



Kent Academic Repository

Sánchez García, Arturo (2014) *The Happy Judicialization of Sexual Rights: Abortion and Same Sex Marriage in Mexico*. Doctor of Philosophy (PhD) thesis, University of Kent,.

Downloaded from

<https://kar.kent.ac.uk/48613/> The University of Kent's Academic Repository KAR

The version of record is available from

This document version

UNSPECIFIED

DOI for this version

Licence for this version

UNSPECIFIED

Additional information

Versions of research works

Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal*, Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

Enquiries

If you have questions about this document contact ResearchSupport@kent.ac.uk. Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

**The Happy Judicialization of Sexual Rights:
Abortion and Same Sex Marriage in Mexico**

Arturo Sánchez García

**Submission for the Degree of Doctor of Philosophy in Law
Kent Law School, University of Kent
Canterbury, Kent, UK
October 2014**

ABSTRACT

This project studies one of the most intense moments of the judicialization of Mexican politics: the Mexican Supreme Court of Justice's intervention in the legal reforms on abortion and same sex marriage approved by the Legislative Assembly in Mexico City in 2007 and 2009. The cases stimulated the optimism of a transnational sexual rights agenda with images of progressive legal reforms and a responsive Court. But a study of the cases, it is argued here, reflects little engagement of the Supreme Court with human rights agendas of progressive images of judicial activism; instead, the momentum of judicialization speaks of a critical period of readjustment of authority in Mexico's democratic institutions.

Judicialization in Latin America is generally studied as the opening of constitutional courts to the citizenry and the establishment of tools for judicial review as the guarantor of constitutional rights in the new democracies. The Mexican experience of judicialization has been of a Court becoming the arbiter of conflicts between the executive and legislative branches of the government; it was historically initiated as a project to guarantee the stability of the political regime and the federal order. The Mexican Supreme Court evolved in democracy with a narrow formalist and self-constrained interpretation of human rights. The sexual rights cases were accepted by the Court when it was going through a compromising political period, and their successful decisions helped to moderate the legitimacy of the judicial tribunal, encouraging the attachment of social movements towards the Court, seen as a vehicle for social change.

The thesis recognises sexual rights as a location of enunciation and production of subversive knowledge, generating intimate processes of subjective empowerment that inform new relationalities across a political sphere which includes legal culture. Sexual rights guide the study of the Court and the desire of a better trajectory of judicialization. The legal reforms and their judicial interventions are presented as optimistic promises, as signs that anticipated something good to come, even though they did not fully deliver against such hopes. Part I presents a theoretical frame to engage with optimism and promises, aiming to relate to the strategies of critical optimism with which one as a researcher can evaluate the conditions in which different people can relate (or not) to desired futures. Chapter 1 is a theoretical consideration of promises and optimism, chapter 2 presents the optimistic development in the new constitutionalism in Latin America embodied in constitutional moments, or constitutional reforms. Part II presents the political context that precedes the cases: first, in chapter 3, with the history of Mexico City and the institutionalisation of opposition, and then, in chapter 4, with the establishment of tools for constitutional review in the Supreme Court. Part II is dedicated to the case studies.

ACKNOWLEDGMENTS

My PhD started because of the generous support of the Larry Grant Scholarship. Their initial sponsorship was the best welcome to one of the most stimulating and supportive research environment I could have ever wished for. From my second year I received financial support from Kent Law School. I will always be grateful for their trust in my project; being able to work with Law School students has been an unexpected but highly enriching experience.

From the very beginning of my work, Kate Bedford and Didi Herman have been inspirational supervisors. I am extremely grateful for their guidance, for their patience putting up with my constant exploration of different frames and attempts to talk about sexual rights, but most of all, for the reassurance they always gave me to keep on going in the most challenging parts of the process. The most amazing part of this journey has been to be able to share it with such amazing and generous scholars. Thanks for teaching me that scholarship cannot be done without generosity.

A PhD is never as isolating as everyone warns. Some of the best parts of my work I owe to conversations with colleagues. I am grateful to my PhD colleagues of Kent Law School for showing me how fun research can be. Thanks to Nayeli Urquiza Haas for pushing me to realize that my project has always been about ethics, generosity, and the way they affect us. I am particularly grateful to Nick Piška for his intellectual and personal hospitality, and his beautiful friendship. I am grateful to the staff in Kent Law School for the companionship, to Maria Drakopoulou for challenging the critical engagement of the PhD community, to Lynn Risbridger and Dylan Williams to make things happen for us. Thanks too to the Centre for Gender Studies at SOAS where I spent a year at the beginning of my PhD. Nadje Al-Ali opened the doors of British academia and inspired me with her work and friendship in more ways than she might be aware of. The companionship of Katherine Natanel throughout the journey we started together has been one of the most reassuring and inspiring examples. Thanks to Kay Lalor, Paul Ryan and Stuart Flynn for helping so generously to proofread parts of the work, and for having shared such beautiful moments. Thanks everybody for all the love.

In Mexico I owe the beginning of my journey to the example set by Lydia Alpizar, and Marusia Cruz, two of the most amazing feminists I have met. Over many years, together with my other colleagues in ELIGE, we learnt together to talk about sexual rights in feminist ethics and loving companionship. Thanks to Mónica Alemán for convincing me to come to Europe, and for always being there despite the distance. Later on, the loving guidance of Jenaro Villamil in Mexico City and the colleagues, old and new, who shared their journeys with me in interviews, and those scholars I had admired from afar before meeting for interviews, who generously shared their work with me. I owe this to all of you.

All those who have passed through PhDs know how it feels to have our families always there to keep us grounded. My brothers and sisters, my nieces and nephews have always been there watching from the distance the long development of the research. *Gracias a mi mamá por enseñarme a amar lo que hago, y a mi papá por enseñarme a hacer lo que amo* [thanks to my mom for showing me how to love what I do, to my dad for showing me how to do what I love]. Thanks to Bárbara for our Madrid. Thanks to Robina, Martha and Jake for becoming my family. And thanks to Martin for being everything else.

LIST OF ABBREVIATIONS

AI Acción de Inconstitucionalidad [Appeal of unconstitutionality]

ALDH Asamblea Legislativa del Distrito Federal [Legislative Assembly of the Federal District]

COCOPA Comisión de Concordia y Pacificación [Commission for Peace and Reconciliation]

CONAI Comisión Nacional de Intermediación [National Intermediation Committee]

CMDPH Comisión Mexicana de Defensa y Promoción de los Derechos Humanos [Mexican Commission for the Defence and Promotion of Human Rights]

CNDH Comisión Nacional de Derechos Humanos [National Commission of Human Rights]

DF México Distrito Federal [Federal District]

EZLN Ejército Zapatista de Liberación Nacional [Zapatista Army of National Liberation]

ILO International Labour Organization

LTP Legal Termination of Pregnancies

PAN Partido de Acción Nacional [National Action Party]

PGR Procuraduría General de la República [General Attorney]

PRD Partido de la Revolución Democrática [Party of the Democratic Revolution]

PRI Partido de la Revolución Institucional [Party of the Institutional Revolution]

PVEM Partido Verde Ecologista de México [Ecologist Green Party of Mexico]

TABLE OF CONTENTS

Abstract	2
Acknowledgements	3
List of Abbreviations.....	5
Table of Contents	6
INTRODUCTION	10
I. The New Legal Culture of Judicialization in Latin America.....	15
II. Sexual Rights are Human Rights! (The Concept of Sexual Rights).....	27
III. The Case Studies.....	34
IV. Methodology.....	37
V. Chapter Outline.....	43
PART I PROMISES	46
Chapter 1. THE PROMISE OF JUDICIALIZATION	47
I. Defending Language for Optimism.....	50
II. Critical Optimism.....	57
III. The Concept Of Promises As Relational Encounters.....	60
III. 1. <i>Political promises</i>	63
Conclusion.....	66
Chapter 2. THE PROMISES OF CONSTITUTIONAL MOMENTS	68
I. The Plurinational Countries.....	69
II. Constitutional Reforms in the Transnational Sphere.....	73

III. Attachments and the Theoretical Authorization of Political Positions.....	79
IV. Rational Frames: Political Opportunity Structures and Historical Institutionalism....	87
Conclusion.....	94
PART II DEMOCRACY AND JUDICIALIZATION IN MEXICO	97
Chapter 3. DEMOCRATIZATION IN WONDERLAND	98
I. The Autonomous City and the PRD.....	102
II. The National Commission of Human Rights.....	107
III. The 2000 Elections. New Democracy, New Rights.....	109
IV. Mexico City after the PAN.....	112
V. Mexico City Becomes the City of Freedoms.....	116
Conclusion.....	121
Chapter 4. CONSTITUTIONAL MOMENTS IN MEXICO.....	123
I. Constitutional Moments.....	127
II. Mexican Constitutional Moments.....	131
II. 1 1994. The end of presidentialism	133
II. 2. The judiciary.....	137
III. 2001, the Constitution and the Indigenous People.....	148
IV. A New Culture of Rights.....	157
V. Towards a More Transparent Court. The 2001 Reform.....	161
V. 1. Using the Court: The <i>Facultad de Investigación</i>	163
Conclusion (The Democratic Objection).....	170
PART III CASE STUDIES.....	174

Chapter 5. AN ABORTION IS SOLELY FOR WOMEN TO DECIDE! (AND JUDGES!)	175
I. <i>As If</i> that is what the Court Does.....	183
I. 1. The Legal Interruption of Pregnancies.....	190
II. The ‘Happy’ (But Disordered) Judicialization	195
II. 1. Abortion in the Court.....	200
a) The precedent.....	201
b) The decriminalization of LTP.....	208
III. The Disordered Process.....	213
III. 1. The <i>acción and its acumulada</i>	216
III. 2. The Public hearings (<i>audiencias públicas</i>).....	221
III. 3. The sentence, the last word of the Court.....	226
IV. The Last Word.....	234
IV. 1. Who won the case?.....	234
IV. 2. One step forward, seventeen steps backwards.....	235
The last word.....	238
Chapter 6. JUDICIALIZATION AND THE RIGHT TO MARRY	243
I. The Transnational LGT Agenda and the Subject of Rights.....	249
I. 1. The transnational sphere: having rights for the first time.....	250
I. 2. The global gay and the subject of rights.....	258
II. The Judicialization of the Right to Marry.....	263
II.1. The right to marry.....	265
II.2. The right time for LG rights in Mexico.....	268

III. The Legal Reform. The right to marry (and have a family).....	269
III.1. The Acción de Inconstitucionalidad 2/2010.....	275
III. 2. The content of the acción (Be careful with what you allow, because tomorrow ... you'll regret it).....	276
III. 3. The ideal constitutional family (or actually, the motivation principle)....	278
III. 4. The normative systems of the legislative acts.....	282
III. 5. The federal pact (Yes we do, No you don't).....	283
III. 6. The decision (Yes you do, no we don't).....	285
IV. The Decision in the States.....	289
IV. 1. Marriages in the legislative.....	290
IV. 2. Judicializing marriage	292
Conclusion. Against the Enchantment of Judicialization.....	297
Conclusion.....	301
Bibliography.....	318

INTRODUCTION:

THE HAPPY JUDICIALIZATION OF SEXUAL RIGHTS

I am writing this thesis because I believe we can have a *better* and *more accountable* Supreme Court of Justice in Mexico; I argue that sexual rights narratives have the capacity to help us re-imagine that court. In the period studied, between 1994 and 2010, sexual rights achieved a privileged level of visibility in Mexican politics, and the success of legal reforms addressing sexuality was significantly higher than many other human rights claims. Against the grain of legal traditions, the slow recognition of sexual rights became not only a competitive marker of modernity in local and national politics, but also a fundamental bastion of the recently gained legitimacy of the Mexican Supreme Court. It is that privileged position which facilitates an original revision and evaluation of the resonance progressive legal reforms on sexuality have for Mexican politics, a privilege that fuels a commitment from those of us who study sexuality politics towards the demarcation of the standards with which a better Supreme Court -and a better legal system- are to be imagined, and desired.

