hearing, especially after the draft opinion was made public—in accordance with usual practice

[81]Elías Camhaji, *López Obrador justifica el respaldo de Yunes a la reforma judicial: "Es buscar el equilibrio entre la eficacia y los principios"*, El País, (Sept. 11, 2024), https://elpais.com/mexico/2024-09-11/lopez-obrador-justifica-el-respaldo-de-yunes-a-la-reforma-judicial-es-buscar-el-equilibrio-entre-la-eficacia-y-los-principios.html (Mariana Velasco-Rivera tr.).

[82]Andrea Becerril, *Se actuará contra jueces que han buscado frenar la reforma judicial: Godoy*, La Jornada (Sept. 29, 2024), https://www.jornada.com.mx/2024/09/29/politica/005n1pol.

[83]Constitución Política de los Estados Unidos Mexicanos, CP, arts. 105, 107, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 31-10-2024 (Mex.).

[84]*See* Mariana Velasco-Rivera, The Politics of Constitutional Rigidity: Unveiling Pathways to Change in Mexico 1 (forthcoming); *Senado aprueba en fast track "supremacía constitucional"; hará intocables reformas de Morena frente a la Corte*, El Universal (Oct. 25, 2024), https://www.eluniversal.com.mx/nacion/senado-aprueba-en-fast-track-supremacia-constitucional-hara-intocables-reformas-de-morena-frente-a-la-corte/; Angélica Melín, *Supremacía Constitucional Sale En Fast Track En San Lázaro*, MVS Noticias (Oct. 30, 2024), https://mvsnoticias.com/nacional/2024/10/30/supremacia-constitucional-avanza-paso-acelerado-en-san-lazaro-663436.html; *En tiempo récord, estados avalan reforma de Supremacía Constitucional; ya van 20 entidades*, El Universal (Oct. 30, 2024, 10:25 PM), https://www.eluniversal.com.mx/nacion/supremacia-pasa-por-congreso-de-los-estados/; *Presidencia publica en DOF decreto sobre supremacía constitucional*, La Jornada (Oct. 31, 2024, 11:43 PM), https://www.jornada.com.mx/noticia/2024/10/31/politica/presidencia-publica-en-dof-decreto-sobre-supremacia-constitucional-2537.

[85]A party that is different from MORENA only by name—that is, many of its members are affiliated to MORENA.

[86]Israel Aguilar Esquivel, *Diputados del PT presentan demanda de juicio político contra 8 ministros de la SCJN*, Infobae (Oct. 23, 2024), https://www.infobae.com/mexico/2024/10/23/diputados-del-pt-presentan-demanda-de-juicio-politico-contra-8-ministros-de-la-scjn/.

[87]*Id.*

[88]*Id.*

regarding high profile cases—a week in advance of the hearing day.[89] Penned by Justice Juan Luis González Alcántara, the draft opinion proposed to partially strike down the judicial overhaul. Additionally, that same week, the eight Justices who were being increasingly targeted by the government, submitted letters of resignation to take effect in August 2025—once the newly elected Justices take office. In so doing, they seemed to have neutralized one of the main talking points to attack them and question their authority to decide on the case: That they had a conflict of interest to decide on the validity of the judicial overhaul because they were directly affected by it. Unsurprisingly, the publication of Justice González Alcántara's opinion draft only intensified the smear campaign against the judiciary. The President, governors, the President of the Senate, the President of the Chamber of Deputies, legislators, and pundits, doubled down on their attacks—in particular against the Justices that had submitted their resignation letters. Talking about Justice González Alcántara's draft opinion, President Claudia Sheinbaum,[90] just like her predecessor, chose to vilify him as well as the other seven of the non-aligned Justices:

> [T]he problem is that they are legislating. They are changing the constitution . . . . what the draft opinion says is "here is a new judicial reform proposal." Who are the authoritarians here? Eight individuals are attempting to modify a [constitutional] amendment against the will of the Mexican people, against the will of the constituent power [sic]. Do you realize the significance?[91]

Similarly, the President of the Senate, Gerardo Fernandez Noroña, also referring to Justice González Alcántara's draft opinion went as far as saying that it constituted an act of rebellion and an attempt to overthrow a democratically elected government.[92] As the days passed, it became abundantly clear that neither the executive nor the legislative branch had any intention to comply with the ruling should it struck down the amendment in whole or in part. By accusing the Justices of rebelling against the constitution it seemed that MORENA's coalition was laying the groundwork to dismiss the eventual invalidation the judicial overhaul.

Unexpectedly, even though the Supreme Court decided seven to four that questions about the constitutionality of amendments were admissible, the court did nothear the case on the merits as it should have.[93] In an unorthodox move, once the majority of Justices decided in favor of granting standing and for admitting the claim, CJ Piña asked the Justices in the four–judge minority—three out of which are known to be MORENA loyalists: Justices Lenia Batres, Loretta Ortiz, and Yasmin Esquivel—to say how were they going to vote on the merits.[94] That is, for striking down or upholding the judicial overhaul. As the constitutional requirement to strike down legislation in abstract review is eight out of eleven votes, the CJ perhaps wanted to know—against court proceedings norms—how Justice Alberto Pérez Dayán, one of the eight Justices who had announced his resignation the week before, was going to vote. Justice Pérez Dayán had already voted against the admissibility of the claim but technically he would have been bound by the majority to hear the case on its merits—which would have given the public the opportunity to hear the opinion of Justices on the judicial overhaul. However, that did not happen because, when

[89]Acción de Inconstitucionalidad 164/2024, Proyecto de Sentencia del Ministros Juan Luis González Alcántara Carrancá Cámara de la Suprema Corte de Justicia [SCJN], https://www.scjn.gob.mx/proyecto-de-sentencia (last visited Jan. 22, 2025) (Mex.) (a copy of Justice Juan Luis González Alcántara's draft opinion).