This privileged position represents an encounter between sexuality and law that is the result of the intersection of three different trajectories in Mexican democracy: the struggle of feminist, lesbian, gay and transgender activists for the promotion of progressive legal reforms; the active appropriation of social movements' narratives by political parties and governmental institutions -jockeying for electoral advantage- via novel projects of citizenship fashioned in the language of sexual rights; and the government's agenda to maintain the stability of the institutional order across the transition to democratisation by a redistribution of institutional power between new actors in charge of giving new meanings to human rights (the Supreme Court being at the centre of this redistribution). The thesis unfolds through the specific encounter between the Court, the highest judicial tribunal in Mexico, and the legal reforms of abortion (2008) and same sex marriage of Mexico City (2009/2010), specifically when the Court

was called to intervene against the reforms, and upheld both. Both events transcended the mere technicalities of the judicial tradition to offer new imaginaries for legal mobilization, as part of a trend described as the judicialization of politics: “the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies” (Hirschl 2006: 721). As it happened in any country with newly acquired judicial review procedures, in Mexico the Court appeared to social movements and the general public as a new space in which to invest political hope, in the midst of agitated redefining of the basic terms of Mexican legal culture, transforming the ways to imagine what is it that law does, and does not, for people.

I will emphasise in my narrative the last two trajectories. I will not recount critically the way sexual rights activists negotiated and achieved the legal reforms, I will instead study the shifts of political opposition in the country (and the appropriation of sexual rights language in party and governmental agendas) and the redistribution of power between new actors of democratization, because both of those determined the conditions in which abortion and same sex marriage reforms succeeded, if not at the same level as social mobilisation, with more determining intensity. The thesis does not offer a critical engagement of the strategic choices activists made to achieve these reforms and their involvement with the judicial success, but an analysis of the Mexican political terrain; it is presented as an intervention in the academic discussions taking place among those of us who study sexuality, the place it occupies nowadays in democracy and its capacity to inspire the rearrangement of *political positions*. I use this term to refer to the situations that individuals find themselves in when confronted with the law, qualitatively different from all other relations with public institutions because of the specific ways in which these are mediated by competing interests and the distributional impact of regulation. ‘Political positions’ will be used as a term in the thesis to acknowledge that different people occupy different places in relation to the law, and have different resources to compete for support in order to ensure the conditions of possibility that are enabled by accessing the law are always going to be a benefit only for those who become part of the law, either because they have material access to legal resources, or because they grant validity to the truths of the law and its epistemic borders.

I present the same sex marriage and abortion reforms as milestones in a linear evolution towards a substantive development of sexual rights in the legal sphere, not because I question the possibilities of such approach in the generation of practical knowledge contributing to the expansion of sexual rights (or the enthusiastic meanings attributed by activists to this linear narrative of progress). The research is focused on the capacity of sexual rights to produce knowledge about the state and its authority in legal enforcement, a challenge that repeatedly highlights some of the most salient political and theoretical obstacles of academic analyses of sexual rights activism. For decades, sexual rights activists have been establishing in the fundamental locus of sexuality, a condition of possibility for freedom, but whenever their political mobilization is invested in determining strategies for legal reforms, their desire for freedom gets inevitably encapsulated in representations of subjects of rights that appear to the academic observer (or legal practitioner) as subjects in need of protection by the law; the emancipatory potential of sexuality in human rights language is constantly undermined by a narrative of progress that is increasingly committed to the legal institutions created to fulfil specific needs, and protect individuals from physical and symbolic harm, attributed to the relations that occur in the sexual sphere (see Brown 1995, Miller 2004).

By researching sexual rights organised by notions of progress in a linear development we risk depending on a notion of sexual rights that relate to broader goals of social justice only in fragmented relations because of the specific forms of harm and need they aim to address. The ideal of freedom that emerged from the original locus of sexuality as a condition of possibility can be yielded by the attachment to the law and its institutions, by the representations of subjects that “desire and need” to be protected by the law. My research pushed me into a certain appropriation of the discourse of sexual rights (originally learnt from activists, but different to the strategic discourses used by them at different historical moments) in order to emphasise a simple and non-controversial argument: *a progressive legal reform does not necessarily mean having a good legal system*. This, however, does not prevent the controversy over the exercise of appropriation itself. For my research I found it essential to promote sexual rights in

academic jargon as virtually independent from the attachment to the law (and its institutions) as a way to participate in a conversation with those who study and theorise sexuality. I am defending a location in academic discourses where sexual rights can produce knowledge about the state, the law, and even democracy, but resist being determined by them and their specific historical and political circumstances.

The basic argument running throughout the thesis is that the dismissal of the different trajectories that brought about the legal reforms can produce, within sexual rights discourses, a relation of *attachment* towards governmental institutions: sexual rights claims appear as bounded not only to the legal reforms that have been historically fulfilling them, but to the authority of the legal and political actors who enabled those reforms, cancelling (or postponing) sexual rights promoters' *imagination to project change otherwise, through different exercises of authority*. The endorsement of the abortion and the same sex marriage reforms by the Supreme Court is not a sign for optimistic achievements. The *happy judicialization of sexual rights* in the thesis stands for the inclusion of sexual rights agenda in the Mexican judiciary as the outcome of complicated political processes of authorisation that enabled only those actors *who opposed* the legal reforms to access the Court. The judicialization of sexual rights has more to do with the authority of those who opposed sexual rights, than with the power of those who promote them, but had no access to the Court.

Against the premature depiction of the “sexual revolution” of the Mexican legal, political and judicial systems celebrated in national (Madrazo and Vela 2011) and international dialogues (Encarnación 2011) where the judiciary is depicted as playing a pivotal role in a promising human rights culture, the happy judicialization of sexual rights sheds light on political interactions that occurred outside social movements' trajectories. The reception of the sexual agenda in the Court was not contemplated as strategy of the sexual rights movement, and yet it set up priorities for their agendas and restricted its imaginaries. Those interactions teach us something about the role the Court decisions on same sex marriage and abortion played in the broader legal and judicial system, a tendency to give content to human rights that differs from the praise of sexual rights as emancipatory

projects.

The main drive of the thesis is the conviction that sexual rights discourses *can recognise* the exclusionary character of the technology that cancel and postpone their politics, and reverse the attachment to the law by complicating the assumption of progress and historical change that comes with “progressive reforms”, producing different ways of imagining change as the expansion of political positions. The historical note of progress in sexual rights should not be measured exclusively (nor mainly) by the discourses that law closes (the alleviation of need and protection from harm resolved in a political juncture of reform), but by the relations law opens, the address of the uneven positions that different subjects occupy in relation to the state and its legal system, in an ambitious project of social change that departs from the equal distributions of conditions of possibility.

The title of my thesis is taken from an interview I conducted in Mexico in the summer of 2012. Discussing the evolution of the Supreme Court in Mexico, my interviewee, a legal scholar, described the judicialization of sexual rights in Mexico as a particularly “happy judicialization”, because the success of the cases I studied had no parallels with other areas of rights litigation in Mexico.

“The sexual rights field is a particularly happy case of judicialization (...) We can actually recognize an incipient judicialization through the few cases on sexual and reproductive rights, but those are not comparable with other cases. We recognize cases that we validate as good (mostly from the political point of view) because they inspire us, because those are the kinds of cases we want in this country. But those are not the defining factors that can help us sustain hope in judicialization (...) because so far it has not shown itself to be a systematic practice in the Mexican judiciary (...)”¹

Sexual rights are part of an *incipient judicialization* in the Mexican Supreme Court that was not fully accomplished; the two case studies are found at the peak of intensity of this process because of a political momentum of democratic shifts and redistribution of

¹ Interview Isabel S. Summer 2012 Mexico City.

political authorities. The happy judicialization of sexual rights was not the anticipation of a greater juridical culture, nor a promising human rights revolution.

Two underlying statements demarcate the political context of the happy judicialization. First, the judicial upholding of the reforms on abortion and same sex rights became a crucial junction for the establishment of a new virtual platform for human rights mobilization in the Court. when it attracted the cases, the Supreme Court was only starting to be perceived as capable of repairing legislative decisions in judicial review (or completing them), not only in legislative process but perceived by the general public as a suitable instance to intervene against broader human rights violations, even if it had neither the formal capacity to do so nor the political will to stimulate such expectations. Second, the sexual rights reforms happened in the Mexican capital in ways that could not have happened elsewhere in the country. They resulted from the organization of different political variables, and not from a sustainable evolution of a legal culture of rights that could have replicated similar reforms throughout the country. The intervention of the judiciary did not facilitate the expansion of sexual rights reforms, it indicated instead paths by which conservative actors could exercise their authority to prevent, or slow, their evolution. The happy judicialization of sexual rights, as it was pointed in the interview, is an overstatement, a contradiction between the way the abortion and same sex marriage reforms are perceived in the local, national and transnational arena, as celebratory promises of a new culture of rights, and the actual development of the Mexican legal culture that keeps hold of formalist perceptions of its judiciary.

In this introduction I will provide further clarification on the notion of *judicialization of politics*, and the concept of *sexual rights* to ground my argument. The judicialization of politics is understood as the novel, and to a certain extent unexpected, centrality of the Supreme Court in Mexican politics, incorporated into national politics from a regional trend to promote constitutionalism as an axis of democratization, and constitutional courts as one of its most effective vehicles. The concept of sexual rights, as it follows in the next section, is introduced as an expression of social movements that emerged in the region outside of the epistemic monopoly of the law, and the state over the notion of

human rights, because only from a position of detachment from the law can sexual rights re-think legal reform, readjusting their basic commitments towards social imaginaries of justice, beyond the legal constraints of democratization.

I. THE NEW LEGAL CULTURE OF JUDICIALIZATION IN LATIN AMERICA

In 2008, the Mexican Supreme Court first took a historical decision upholding the reform that decriminalized the interruption of pregnancy in the first twelve weeks after conception², and two years later the Court took another (and also historical) decision rejecting the appeal against the law that authorised same sex marriage in the capital. Throughout my research I felt constantly provoked by the evocation of history, as the frame chosen by activists and NGOs to celebrate the processes, echoed also in the media. It is in that call of historical novelty, I claim, where the *attachment* of social movements towards the Court shows first, and determines its intensity cancelling, or postponing their politics by isolating the event historically from their immediate political precedent on behalf of a future that announces, and fragmenting contemporary human rights struggles that seem to be competing for publicity in the historical claim of progress.

I use the term ‘attachment’ to qualify the investments that civil society makes into ideas *about* the legal system and the state, the way it recognizes in a general agreement their legitimate authority, political power, and efficacy; and also to describe how those ideas produce political identities by setting up the way a group’s needs, desires and imaginaries are conceived. Together, the idea of the state and the legal system, and the ideas that civil society forms of itself, merge to become the political resources with which groups make claims for legal recognition and representation in front of the state and its institutions. The notion of culture has been used in similar terms to study political mobilisation: as the way in which needs, desires and imaginaries of a group are recognized as *capitalizable*

² In the Mexican campaign there was a strategic decision to use the language of “legal termination of pregnancy” instead of abortion to ground the dialogue in a legal, political and health-related discussion, and avoiding the moral connotations that abortion carries with it. In the thesis I will use the term abortion to resonate with more generalized conventions, with no intention to dismiss the internal debate in the Mexican process.

resources in instrumental relations with the state (see Moore 2011: 33; Yúdice 2003: 165). I adopt it in my thesis to describe the specific relation that happens around the legal reforms on abortion and same sex marriage, not only with capitalizable identities but also with an idea of the law that is valued for something that it is not: an aspirational or utopian version of a law seen as if it has the capacity to fulfil that which is desired of it, against the grounded experience of legal systems and personalised politics with limited emancipatory potential (see García Villegas 2004; Lemaitre Ripoll 2007b). If the broader notion of culture is already recognized as an ever-shifting repertoire of ideas, behaviours and practices (see Merry 2006:11), the idea of the attachment in legal cultures can also accommodate fluidity and contingency, it describes the relation a group establishes with one event, which might vary in relation to other events, or develop in contradictory terms.

Javier Couso uses the term *legal culture* to describe the ways in which individuals who are exposed to the law and legal systems conceive them, and also the way they choose novel ways to relate law to politics (2010: 143 see also Domingo 2004). Expanding this concept I suggest that legal cultures also allow us to describe characteristic ways in which those same individuals choose to relate -or not- with others, other individuals who have only distant relations with state-law, or are excluded from the life of the legal system altogether (see Santos 2007). We can represent the legal reforms on sexual rights as part of a new legal culture that speaks highly of an engaged legislature and a committed judiciary, but in order to rescue that second element of the term, to make it useful, to value the way we relate to each other in our community and across different political positions, it is important to highlight that the idea of the legal culture –when it is described with an enthusiastic optimism– can undermine knowledge about the technical aspects of the law (see Riles 2005), but more dangerously, can mix up rights claims with institutional agendas, and the needs and interests of social groups with those of the state, and can merge the identity of the state with that of the individuals that it is supposed to represent (see García Villegas 2000: 25).

In the abortion process, a leading pro-choice NGO praised the decision as proof of the Court's commitment towards “the right to pursue happiness” as a basic principle of

human rights³. In the same sex marriage case, one of the activists who facilitated the campaign trumpeted a historic anticipation of new relations to come for all Mexicans in the wake of marriage reform (Castañeda 2011). It is puzzling to think how the Mexican Court became the recipient of such ambitious attachments: in chapters 5 and 6, where I present the case studies, I claim that the engagement of the Court with sexual rights was actually very limited. Both processes were resolved with the referral of authority to the legislative bodies, backed by a strict formalist interpretation of the Court's mandate, without compensating for the lack of access to advocate for progressive legal reforms most people have in the rest of the country. Also without mediating the fundamental disagreements against sexual rights promoted by the powerful block of the conservative lobby that, with democratization, expanded its presence at all levels of the national administration, including the executive (see Plácido 2010).

Abortion and same-sex marriage were not the only optimistic encounters of the Mexican judiciary with sexual rights; for example, events of gender recognition and healthcare provisions for people living with HIV were also mediated by the Court, for example⁴. Nor has the Mexican Court been alone in the region in this trend of sexual rights cases attracted by constitutional courts altering traditional legislative procedures: the Colombian Supreme Court extended the regime of exceptions for abortion in 2006 in a *historical and revolutionary decision* “in favour of all Colombian women”⁵, and in 2008 “granted gay couples full rights of insurance, inheritance, immigration, and social-security benefits” (Encarnación 2011). Judges in a lower court of Buenos Aires in 2010, supported same sex marriage, standing against restrictive legislation as a clear political act that prompted a national legal reform, later gaining the support of the President who embarked on a general and expansive pattern of inclusive citizenship (Díez 2011). In

³ As phrased in the statement by the head of the juridical team of GIRE in their celebration of the three years anniversary of the event. GIRE is one of the most visible pro-choice NGOs in Mexico, and it has been at the forefront of the defence of women's right to choose over their bodies since the early 1990s in the country. (See <http://eljuegodelacorte.nexos.com.mx/?p=1378> Last accessed August 15th 2013).

⁴ The legal resonance of these cases is less significant because they were resolved with decisions that only produced individual resolutions, without challenging the unfair legal relations that originated the cases in the first instance, as I will explain later when I introduced my case studies more extensively.

⁵ In the words of the lawyer Mónica Roa, who initiated an appeal in the Court in 2006 (see a media report in <http://www.semana.com/on-line/articulo/corte-constitucional-despenalizo-parcialmente-aborto/78786-3> Last accessed August 15th 2013).

2011 Amnesty International celebrated the historical event of the “legalization” of same sex marriage after the Brazilian Supreme Court issued a decision “on behalf of equality and civility” (Ciampolini 2011). More recently, the Uruguayan Court in 2013, took a *historical step* towards the decriminalization of abortion, resolving a decade of mobilization of the feminist and women’s movements, widening the regime of exceptions that guaranteed certain practices of abortion without criminal punishment⁶. Such judicial decisions continue to mount up even as I write this.

Those events have in common an optimistic depiction of history, assumptions of closures for human rights struggles simulated whenever a legal reform comes to alleviate harms and needs, announcing better -and fairer- relations between the citizens and their governments heralded as single experiences with full potential to become universal. But in their celebration there are rarely enough insights about the specific interactions that enabled each of them in their political contexts, about the circumstances under which different actors promoted them all. Listed as historical achievements, the adscription of the optimistic narrative of a promising legal culture cannot explain why sexual rights became the object of regulation in some places, but not others, and why the achievements of one community do not necessarily represent structural opportunities for others. The familiar narrative in these listings is one of achievements, not of actors, not their motivations, nor the way they were authorised to wield influence. *The historical celebration demands as its object the laws, but rarely the legal system.* We embrace celebrations at the cost of overlooking that legal reforms, capitalized as closures, are often assimilated in political junctures that suppress social conflict in legal language. All other political struggles can get disqualified, dismissing the motions of conflict that moves them in order to give place only to narratives that are eligible for regulation (Santos and Rodríguez Garavito 2001). Those are the selected “conflicts of the law”⁷ (Merry 1982: 69) that are flexible to be rationalized as justiciable and transformative

⁶ Reported by the International Planned Parenthood Federation in <http://www.ippfwhr.org/en/blog/uruguay-takes-step-toward-safe-abortion> (Last accessed August 15th 2013).

⁷ Those were the terms with which the Mexican constitutional scholar Miguel Carbonell evaluates Mexican citizenry in the outcomes of a research project on the Mexican culture of rights sponsored by the *Instituto de Investigaciones Jurídicas* in UNAM. See *La Silla Rota*, interviewed by Roberto Rock on October 2011. Available in <http://www.youtube.com/watch?v=lzasavow10M> Last accessed March 20th 2013.

(Phillips 2005). This turns the agendas of political mobilisation into the normalisation of a voluntary compliance with political and legal institutions, and their narrow interpretation of conflict and mobilization, the selective assimilation of the agendas that can be afforded by democratic states, because they will not radically transgress the principles of its institutions (Santos 2006: 6-9; Yúdice 2003: 48-49).

Now, let me clarify that my starting point is one of recognition that the decisions of the Mexican Court to uphold the reforms were good decisions: they took *us* and *our* political communities somewhere better than where we were before. With that let us confirm that the courts and the judicialization of politics in Latin America improved something in legal, social and political relations in the region. But let us try at the same time to challenge their historical note and the imaginaries of the law that emerged from it, by questioning the circumstances in which the processes were enabled, testing them against the various conflicts that were resolved in the same political junctures.

Individuals in Mexico can choose to recognize themselves (or not) in the attachment to the law, to identify themselves with the abstract individual subject who benefits from the particular events of judicialization, because each single event is perceived to have the potential to become universal and benefit all Mexicans. The sights of the political will of the Court are expected to transform the experiences that all of *us* have of the state as citizens, even though in reality only the experiences of some citizens gets transformed in a reform, those who embarked on the democratic project and the liberal underpinnings of democracy (Domingo 1999; Jones 1998; Mendez, O'Donnell, and Pinheiro eds. 1999; Morris 2009). The individual in the rhetoric of attachment is capitalized as an impersonal and abstract notion of subject of rights, complacent with the logics of regulation and the expectations defined by the institutions of the representative democracy, granting legitimacy to the way those give content to the “us” of the community that is imagined after the -now outdated- notion of homogeneous and potentially solidaristic blocs of citizens with shared needs in the universal pretension (see Fudge and Glasbeek 1992: 47). The celebration of sexual rights reforms that postpones the critical accounts of the local legal systems is justified when individuals identify themselves with the (perceived) needs

that the law can afford to grant exclusive recognition (for example, certain social movements), promoting in the identification a version of human rights mobilisation that accepts resolutions of rights with fragmented actions, even if those address only very specific forms of associational activity (see Baxi 2006: 69; Brown 1995, 2000). When individuals choose the attachment, they can renounce the ambitious projects of human rights that comprehensively reimagine the social and legal order.

There are perhaps not enough resources in Latin American legal theory to escape this attachment, either as part of a collective engaged in mobilisation, or as an observer of the legal phenomenon in the academic front. The legal tradition suggests the assimilation of constrained notions of legal culture described in legal formalism, censoring most of the alternative ways to re-imagine legal processes. Culture in Latin America, in general terms, is predominantly used to refer to the static and determining character of *the other* that is not well versed in the habits of democracy (Mignolo 2000, 2005; Rodríguez Garavito 2001). In legal terms that implies the *object of democratic pedagogy* ought to be instilled into the values of the legal system (see Bhabha 1990). This subject can aspire to have her or his rights recognised in the block of “social and cultural rights”, but is incapable to dismantle the neoliberal depiction of human rights that establish a hierarchal distance between law and culture (see the critique of Abramovich and Courtis 2002; Rodríguez Garavito 2012). Culture in law is also understood as a historical prescription, an object of analysis that keeps track of the updates and adaptation of one group of citizens, from the formalist civil law tradition to the contemporary transnational notion of the Rule of Law (Esquirol, 2012; Herrera Flores 1985, 2010; Mignolo 2005). Culture becomes a standard notion adaptable to report on other cultures, as comparative indicators that perceived the needs of one group as a priority for intervention. But it is rarely treated as the empirical notes an observer might have about local particularities, and about the different social and affective ways to encounter the law. I am talking about a more anthropological notion of culture (see Spivak 2012: 119, 126), where the notion might accommodate attachments and resistances at the same time: those whose identities depend on the abstract notions of legal epistemology and those whose identities take meaningful distances from it.

In the Latin American local experiences of the law, legal systems have failed to deliver the basic enabling conditions for true democratic relations, or as some would argue, legal systems have actually maintained the socio economic structures of inequality that characterize the region (Domingo 1996; Esquirol 2008; Gargarella 2010; López Medina 2004; Novoa Monreal 2006 [1975]). In this line of thought, a third notion of culture has been used (that manages to combine elements of the previous two) in a conservative convention that employs the idea of culture typically in negative terms to highlight the distance between the law and the others of democracy. Legal formalism is routinely invoked as a founding principle for democracy (in both legal theory and legal and judicial practices) and as the external aspiration of the regional governments to internalize the basic principles of the Rule of Law (Stotzky and Nino 1993: 6); but governments have always been incapable of fulfilling its requirements due to some sort of cultural condition that condemns the region to legal backwardness and political apathy, among both citizens and legal operators (Comaroff and Comaroff 2006; Morris 2009). Politicians and/or civil society *seem to show no interest* in the principles of constitutional democracy and in the prospect of their countries becoming a “county of laws”, and even worse, would support the rise of meta-legal (mainly communitarian) systems of justice, in a defective legal culture unfit to assimilate the democratic separation of powers, by considering illegal challenges to be legal reasoning (De la Madrid Hurtado 2004: 167-169)⁸. Legal formalism articulates a *democratic objection* against all expressions that exceed the limits of the law: all forms of resistance, including expressions of legal pluralism, and the political claim to recognize the plurinational character of the state, that emerged from indigenous mobilization in the region, are rejected as direct threats not only to the authority of the state but to the constitutional democratic tradition (for a critical appraisal of the argument see Adelman and Centeno 2002: 142; Hunneus 2010).