[90]President Sheinbaum took office on October 1, 2024.

[91]@PartidoMorenaMx, X (Oct. 30, 2024, 12:19 PM), https://x.com/PartidoMorenaMx/status/1851660194683421100.

[92]@senadomexicano, X (Oct. 29, 2024, 1:19 PM), https://x.com/senadomexicano/status/1851312942417080723.

[93]Acción de Inconstitucionalidad 164/2024. Partido Acción Nacional, Partido Revolucionario Institucional, Diversas Diputadas y Diptuadas Integrantes del Congreso del Estado de Zacatecas, Movimiento Ciudadano y Unidad Democrática de Coahuila, Pleno de la Suprema Corte de Justicia [SCJN], Pleno de la Suprema Corte de Justicia [SCJN], versión estenográfica, página 164 (Mex.).

[94]*Id.* at 165.

Justice Pérez Dayán said he would vote against striking down the amendment, CJ Piña decided to take a vote to dismiss the case.[95] Unsurprisingly, the government profusely celebrated this outcome.[96] The practical implication of this turn of events is that the Supreme Court went without a fight. To be sure, in the context described in the preceding lines, the Supreme Court, even with the required eight votes to invalidate the amendment, did not stand a chance of successfully stopping or ameliorating the damage of the judicial overhaul because the President and his party were determined to do away with the system of democratic checks.[97] President López Obrador and his enablers—including now President Claudia Sheinbaum—eroded the soft guardrails of legal constitutionalism to such an extent that they were able to overtake the judicial branch of government that was built over the span of a century without any immediate political cost.

E. Conclusion

Levitsky and Ziblatt suggest that mutual toleration and institutional forbearance as unwritten norms "do not rely simply on political leaders' good character, but rather are shared codes of conduct that become common knowledge within a particular community or society—accepted, respected, and enforced by its members."[98] Though not exclusively, the examples of South Africa and the United States suggest that the good character of one individual can be consequential. Most importantly, the case of Mexico shows that these norms, while not exclusively relying on one single individual, do rely heavily on the good character of the members of their co-equal branches of government. The reason is that the willingness to enforce shared codes of conduct depends on the ethics of those enforcing them. Mexico offers an instructive example of how a political leader's bad character, compounded by coordination and discipline from the relevant political actors—who in theory would be the ones enforcing the observance of the soft guardrails of legal constitutionalism—has the potential to quickly promote the collapse of shared codes of conduct and behavior. President López Obrador spent his presidential term deploying a vicious campaign to delegitimize the judiciary, spreading lies and disinformation about the court system, individual judges, and court decisions without any pushback.[99] And those who dared to speak, for instance, against the judicial overhaul, were swiftly ostracized. It is the lack of true commitment to the soft guardrails of legal constitutionalism that represents one of the major challenges to the viability of constitutional democracy in our times. It is a crisis of public ethics that threatens the stability and survival of democratic institutions.

In a context like this, courts and the judiciary in general have very little room for maneuvering to ensure self-preservation without reciprocity from their co-equal branches of government. So long as the latter do not accept and acknowledge their legitimacy and authority regardless of the outcomes of their decisions, courts remain in a very vulnerable position. Comparative constitutional law scholarship has spent decades thinking about the power courts have to advance the values and ideals of liberal constitutionalism, assuming that the legitimacy and

[95]Id. *at* 173–75.

[96]Alma Muñoz & Alejandra Alegría, *Ganó el pueblo con el triunfo de la reforma en la Corte: Sheinbaum*, La Jornada (Nov. 7, 2024), https://www.jornada.com.mx/2024/11/07/politica/009n1pol.

[97]*See* Susan Rose-Ackerman, Diane Desierto & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines*, 29 Berkeley J. Int'l L. 246 (2011) (discussing presidents being determined to undermine separation of powers and checks and balances in both Argentina and the Philippines).

[98]Levitsky & Ziblatt, *supra* note 1, at 90.

[99]For examples of President's behavior and the lack of pushback from members of his party, see Velasco-Rivera, *Mexican Democracy (and the Supreme Court) at a Crossroads*, *supra* note 36; Velasco-Rivera, *Can the Mexican Supreme Court Save Constitutional Democracy?*, *supra* note 36. For a discussion of the presidential pattern of behavior in this regard, see Azul Aguiar, Subverting Judicial Legitimacy: Presdiential Rhetoric and Democratic Erosion in Mexico (2024).

authority of courts would go unchallenged.[100] Is it perhaps time to shift our attention to the political branches to try to better understand what are the institutional and non-institutional factors that produce healthy public ethics, and politicians and office holders truly committed to democratic and constitutional values, and democratic institutions?

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[100] *See, e.g.*, Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune (Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan & Ximena Soley eds., 2017).

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