The attachment to legal events is sustained in standard imaginaries of the liberal subject of rights that emerge from them. Imaginaries that can perhaps be a more costly feature in

⁸ This meta legal systems of justice can be understood not as illegal arrangements but as expressions of the juridification of social relations, the mimicking of legal structures in community based systems of justice replicated by communities that do not recognize the authority of state law; common example among indigenous and campesinos groups in the region, and recently in self-defence groups (see Sieder 2010, Faundez 2005).

the most unequal region of the world⁹, far from those cultural environments where the measuring of standards, with which we all imagine democratic values, were originally defined. I will refer to the internationally-prescribed (but Western-modelled¹⁰) diagnoses, or generic prescriptions for good democratic environments, as the *idées fixes* of democracy: the integrity of legal operators, the political independence of the three branches, public responsiveness in political institutions, electoral fairness, etc. (I adopt the notion from Esquirol 2009; for critical discussions about the national appropriation of translational legal standards in Latin America see Adelman and Centeno 2002; Herrera Flores 2010; Esquirol 2012; Merino 2012). The argument is expanded in chapter 4 with the unfolding of the notion of democratic objection, the passionate rejection of the practice of judicial activism in legal contexts that lack the basic institutional stability necessary to afford the challenge of politically inspired activism: in face of poor democratic performance of political organisms with little legitimacy, the judiciary cannot challenge the legislature and proclaim itself as a new (or alternative) source of law, because the legislature in the first instance has not yet fulfilled its basic mandate, and the democratic order would be challenged before achieving a stable democratic arrangement (see Fiss 2000; Prieto 2003; Lemaitre 1993).

I see the democratic objection as a paradox, an attempt to tune democratic aspirations to *idées fixes* of institutions that were designed in “a mode of transnationalism that falls far short of responsive engagement with legal actors in Latin America and horizontal participation in the societal negotiations of national law and legal institutions” (Esquirol 2009: 704). The democratic objection makes impossible the encounter between grounded critiques against the inefficacy of legal institutions and alternative forms of political imagination that would venture to think them otherwise, because the encounter depends

⁹ See the UNDP note in <http://www.latinamerica.undp.org/content/rblac/en/home/presscenter/speeches/2013/07/10/lessons-from-the-world-s-most-unequal-region/> Last accessed September 8th 2014.

¹⁰ By Western models I mean the discursive notions that are created in developing contexts (but also in occasions in third world -or semi-peripheral- countries) to demarcate clear distinctions of geopolitical identity in a complex combination of critique, appropriation, distance, emulation or codification of the “knowledge produced in the West” (see Mohanty 1988). In this specific dialogue I mean the productions of the idea of democracy that relies on assumptions of a certain level of equality that makes of projects for social mobility realistic resources in political imaginaries, that also settles the terms in which transnational ideas of development travel (see Santos 2002: 165-168).

on abstract ideas of democracy that sustain their legitimacy in the fiction of efficacy that is never fulfilled. As I was warned several times interviewing legal scholars, there are only certain things that legal institutions can do, and not much more we can ask from our legal culture if we are to remain respectful of the legal tradition. Confronting two positions, one that strictly observes the normative prescription of legal formalism, and one with a political desire to transcend those prescriptions, the anticipation of new language with which to imagine a different kind of progress is doomed unfeasible, because the first one imposes the reinforcement of *idées fixes*, at the same time as dismissing the alternatives defined by inferior forms of knowledge *about* the law.

Nevertheless, and regardless of theoretical tensions, the Supreme Court found itself under the spotlight of Mexican politics as an activist court, as in a few other Latin American contexts: the judiciary gained place as a new terrain to embark on novel commitments towards human rights. From observing the publicity of the Mexican Court's decisions, both in legal and non legal spheres, I explore in the thesis the premise affirming that the Court in this period took part on a project to renew legitimacy in the legal system, that the decisions on sexual rights inspired a hope for judicial activism actually based on unrealistic expectations that would have implied for the Court, if materialised, to transgress the democratic order according the formalist legal gaze. The contemporary history of Latin America, put in general terms, is characterised by legal cultures that have only recently overcome conventions of authoritarianism (the tradition to grant almost exclusive control over national politics to the executive). The expectations invested in constitutional courts shaping new human rights cultures are growing rapidly because of their sense of novelty, despite few actual records of activism, and despite in most cases the lack of institutional capacity of constitutional courts to live to ambitious expectations, like the case of Mexico (see Gargarella 2006; Méndez, O'Donnell and Pinheiro 1999; O'Donnell 1998; Sieder 2010; Smulovitz 2005).

I recognize the judicialization of politics as a new form of legal culture in the region, or a new parameter to observe the regional legal cultures, both in the development of procedural and formal adjustments in judicial decision making processes, and in the way

those same adjustments impact on social groups, who started invoking them in non predictable ways. In the 1980s, under the gaze of scholars in the United States, Latin American legal cultures became objects of a transnational dialogue through the demarcation of political adjustments and “best practices” to relieve the treacherous political, social (and very noticeably economical) transitions to democracy, by setting up standard aspirational patterns of liberal citizenship, expressed within the effective establishment of the Rule of Law, later part of the Law and Development movement (Carothers 1998; Domingo and Sieder 2001; Trebilcock and Daniels 2008; Davis and Trebilcock 2008). Whereas the premises of the gaze have shifted since then, due in part to the crisis of the Western economic centres and the lack of coherence in their political projects of assistance during the 1990s (Cao 2007: 361, see also Trubek and Santos eds. 2006), legal cultures are still observed predominantly as parameters for transnational comparative research, like the literature on judicialization of politics that is fed by an important network of bilingual lawyers working in their countries of origin and coming together in their dialogues in universities across the United States, somehow determining its main character and its theoretical grounding¹¹.

As César Rodríguez Garavito indicates, because of their transnational character the dialogues of Latin American critical legal theory are often based on local experiences of progressive legal activism but portrayed as peripheral (and exceptional) experiences, thus deepening the inequality of the global juridical circuits of knowledge (2011: 14). Only recently, and also within a transnational groups of scholars, the concern about the need to renovate horizontal dialogues between different intellectual, political, epistemological and legal traditions has been raised (see Santos and Rodríguez Garavito 2007; and the edited collections of Gargarella, Domingo and Roux 2010; Méndez, O’Donnell and Pinheiro 1999), acknowledging the *de facto* hybrid and plural cultures of Latin America that legal formalism cannot cover. Ideas of progress are diffused in simultaneous projects of modernity in Latin America, practiced differently by diverse groups across the regions: experiences of modernity as a project of emancipation, of expansion, renovation, or

¹¹ For a general overview on judicialization of politics in the region see Couso 2004; Couso, Hunneus and Sieder 2010; Domingo, 2004, 2009; Gargarella, Domingo and Roux 2006; Hunneus 2010; Kapiszewski and Taylor 2008; Oquendo 2008; Ríos Figueroa and Taylor 2006; Sieder, Scholjden and Angell 2005.

democratization (García Canclini 2005); as Boaventura de Sousa Santos indicates (2007), each of these projects can radically divide conceptions of modernity, separating ideas of progress from lived experiences of violence suffered by those at lower social and economic levels, depoliticizing the political usages of emancipation, and creating an epistemological abyss that accelerates an exclusive notion of modernity (for example, democracy as understood in the liberal description of the rule of law), a notion backed by rational, legal knowledge, leaving behind alternative and pluralist methods that seem to slow the progress of legal modernity.

Latin American dialogues on judicialization had established at the national level unlike relations with the *de facto* plural diversity of their peoples, but in most cases they remained resistant towards it. Judicialization represents an effort to focus attention in the constitution as a primary norm for the legal systems, but also potentially as a primary referent of nationalism (or renovated nationalism in transitional processes), repeatedly within the formalist epistemic borders of the law. With the new comparative academic approaches of the judicialization of politics, autonomous and semi-autonomous projects¹² of national modernisation of legal and judicial institutions have been developing across the region, reinforcing the authority of legal institutions (and the epistemic authority of legal formalism). The inauguration of constitutional courts harmonized with the resurgence of constitutionalism at the centre of political identities and legal cultures (Domingo and Sieder 2001: 144-46) in a search for new sustainable and democratic governmental capacities, due in part to the courts' capacity to resolve (or postpone) political conflict (Lemaitre Ripoll 2009: 388; see also Rueda 2010), as I expand in chapter 2, but mainly because constitutionalism proved fertile ground to regenerate political legitimacy with creative and foundational promises for a better legal order; reasonable promises that the previous legal and political regime, or other institutional instances, could not have afforded. Judicialization presented itself as a new way out of the political and civil violence that kept slowing the delivery of human rights after

¹² I say semi-autonomous because some cases of national modernisation depend largely of international sponsorship for their reform projects, both on economic terms and on the profiling of the reforms according to the agendas of the sponsors (see Domingo and Sieder 2001)

decades of clientelism¹³ and authoritarianism in Latin American politics (see Centeno 2004, Sabatini 2007, follow also the discussion in chapter 3), after the unrest provoked by the movements of opposition that emerged from the radical left since the 1960s, and the extra-legal organisations that have been disrupting the political sphere for decades now (see Comaroff and Comaroff 2006).

The case studies in the thesis are organised in such a way that they emphasise the roles abortion and same sex marriage legal reforms played in the historical path of political transformation, and not presented as part of a linear or causal sequence of events in sexual rights activism, in order to map out their resonance with the expression of the new constitutionalism in Mexico and the Supreme Court as constitutional court, and not as part of a global development of the sexual rights agenda. The political map is unfolded in part 2, with chapter 3 describing the transitions and political tensions at the end of the authoritarian one-party regime that governed Mexico for more than seven decades; and chapter 4 with the context in which the Supreme Court and the tools for constitutional review were settled in Mexican politics, explained as junctions, that resolved at their time, crisis of national identity through a pretend expansion of political positions: the empowerment of the Court conditioned by the transition from ‘presidentialism’ (the historical account of the great political power of the executive, that relegated the other two branches of the government on behalf of strong presidential authority), made possible with the authorisation of some actors to use it and easing with that use the new balances of power in the new democracy.

The passage of abortion and same sex marriage through the judiciary has great pedagogical potential. It tells something different about Mexican politics that is more than their passing through the legislative. I study the political set up that made it possible for the Court to receive the sexual rights cases: the relations established between the recognised sources of rights claims -political parties appropriating the language of

¹³ USAID has used the concept of clientelism to evaluate as a political risk what have been seen as the characteristic of entire political systems, particularly in Latin America, the enduring mechanisms of control that bind leaders and followers in hierarchical relationships of uneven power and status (Brinkerhoff and Goldsmith 2002).

NGOs' claims-, the actors authorised to engage with those claims in the judiciary -the National Commission of Human Rights (CNDH) and the General Attorney-, and those who legitimized the process, celebrating it as a historical achievement despite being excluded from it –social movements with no authority to stand in the Court-. The happy judicialization of sexual rights could have expanded the political positions in the country, but did not do so, and this note teaches us more about its historical significance. Its bearing is evaluated according to the projects it opened (or did not) for the expansion of the human rights culture, and not the past claims they resolved (or seem to have resolved) with juridical resolutions.

The account of progressive sexual rights triumphs is often represented as one of the most evolved forms of political positions in democratisation, promoted by *new social actors* equipped with new skills to negotiate the terms in which human rights claims resonate with the state and its institutions. The theoretical study of these negotiations has been influenced by social movements theory and the study of the political opportunity structures (POS) of Sydney Tarrow, defined as the external incentives (or pressures) that enhance or inhibit people's prospects to undertake collective action and affect mainstream politics (Tarrow 1994: 85). The POS demands from a theoretical project, an articulated account of the mobilising structure of social movements: their capacity to build support structures (rights advocacy lawyers and organisations), to obtain material resources (Epp 1998), to hold stable political alliances (discussed largely in electoral terms); and their ability to sustain collective processes of framing (interpretation, attribution and social construction mediating between the opportunities, and the ideological motivations for action) (see also McAdam 1982, 1996; McAdam, McCarthy and Zald 1996; Kitschelt 1986: 58; Tilly 1978). The frame, however, is not fully suitable for the diagnosis of the Mexican experience of the happy judicialization.

The way the sexual rights movement has negotiated its political opportunities, securing a strong transnational network and now often local mobilising structures, is so great and feels so fair that it granted for the movement a privileged location in the contemporary history of human rights, with a more solid support structure and access to resources that

many other movements (made available, predictably, to urban elites with scant possibility of replication for an expansive constituency; see Díez 2011: 19). In their legal expressions sexual rights, indirectly and unintentionally, gained such a symbolic power that they easily *cancel or postpone* possible links between sexuality and broader human rights claims, on behalf of their attachment to the legal system that distributes material and symbolic resources unevenly across different rights agendas, or on behalf of a representation where they are armoured as the evolved political positions that other agendas should imitate. The privileged location thus endangers political and ethical prospects for solidarity across movements, and hinders the pedagogical potential of sexual rights and what they have to teach us about the state, the law and the judiciary. This demands a careful revision of the way sexuality contributes (and the way it does not) to our legal culture. I aim not to discredit the strategies chosen that achieved success for sexual rights in Mexico, but to advance a claim for a different way to celebrate them, rejecting the unavoidability of the attachment towards the Mexican legal system, the Supreme Court and the politics that mediate them. The Court's decisions to uphold the reforms on abortion and same sex marriage were good decisions, but they did not fulfil the historical fictions of progress and emancipation that they appropriated. To accept the celebration of sexual rights in law without awareness of the attachment, and to take for granted their place in the history of human rights, means undermining all the other human rights claims that are formulated outside the strict rules of authorisation that condition legal formulations in liberal democracies, benefitting the cases that I study here, but no others.

I have the greatest respect, admiration and gratitude towards all the activists, legislators and the judges of the Supreme Court who enabled these processes, and to those that defend the optimism of the sexual revolution in the courts, in Mexico and Latin America. I began my own path in human rights as a sexual rights activist in Mexico City working with an NGO; I witnessed first hand the early development of these processes more than a decade ago, how powerfully they brought together and bonded local, national and transnational networks; since then I have seen how the sexual rights movement in the country has gradually produced rich tools to make political sense of legal strategies and

agendas. At the same time I feel committed to ground these achievements in a critique against the naturalization and apparent unavoidability of their attachments. The thesis, in general terms, aims to open a critique to share among those of us who research sexuality in politics and law, intended for the scrutiny of categories and horizons that we use to observe sexual rights mobilisation, but never to hinder the mobilisation itself or the agency of activists to navigate through political opportunities. I am convinced that an insight suspicious of the rhetoric of the happy judicialization neither discredits nor replaces any other intellectual and political engagements that (also) desire a human rights revolution in the judiciary and a radical reform on legal systems. My alternative reading of the decisions claims to be neither better nor more accurate: it is just a personal effort to conciliate my own politics with the historical relevance of the decisions, trying to establish the terms of the celebration in the political context and the grounded historical development of human rights during the years these cases occupied the Mexican political sphere.

III. SEXUAL RIGHTS ARE HUMAN RIGHTS! (THE CONCEPT OF SEXUAL RIGHTS)

To offer here a concept of sexual rights will be to put myself (and the whole of the research project) in a predicament, because the task would demand one of those theoretical *bricolages* that are manufactured whenever theory pretends to comprehend the way social movements use human rights frames in ways that are scientifically observable (Santos 2008), often for the benefit of a portrait of mobilisation narrated exclusively in terms of its interaction with the state (Barret 1980: 228), dismissing the plurality of subjectivities that conforms all forms of political identities (Herrera Flores; 2000:132; Santos 2002). These *bricolages* demand the inevitable reduction of the contradictions and contingencies that are at the heart of all human rights practices (Goodale 2006; Merry 2006), ordering them as common and heterogeneous ideological bases of identities, suitable for the strategic deployment of social movements towards the instrumental relation they establish with human rights language throughout the different events of the history of democratisation (see Alvarez, Dagnino and Escobar 1998).

The richest asset, and possibly the most powerful feature of sexual rights, resides in fact in their resistance against a concrete definition. Sexual rights are dynamic categories that have been constituted as a patched fabric with different tools for mobilization, a flexible fabric that covers the intersection of different movements and suits the wide range of sexual and political experiences of persons in different situations (Miller 1999: 289). Sexual rights encompass both formal and non formal applications of human rights frames: from claims strategically placed to cover information and health needs generated in sexual practices (Lamas 2001), and the effect these needs project as social and economic rights (Rojas 2001), to rights claims enunciated by subjects who demand expansive frameworks of citizenship determined by specific needs and identities of women (Ortiz Ortega 1999; Szasz and Salas 2008) and groups that distinguish themselves as holders of specific politics because of their sexual orientation and practices.

I am not trying to suggest that sexual rights have adjustable contents for every political identity that claims allegiance to them. They do have a core that identifies them as a coherent project. What I am trying to emphasize is that they can resist the objective content that a court or other legal instances, for example, could impose on them, or in other words, they transcend the objective definitions given by liberal conceptions of legal rights, and respond to a different sort of coherence. In a court, or in process of strategic litigation, sexual rights have to be systematized as *claims* that can be tested within the already established *frames* of interpretation for human rights language; but those *claims* in law are only codified versions of something desired by the person or group who invokes them in those frames, a desire that can be the alleviation of material needs, the confrontation of political authority perceived as unfair, or the empowerment for political action and social interaction. They only resonate with pre-established *frames* to strategically adapted to narratives that although simplify the meanings of their original desires, they offer codes that can be in local legal environments and recognized by a transnational community (the discussions on frames, claims and resonance has been explored in Cowan et al. 2001:21; Goodale 2006, Ferre 2003).

There are expressions of sexual rights that I recognize as Western frames, used to study the meanings, applications, and consequences that law and social policy have in sexuality, casting the idea that rights are acquired through the expansion of more or less fixed models of citizenship, defined somehow in transnational frames (see Evans 1993; Richardson 1998, 2000; Weeks 1998). When those expressions are used to represent local sexual cultures is perhaps when the attachment to the law grows stronger, a global idea of sexual rights is transplanted in local spaces assuming that it can be adapted to acknowledge the strategies used by individuals and groups to conform sexual politics into the liberal and abstract notion of law in exchange for Western signifiers of a democratic polity (see Phillips 2005). This transplant is problematic inasmuch as those transnational accounts do not address the sets of questions that one is challenged by in legal systems like the Latin American ones. Social movements seem to desire the democratic polity, but the questions about basic conditions of interaction with the state that define historically the regional traditions are dismissed. That is the understanding of all human rights agendas through the “right to have rights” that precedes as a struggle those Western expressions that give account of rights that are ultimately delivered only through exclusionary codes of citizenship (for a theoretical problematization of sexuality and exclusionary expressions of citizenship see Alexander 1994; Yuval-Davis 1998, 1999).

The idea of sexual rights that I use as the main reference in this thesis presents them not only as expressions of –or desires for– citizenship, or expansive legal projects, but wider statements about sexual politics. They represent a *location for enunciation*, negotiated in grassroots debates about sexuality that helps us to navigate through ideal forms of legal, political, social, cultural, and economic relations but that is not determined exclusively by any of those. Each of those spheres, the legal, political, social, cultural and economical, if treated independently (or organized hierarchically), could *limit the thinkability* around the relation between rights, law and public, dictating what seems possible (or desirable) according to each one of their own agendas and priorities (see Cooper 2007). A concept of sexual rights overtly focused on one of these spheres constructs an *affordable* and adaptable version of their meaning moulded after a given political context, but sexual rights ought to be understood as an independent location so they can produce new

imaginaries, beyond what is already given. Sexual rights can prefigure an alternative political imagination by navigating through the legal, political, social, cultural, and economic relations, intervening on them (or occupying them), and then transforming them.

The original idea of sexual rights is a dialogue that articulates a connection between *embodiment* and mobilisation for collective action. Borrowing from Rosi Braidotti's concept in *Nomadic Subjects*, embodiment encompasses a feminist strategy to recognise subjects in the total experience of their bodies, and their capacity to produce situated knowledge through the understanding of the self in relation to sexual difference, sex relations and gender stratification, as a strategy to transform them (1994: 182, 183)¹⁴. What Braidotti builds as a theoretical account is what has been politicised in the tradition of activism in feminist groups as processes of *empowerment*, where feminists recognise themselves as agents of change, individually (at the level of consciousness) and collectively in political action (León 2001: 1998), creating autonomous political spaces outside of the margins of institutionally driven policies (Fries 2000: 62, 63).

In the Latin American history, these spaces were created by women looking to articulate their own political agendas in relation to the different mobilization groups that they were active in, and also to reflect upon the differences between them: the oppression that affects women unevenly, the asymmetries of power between them as a collective, and the way those can determine (and fragment) their identities in specific moments and specific circumstances (Obando 1997). On those terms, the strategies of empowerment became a condition for activists that precedes their encounter with public policy and law, it meant the activation of sexuality and wellbeing (and for some, the bodily sensations of pleasure) as the unique and formative experiences that enable conditions of individuation and create possibilities for freedom, cast in a collective dialogue as concretely realizable and universally available (the premise of sexuality as a source of empowerment in politics has

¹⁴ My understanding of sexual politics is pretty much dependant on this notion of embodiment. It is the way one recognizes the hierarchies of a patriarchal regime according to where one is situated, and not the way sexuality is discussed in political institutions. Kate Millett describes these hierarchies as sexual casts in her *Sexual Politics* (1969), the organization of privilege, capacities for social mobility, and power, according to sexual characters, gender expressions, class, race, etc.

been explored in Cornell 1995; Garcia and Parker 2006; Hinojosa 2007; Parker, Barbosa and Aggleton 2000; Macklin 1996; Petchesky 1986).

Sexual rights are not agreements brought about by progressive legal reforms, they precede them. In their relationship with law I see them as ethical predicaments that can be used as tools to imagine legal reforms and judicial interventions, to evaluate them, and to transcend them in their political imaginaries. In the location of enunciation the conditions that limit the thinkability of sexual politics can be rendered visible, not as the enumeration of cumulative basic needs of sexuality (legal, economic, cultural, etc.) but as the fundamental conditions that are formative for the subject's situated knowledge about the self and their understanding of human rights (see Petchesky 2000). The location of enunciation in a theoretical project has to be profited as a privilege, not granted by compliance with institutional thinkability and the instances that authorise individuals to govern themselves in liberal fashion (see Richardson 2005: 529) but accomplished by a social movement's capacity to defend an independent space where the way in which law can deliver rights can be reimagined (the idea of imagination and feasibility is expanded in chapter 1 through the work of Paulo Freire and material optimism).

In the collective experiences of subjective embodiment, sexual rights dialogues have, in recent decades, produced new conceptual tools that have allowed the temporary reconciliation between subjective intimate practices of sexuality and the sedimentary "identities" that are demanded by the liberal requirements of thinkability. Activists have profited their privileged location to guarantee through these identities their security and wellbeing and that of their communities¹⁵. Different expressions of sexual identities and sexual practices (including sexual work) have been conveniently named and recognised with the language of institutional democratization, using codes that are both intelligible

¹⁵ There is no point in expanding here the problems that derive from the constructions of fixed sexual identities in the introduction. These controversies will be familiar to every reader of gender, sexuality and rights literature. In literature in English, the early literature of sexual rights always warned against the counterproductive insistence on identities politically produced to link behaviors with expectations from institutions (Miller 1999: 290-291). Judith Butler and the queer scholarship that followed her tradition have embraced those controversies. In Latin America Mauro Cabral and Giuseppe Campuzano (2007), or in Spain Paco Vidarte (2010), have insisted on resisting the normative definitions of sexual identities. I touch upon the controversy in chapter 6 with the discussions of same sex marriage reform.

and legitimate for the problematization of sexuality as a human rights claim, and suitable for specific political developments. These identities, of course, have often destabilized the principles and desires of sexual rights whenever they conform to strict criteria for affiliation to the democratic project (see Altman 2001; Eaton 1995; Lalor 2011; Menon 2007), but that discussion cannot be confused with a statement about ethical ways to yield opportunities. As I claimed earlier, democratization is only one way to understand progress in modernity, it does not cover all projects and desires of sexual rights practices, it only overlaps the stage of mobilisation.

Having been asked in an interview to reflect on the politics of sexuality, Michel Foucault presented a crucial reflection, which I borrow to delineate my own ethical account of the expectations of sexuality in human rights frames. He was asked by a French gay magazine to give advice to young readers about the “problem of homosexuality”, and responded articulating a link between desire and ethics that left the law outside of the equation, or located it on the side only peripherally as an accidental factor in a process that should be jealously preserved as a process of empowerment and subjectivity. Braidotti’s idea of embodiment (that I presented as a possible description of the political practice of empowerment) took an explicit distance from desire, claiming that desire is external to the feminist embodiment (distancing herself from psychoanalytic precepts of desire) (1999: 184); but with Foucault’s advice on the “problem of homosexuality” (and homosexual subjectivity) we can bring it back, because his argument is deeply rooted in the principle of desire. According to Foucault, desire informs a way of life when it is socialized, organized in a culture (the homosexual culture) that can recognize and name the effect that power relations have in the way norms are defined and implemented; and then, after that exercise of cognitive socialization, desire gives place to ethics.

“Homosexuality is a historical opportunity to reopen relational and affective virtualities (...) It is not a problem of desire but a desirable place to be in” (Foucault 1981: 38). The trajectory that starts in desire and leads to ethics for Foucault is configured by virtual relations of reciprocity, affection, tenderness, friendship, loyalty and companionship, that are generated always *outside of the limits of the law*: the ethics of homosexuality, and the

politicization of the culture of intimate affection, are both desirable places to be because in their condition of illegality they can produce independent insights of the relations of power that determine the norms, including a critique of the law. In the condition of illegality, Foucault emphasizes, the homosexual recognizes “the diagonal lines [that he] can lay out in the social fabric [to] allow these virtualities to come to light” (1981: 39). The law appears in this trajectory only peripherally, which means that the homosexual has resources to distance himself from abstract ideas of the law that is enacted with specific and recognizable authority. On these terms, I am using Foucault’s argument and pushing it so it can accommodate not only homosexuality but all other expression and practices of sexuality, the project of sexual rights that I recognize is precisely to enable individuals and communities to determine their own trajectory so they can bring desire into ethics (inspired by the feminist project of Braidotti), trusting the capacity of sexual rights as a location for enunciation to make possible alternative imaginaries through their subversive relation with institutions.

Where Braidotti casts an ethical project in the disclosure of difference in the experience of embodiment, Foucault highlights the power that emerges in the transgression of those differences, the sexuality that happens outside of the norm that can reverse the power that institutions impose on individual through both material restrictions and cognitive exclusions. This is the concept of sexual rights that inspires me, a mixture between processes of embodiment, and the ethical commitments towards the recognition of oneself in intimate, social and political relationships. As Braidotti indicates, the possibilities of politics are born in embodiment precisely because of its slightly utopian touch: possibilities are projects, political hypotheses, and the expression of an ethical desire for alliances across the boundaries of race, age, and sexual preferences (Braidotti 1994: 189. see also the concept of active citizenship of Cooper 2007).

Sexual rights inform the *political imagination* of those who participate in their dialogues, they offer guidance for the attribution of values, associations, and interpretations of the world that are activated in the instrumental engagements they establish in human rights frames. The Chicana feminist Gloria Anzaldúa defines imagination as a space of

resistance and contestation against normativity: imagination is that inhabited reality whose potential is easily discredited and labelled as fictional, as make-believe, and wish fulfilment, but it is still experienced in the body as real, and through it one relates with others (1987: 37-38). Imagination cannot be fulfilled by law, or by the norms dictated in institutional politics (just as sexuality will always elude legal reasoning), but it can certainly help us navigate through it and its contradictions, facilitating the deconstruction of already fixed and naturalized projects of progress and modernity always in the search for something else and something better. That is a motivation to defend the transgressive imagination: only imagination can be accountable for the narration of the becoming of politics, because it is the only thing that can be submitted to the possibilities of change and at the same time be the object of narrations of change (Herrera Flores 2000:31; Baxi 2006) beyond the determinacy of institutional power (see Fitzpatrick 2207: 10).

Sexual rights are then spaces where the relations that are imagined to be universally applicable are enunciated and therefore anticipated, relations of reciprocity and affection that are desired between particulars and between groups that inform new relations of solidarity in a political community. In embodying those relations, sexual rights discern their own priorities when they navigate through institutions: they can choose between desiring a good law and desiring the good legal system that can ensure effective conditions of possibility for freedom and rights, not only for the narrative of rights that relate to sexuality but to a wider aspiration according to the communities where they are enunciated. They produce specific knowledge, and reunite a specific epistemic community that generates autonomous evaluations of political and legal processes on their own terms¹⁶. And let me emphasize, they are not originally legal projects, but places of enunciation that can be detached from specific grounded legal contexts in order to assess the strategic opportunities those provide, but also the internal contradictions of the legal systems.

¹⁶ For a closer engagement with social movements as producer of particular epistemic interventions see Lamble 2012; Santos 2008.

III. THE CASE STUDIES

My research focuses on the judicial intervention on sexual rights legal reforms, not on the theoretical unfolding of their political and ethical principles. This was not a calculated methodological choice, but a response to an observation of something that I encountered with a certain sense of urgency at the beginning of the project: the ‘turn to law’ of sexual rights observed in the abortion and same sex marriage processes, the streaming of their agenda into legal activism inspired by an abstract premise about a legal system that can effectively facilitate change. The premise opens an interrogation about the power gained by Mexican legal operators, through the legitimisation granted by the social movements attached to them and the way they authorize language, recognize identities, and limit the thinkability and imagination of the movement, co-opting the full potential of sexual rights to unveil the contradictions of the legal system and the overlapping political processes involved in each reform.

Like other social movements, in the last four decades of democratization in Latin America sexual rights gradually ended up investing a large amount of their political energy into legal reform. Struggles previously funnelled through autonomous and/or informal regulation domains gradually adopted regulation as a primary target (Couso, Huneus and Sieder 2010: 9, 10). Social relations were increasingly *juridified*, political claims were projected to settlement within the available legal language, and new language was desired to represent identities and practices, but mainly within legal epistemic spheres. Social movements appropriated “law-like” discourses and practices to expand grassroots politics into legal textures, trusting in the law’s potential to assist them in the creation of a mere just order (O’Donnell 2005: 293; Mendez, O’Donnell and Pinheiro 1999: 162). But this turn to law was not reciprocated with an equivalent expansion on the side of the legal-bureaucratic regulation, the efforts of recognition of social movements did not match evenly with the inclusion of their situated knowledge to inform legal knowledge (Sieder 2010: 161): the new democratic states, in the spirit of promotion of more participatory politics, opened points of access to legal and judicial institutions, but very few, and soon restricted those spaces to actors that were already part

of the state structure, or were linked to it through personalistic politics. Not all social movements benefited from this opening, only to those who were on board with the terms set up by the turn to law.

The happy judicialization of sexual rights is the historical momentum that illustrates the juridification of sexual politics within the few successful cases listed in the Mexican Court, cases that gave to the Court the legitimate appreciation of social movements who trusted in the law as a vehicle to bring something better to the lives of those whose rights have been violated, and believed that those few successful reforms could be eventually shared by all people reshaping a new culture of rights. Its recollections opens an opportunity to review what it is that actually changed in Mexican history throughout the historical period that immediately preceded the Court's intervention. The momentum started officially with the constitutional reform of 1994 in Mexico and the "revival" of the Supreme Court in Mexican politics through the adjudication of faculties of constitutional review. The reform somehow indicates the beginning of a new legal culture, with rights cases slowly being brought to the Court giving unprecedented publicity to the judicial system. After 1994, key constitutional reforms had been adjusting the mandate of the Court in tune with breakthrough moments of the recent Mexican history: the end of seventy two uninterrupted years of a one-party government, the revolt of the *Ejército Zapatista de Liberación Nacional* (Zapatista Army of National Liberation EZLN) attempting to revolutionize and reshape the foundations of the nation-state, and the gradual modernisation of the liberal state that deposited on the Court some of the most ambitious promises of human rights accountability that the Mexican legal system could afford (the whole of chapter 4 is dedicated to contextualize these shifts suggesting a direct link between the evolution of the Court and the political events at the time in the country).

With the Supreme Court making its way towards the establishment of a solid authority backed by civil society, and soon after it started receiving some of the most politically controversial cases of human rights abuses, the judicialization of sexual rights started officially in 2000 with an appeal of unconstitutionality (or *acción de*

inconstitucionalidad) presented against the legal reform that expanded the regime of exceptions for abortion in the criminal code of Mexico City. That case attracted little public attention as a judicial intervention: not enough scrutiny was invested into the technicalities of the Court's decision, despite the unprecedented passage of sexual rights through the Court. We can infer that it was because it was published less than four months before the federal elections of July where the conservative party *Partido de Acción Nacional* (National Action Party, PAN) defeated the *Partido de la Revolución Institucional* (Party of the Institutional Revolution, PRI) for the first time since its foundation. The legal reform of Mexico City, presented in chapter 3, not only inaugurated a peculiar relation between legal reform and repeated judicial intervention, but a tendency for the leadership in Mexico City (ruled by the leftist party *Partido de la Revolución Democrática* PRD¹⁷) to appropriate sexual rights agendas in their party to confront the conservative politics of the new presidency.

The end of the presidentialism of the PRI brought with it an adjustment of the Court to fit the executive's plans for a new federalism and, with that, new power to the Court (the argument is explored in chapter 4). After the first *sexenio* (the constitutionally determined 6 year period of a president in power) of the new democracy of the PAN, the "momentum" of judicialization flourished with greater intensity, and sexual rights became one of the most visible agendas to push forward. In this period, the Court received *amparo* cases¹⁸ presented on behalf of former soldiers who were dismissed from the army after their HIV positive status was disclosed (*Amparo en revisión* 307/2007) (vid. Amuchástegui and Parrini 2009; Carbonell 2007; Pou Giménez 2012). The same year it resolved the *acción de inconstitucionalidad* 146/2007 *y su acumulada* 147/2007 that challenged the law decriminalising abortion in Mexico City. In 2008 new *amparos* were received demanding the right of a transsexual person to modify the civil record of gender in her birth certificate (see Madrazo and Vela 2011). And a couple of years later, the Court received the *Acción de inconstitucionalidad* 2/2010 against the legal reform on

¹⁷ Party of the Democratic Revolution.

¹⁸ The *Amparo*, or *amparo* writ, is the faculty through which citizens with legitimate interest can request constitutional control over a law or legal reform after this has been enacted, or an act of application has been produced. In those cases the Court can declare the inapplicability of the law for the concrete case that raises the action with no further changes in the law.

same sex marriage, later upheld.

I dedicate the thesis to only two of those cases: the *Acción de inconstitucionalidad* 146/2007 *y su acumulada* 147/2007 against the law that decriminalised abortion in Mexico City, and the *Acción de inconstitucionalidad* 2/2010. They were selected over the rest because they were activated in the judiciary by *acciones de inconstitucionalidad* and not *amparos*. The appeals of unconstitutionality (or *acciones*), according to constitutional prescription, have the potential to challenge law, whereas *amparos* can only aim for the inapplicability of law in individual cases. I pursue in that choice possibilities for judicial activism throughout my analysis, unfolding the cases as if the Court had the capacity to challenge the constitutional order creatively inspired by revolutionary notions of justice, ordering new interpretations for human rights, dictating precedents to the legislature to avoid the repetition of *amparo* cases, setting up specific juridical content for sexual rights language so they could moderate the uneven responses to sexual rights in different legislative assemblies throughout the country and considering the limited access to constitutional control for the general public. The *amparos* cannot do that, they are designed only to resolve individual cases and can only produce relative effects: they benefit the person who presents them to the Court by negating the effects of a law or reform on her or him individually. Although the *amparos* have the potential to produce jurisprudence, they only rarely do so. It has become a tradition that new *amparos* only restart processes. The *acciones de inconstitucionalidad* can revoke laws, they are an abstract tool of constitutional control that does not require a grievance to be activated, and therefore they can be used as deliberate projects for legal activism.

IV. METHODOLOGY

I spent two summers in Mexico in the course of the research, first in 2010 and then in 2012. In these visits I organised two separate blocks of interviews. The first summer I targeted mainly sexual rights activists, the second I approached mainly legal scholars and legal activists. Those two summers saw very different political climates in Mexico, which

led to uneven availability of information and different priorities in the dialogues about sexual rights. In 2010 I wanted to study first the path through which the processes of embodiment and empowerment are experienced by sexual rights activists, the way they take control over and politicize their own sexual subjectivity, trying to understand the role that empowerment plays in people's critique and call to mobilize in the broader national political context. I carried out seven in-depth interviews and one focus group exploring personal histories of feminist, gay, and sexual rights activists in Mexico City¹⁹. I hoped from the interviews to update my own account of the sexual rights dialogues through the language and agendas of activists in the city, rewriting the path from desire to ethics that I presented earlier with the work of Foucault and Braidotti.

In the second summer, my research pressed upon me more urgent legal questions. The judicialization of sexual rights was then the clear locus of my thesis; revising my material from the first visit, I was struggling to decipher the abstract and ambiguous ideas that activists use to refer to the Mexican legal system in their political imagination, which I later translate as their attachment to the law. I had three in-depth interviews with scholars in the fields of law and politics who had produced academic work on the specific events of abortion and same sex marriage, and three lawyers who were active in the legal advocacy (and the further academic analyses) of the judicialization of sexual rights. The field of academics working on both judicialization and sexual rights agenda is still quite small; there are legal and politics scholars working on judicialization who have specific political or intellectual interests in sexuality; there are also scholars in the sexual rights field for whom an interest in judicialization is only now emerging because of these cases. Between these two groups, I experienced an epistemic confrontation: one group using a concept of sexual rights in their liberal notion, and another group naming the law as an abstract idea. This pushed me to think about the attachment and the fiction that sustains it.

I confronted three methodological challenges in my interviews. First: convinced in the

¹⁹ I use these categories only because those are the areas of activism in which my interviewees identified themselves. The original criterion was to interview sexual rights activists, with no distinction of how they define their primary identity. While I encounter lesbian women working in sexual rights, I did not have conversations with women introducing themselves as lesbian activists.

first summer by the opportunity to construct my early premises in a collaborative exercise, most of my interviewees were close friends, old colleagues from the time when I was a sexual rights activist; or they were my friends' acquaintances in the sexual rights and feminist movement. While these links facilitated a natural and emotionally supportive atmosphere for my initial fieldwork, it raised special alerts: I had to remain alert to the differences between their knowledge about sexual rights and my own, their concepts, frames, and how they contrasted with the academic requirements of my work. I had to establish an artificial distance from my informants and their narratives, their sources of knowledge, and the ways in which they deployed the language of sexual rights, as strategies that resonated with their own political needs and the political contexts, distinct from my own critical exercise. While these methodological questions can be applied to any in-depth interview, they can always become particularly sensitive when working with acquaintances because of the way we, as researchers, acknowledge the credibility of interviewees (Guba, quoted in Blichfeldt and Heldbjerg 2011) and the way we predict the direction their answers will take by drawing confident portraits of them during the interview (Lawrence-Lightfoot and Davis 1997). For that reason, all references to extracts from the interviews are presented in my work with pseudonyms, as an attempt to mediate in my analysis the different relations I have had with my informants. In the second summer I did not work with personal acquaintances, but I retain the use of pseudonyms to ensure uniform treatment of my sources.

The second challenge was to assimilate the political motivation of my work within the limited scope of the project. Disclosing my political beliefs in my research (as a former sexual rights activist) demanded the internal negotiation of the strong ties I still have with the activists in the field, and the external debate about the expectations generated about the work being held accountable to activists on the one hand, and to academics on the other (Frampton, et al. 2006; Reinharz 1992). While my work always had as its primary target an academic audience, the interviews triggered an interest about the junctures and coincidences between my working premises and the political agenda of the movement: a general expectation about the way academic knowledge can support activists' agendas and their own research priorities (Cancian 1993: 93), by "giving back" findings to the

participants who can validate the work according to their own needs (Ramazanoglu and Holland, 2002). I had then to negotiate my way through my respect and gratitude towards their work and their narratives, while revealing my critical impulse with my findings at all stages of the research, findings in both the field and the rapports I established in the interviews: beyond reconfirming the knowledge that we always assumed as shared about sexual rights activism, and despite the distances I wanted to create with my findings, I was particularly sensitive about the possible reception that my understanding of the attachment to the law might have had, because it was a theoretical version of their political work. In the summer of 2012 there was a federal election in the country; most political engagements somehow were influenced by the electoral climate and the hopes of social movements focused in the electoral opportunity to change the presidential leadership. Most of my interviewees were interested in the electoral defeat of the conservative federal government of the PAN, and some were even establishing strategic alliances with the partisan left. My task was then to support my statements about the locations for enunciation outside of the legal and institutional spheres, to insist on a notion of sexual rights that would allow me to learn more than the partisan exchanges of the time.

My reading of the *acciones* always remained suspicious of the optimistic evaluations that my informants in the summer of 2010 made of the Supreme Court. All activists claimed that the Court's decisions were invaluable steps towards a more tolerant and democratic society, which in principle felt like a contradiction of my working premises that instinctively affirm that the historical change that came about with the cases was overestimated. When I presented a piece of the research on a panel in the UK, with some Latin American students in the audience, someone confronted me claiming that the pedagogical potential that I insist throughout my thesis the two cases of *acciones de inconstitucionalidad* have, apart from endangering the spaces that the sexual rights movement has won (both in the legislature and in the Court), is only relevant to legal contexts where progressive legal reforms have happened already, and might not contribute to expansive projects elsewhere. I agreed with the critique, and at the same time it clarified for me the reasons why I was suspicious of my interviewees' optimism. I

reconciled myself with the idea that my critical representation of the cases did not attempt to offer a guide for expansive strategies of litigation, nor to critique the choices of activists on their journeys in mobilization. The critique is based instead on a thorough scrutiny of the political junctures that explain how the cases happened in Mexico City, in a way that could not have happened elsewhere in the country: the cases teach us something about Mexican politics in the judiciary that very few other cases can.

In the summer of 2012, I had to confront new epistemic challenges in my interviews with legal and political scholars. The language of the discussions was mainly legal language, and no questions about legal rationality or challenges to the constitutional order were posed. While the activists that I met helped me to understand the cycles of sexual rights litigation within electoral politics, legal scholars pushed me to emphasize notions of the state and the idea of judicialization as stable frames to make legal sense of the great progress of the Supreme Court in the Mexican democratization. My premises were now confronting me but from the other front: I was asking from judicialization something that is not, that does not correspond with the legal (and democratic) epistemic order. I felt my own growing interest to defend the location of enunciation of sexual rights as their main concept, in order to reveal the epistemic confrontation that is unfolded as a competition for authorized legitimate knowledge about the legal events and the order of the Court. The concern has been somehow addressed already and theorised as the professionalization of activists as a condition for entry into democratic institutions (Alvarez 1998; Vargas 1999, 2001), but to me the problem was not only the inclusion of activists into the think-ability of the law, but the discredit of their grounded knowledge on the basis of lack of formal authority, which drove me to ground my research as an inquiry about the different ways in which legal knowledge is authorised in Mexico, perhaps suggesting the specific form that authorization takes in the region, to pose a question about the right way to formulate these concerns in the Latin American experiences of law.

The third challenge refers to this last concern explicitly, but it also extends the previous ones further: it is about the negotiation of my presence and reflexivity as a Mexican

researcher writing a PhD in Great Britain. In 2010 when I started the research I attended a panel in a workshop for early career scholars organised to explore the relation between activism and academia. I asked the feminist scholar Avtar Brah about her position on “doing our research abroad”, for non British (and perhaps non-Western) academics working in this country; she replied generously with what became perhaps the most powerful motto throughout the research years: all responsible positionality passes through the consideration of the fundamental demands for justice that are recognised as urgent and unavoidable in our countries of origin, no matter what the specific focus of our research is, or how much those questions contrast with the academic jargon that is expected from us in our writing. I ended up writing, as a Mexican scholar in the United Kingdom, a thesis about Mexico, aware of the epistemic distance that separates me from my old colleagues and fellow citizens, and distanced also from urgent human rights issues that mark the day to day of the political life of my country that cannot be grasped in the legal events that I study, because those are contained in their own special temporal frame. In that sense, my thesis became a reflection about what is written and what is not written, of the human rights questions in an unfair world that impose an ethical commitment to suspect the achievements of sexual rights and demand hope for more, for better legal relations.

Since Nancy Hartsock suggested the concepts of standpoint and positionality in feminist research (1983), the systematic reflection of our own experiences (and the way they are rooted in our own circumstances) became a compulsory exercise when one is committed to consider the material conditions, activities, and institutions that determine our premises and observations, and reinforce the relations of power in which we are located in relation to others. I found in feminist positionality the resources to address Brah’s challenge, not only as a “way to research” but as a way of embracing the fundamental ethos of sexual rights work. Instructed by feminist traditions, I recognise sexual subjectivity always as being intersected by social, economic, racial, nationalistic hierarchies (see Alexander 1994; Kapur 2005; Millett 1969; Rubin 1976; Sandoval 2002); the experiences we have of each of those hierarchies as academics are the sources of our knowledge, and it is through those experience that we imagine an ideal individual subject who we set up as

the bedrock of evidence upon which our explanations are built. We make choices about the experiences that are represented in our theoretical accounts, and about those that will be absent from our writing, we narrow our epistemic possibilities and make ethical decisions about who to include in our theory. Throughout the work, references to “sexual rights dialogues” or “Mexican citizens” are repeated to acknowledge epistemic communities in which I take part, while mostly being used to emphasize the limits of both groups.

Both in my previous work as an activist, and during this research, I have constantly challenged my usage of feminist language in my politics as a man. I acknowledge the work in which men (and some women) have profited from the knowledge produced in feminism to think masculinities as positions from which men can think through their own experiences within gendered roles (Connell 1990; Digby 1998; Kaufman 1994), demonstrating by using those frames their commitment towards progressive methodologies of reflexivity (May 1997). My interest in feminism, however, has never gone in that direction; instead it starts in my commitment towards sexuality: I have always read feminism “still [as] the only movement for social justice that offers a vision of mutual well-being as a consequence of its theory and practice” (Hooks 2000: 92). In social mobilisation and academic endeavours, feminism has successfully pushed exercises of embodiment and empowerment from the intimate spheres of desire to the national arena (Alexander 1994; Yuval-Davis 1998) and to global transnational exchanges (Mohanty 1998); it has done so without having to renounce to affective commitments towards the other, the subject who speaks even when do not have enough language to understand her (see Spivak 1988). Feminist positionality has acknowledged, like no other tradition of thought, the significance of the other in our assumptions of shared universality, the subaltern other, the object of knowledge, as fundamental tests of coherence for the images of wellbeing, and the objects of our imagination that we project theoretically and politically.

V. CHAPTER OUTLINE

In chapter 1 I make a first attempt to explain the attachment to law and the judiciary with a simple statement: Trust in the law derives not from what it delivers, but from what it promises. The judicial intervention is seen as something good, as an optimistic step forward that inspires generalisations about the whole of the legal system, even if it does not clarify with certainty the paths that it actually inaugurates for the legal culture of human rights. In the chapter I suggest a careful evaluation of that optimism, and the adoption instead of an educated critical optimism, inspired by the politics that reclaim hope and wishful thinking for ethical relations (away from the co-option of institutional and partisan language) that will provide the resources with which we can cast the future of human rights. I use for that purpose a brief reflection on the concept of the promise, interrogating the way a promise bonds civil society and governmental authorities and institutions in determined circumstances on behalf of something that is yet to come, something that makes the postponement of politics worth it. Touching upon utopian dialogues and emphasising the pedagogical project of Paulo Freire of education of hope and optimism, I ground theoretical precepts in the search of new language to relate to judicialization in the coming chapters.

In chapter 2 I test the idea of optimism and the concept of promises against Latin American immediate political precedents, building a conceptual framework suitable for studying optimism in Latin American legal processes, acknowledging its contradictions. The promises for a better legal system have been delivered in new constitutionalism: Constitutional law brings something to the political communities that they did not have before. The main concern touched on in the chapter is the way notions of optimism are restricted by the technologies of authorisation of constitutionalism: imposing a tradition of formalist legal reasoning, the democratic adjustments of Latin America have only lead to further adjustments that reinforce liberal logics with only exceptional events of radical readjustment of the political identity of the country driven by its own people. New constitutions enable a constant renovation of political promises, they recast the political authority of rulers, and neglect in sophisticated ways the direct intervention of social movements from the definition of progress of the nation state.

Chapter 3 is motivated by the original inquiry of why the legal reforms happened in Mexico City and not elsewhere. I explore the evolution of partisan shifts in the country, with special attention to the development of the main leftist party in Mexico City, to ensure that subsequently the role that confrontational politics against the Federal authority played in sexual rights is clear. The chapter attempts to bring a historical insight into the way Mexican left incorporated (and resisted) sexual politics, and how partisan politics capitalised the language of social movements. The happy judicialization of sexual rights happened because the government of the capital city found electoral potential through their promotion, not because the Mexican left assimilated the core of the human rights framework supporting sexual rights.

Chapter 4 follows the historical trajectory that maps the development of the Mexican Supreme Court in contemporary history. The main objective of the chapter is to present the political junctions that propelled the Supreme Court to the centre of Mexican political life, arguing that those junctions had more determining power than an agenda of good governance or aspiration for an activist court. Among those historical junctions, I am interested in highlighting the fact that the historical enabling of constitutional review (that is the direct precedent of the sexual rights cases) coincided with the political disabling of the indigenous movement which had, in the 1990s, experienced an intense episode of social mobilisation, a fact that is dismissed as part of the history of sexual rights, and remains one of the biggest challenges for the optimistic readings of judicialization. This moment represents the most dramatic postponement of human rights politics in the country.

Chapter 5 is the unfolding of the first case study, the abortion debate. I present historical notes about the development of abortion law in Mexico City, and about the role electoral politics played on the reform. The unfolding of the judicial intervention is affected by my own pessimism about the terms in which the Court backed the law. The Supreme Court confirmed that women who decide or need to undergo an abortion could do so in Mexico City, but only in the city because its legislature is entitled to say so. The Court

consciously avoided taking a stand on women's rights, which had consequences with backlashes against women's right to choose in different states of the country. The Court did not mediate interpretations of women's rights that legislatures were ruling over; it only confirmed the structure of the federal system and the authority of legislative assemblies. There was no transformation of the culture of rights in Mexico with the Court decision, only the highlighting of constitutional gaps of interpretation that were covered by several states, to prevent the replication of campaigns for legal reform like the one in Mexico City. The happy judicialization of abortion was perhaps the shortest of all human rights judicializations, since the same operation that brought it about also censored its expansion.

The last chapter, chapter 6, is dedicated to the same sex marriage debate. As opposed to the abortion development, if there is one hopeful development of judicialization it is perhaps same sex marriage, originally activated by an *acción de inconstitucionalidad* in Mexico City, and eventually expanded through *amparos* accommodating the marriage lobby to the latest adjustment of judicialization. In this chapter I insist on the way in which the constitutional design allowed the Court to make sound statements about lesbian and gay rights, dismissing precedents as guidelines for the legislature, and only enabling the repetition of judicial appeals in *amparos* that have not given proper guidance to change the whole of the legislative system. This chapter argues that the main contribution of the same sex marriage debate to the legal culture of Mexico, is the materialisation of a valuable currency to evaluate novel expressions of civilised citizenship in democracy. While the debate has been largely capitalised by electoral politics, even today the Court continues to deliver positive resolutions that keep restoring the attachment of the sexual rights movement.

PART I

PROMISES

Chapter 1

THE PROMISE OF JUDICIALIZATION

"It is likely that of all our feelings
the only one which doesn't belong to us is hope.

Hope belongs to life,
it's life defending itself."²⁰

Julio Cortázar. *Rayuela*, 1963

Choosing and developing a frame in this first chapter became more than a quest for the best possible way to represent in the thesis the decisions of the Supreme Court as *good* decisions, without having to renounce to a critical position and highlight their limited emancipatory potential and all their contradictions. The writing of this chapter was a process of disclosure of my political motivations as a researcher: my intention to write in such a way that the depiction of the legal events of judicialization would not be determined by their objective description, but by my desire for renewed relations between courts and social movements (and between social movements and the citizenry). I *do* want the human rights language of judicialization to be used as a language of solidarity that emerges from the images of a better future that sexual rights evoke when they turn to law. The events of the happy judicialization occurred in a historical moment of readjustments that could have accommodated political creativity and could have demanded more effectively that for which we yearn: they could have happened otherwise and resulted on better and fairer lawful relations and political positions.

In methodological terms, I am calling for the *validation* of optimism as a legitimate method and appropriate for a *serious and responsible* analysis of the judicial intervention

²⁰ "Probablemente de todos nuestros sentimientos el único que no es verdaderamente nuestro es la esperanza. La esperanza le pertenece a la vida, es la vida misma defendiéndose".

on abortion and same sex marriage, and *authorize* therefore, questions about the law and judicial processes that are formulated outside the monopoly of state-law and the explanatory frameworks of legal formalism, as the only source for recording progress in legal transformation. The judicialization of politics is an intriguing object of study for human rights projects, more because of what it *promises* to different actors than what it actually does for them: it promises something that is yet to come, perhaps a desirable performance of constitutional courts outlined by the rights that civil society aspires to have in democracy, or perhaps a more encompassing image of a good legal system where progressive legal reforms can sit. As it happens, with all hopeful, and utopian thinking, recognizing promises is not a simple act of knowledge, but a pedagogical commitment that is established with the acknowledgement of the historical moment when they are evoked and the relations that are defined by it (see Zemelman 1995: 46). Promises are not supposed to reveal something concrete or lucid, and yet we are still amazed by them; it is in our amazement that we interrogate the sources of knowledge that are available to us at the moment we acknowledge them, because that question will help us to understand our place in that venture and to transform the way we know, transforming also the way we learn about the conditions in which promises are presented to us, inspired by our previous desires for new ways of being, yearning for new desires to be revealed in the process.

In this chapter I present theoretical insights to anticipate a way to understand judicialization as a promise, predicting ways to explain the attachment towards legal institutions that citizens commit to when state-law promises something to them. The *attachment* cultivates a legitimate image of the legal system for those who invest on its promises, their political energy whenever they are certain that something good will come from it, it builds a relation of membership and identification of individuals with their political systems. I recognize the promise of judicialization in the encounter established between government and civil society, framed in a specific historical time and justified by the trend of new constitutionalism, having constitutions as guarantors of the promise. Although this promise is limited. It resonates mainly with the part of civil society that can sketch images for a good legal system and can promote it as if they had desired it themselves; experts and activists that have enough epistemic and material resources to do

so because they have been recognized as suitable interlocutors in democratic dialogues.

Judicialization does not mean the same to everybody; the law only accommodates the relations that pass implicit and explicit *tests of authorisation*, that affiliate or subordinate people and groups to the *language of the law* (Dorsett and McVeigh 2007: 5) according to whether their expectations coincide or not with legal imaginaries of rights, to their training and skills to navigate through legal systems, and to different levels of compliance with the programmes of legal development, and the way those project specific notions of justice and emancipation. However they are restricted, the promises of judicialization still become such powerful symbols that most of the time circulate as if they entail universal pretensions: a good promise for one is a good promise for all; that is what makes them so strong, that is why they resolve political conflict bounding communities with renovated political relations at the time of crisis and conflict.

Judicialization (and progressive judicial decisions) promises something new to come, its power lies in the prospect of the future. With careful attention to the process of authorisation (that privileges certain language, and certain actors recognised as worthy recipients of promises) there is great potential to learn about the way promises organize relations in the present and distribute promises disproportionately. From the moment of their formulation, promises demand the commitment of some agents of change and their mobilising actions, some actors are willing to embark on this compliance convinced that they will profit from its political opportunities, some may resist and perhaps even challenge them, and some are in a location of epistemic exclusion and are not even considered in the promise. Whatever it is that the promise will bring, it will not touch them for the mere fact that they have no place in the good future that the promise anticipates (even if the promise has an universalistic pretension). Still, no matter how restricted the process of authorization, and how unfair the distribution of the good future of the promise, *promises are good*. The unfolding of the chapter pretends a re-appropriation of the optimism of promises: they are always good, that makes them different to other ways to foresee the future, promises always announce that something will be amended, restored or improved. They actually call to the future as a way to amend

something in the present.

In a theoretical exercise, a promise is the description of an ethical relation borrowed here to describe political interactions: the mimic of an ethical relation of reciprocity presented to describe political alignments. A government promises something, a legal reform promises something, this is the same as a progressive judicial decision; but the political version is only a mimic of real promises because when they are formulated they only acknowledge a simplistic recipient, they bring something good only to a fictional receiver that is imagined in a homogenous location, denying the real plurality of citizens; besides, political promises are never reciprocal. The borrowing of the concept therefore requires a careful justification. The first part of the chapter is dedicated to considerations on language of optimism as appropriate frames of analysis; the second is the presentation of the concept of critical optimism, the specific pedagogical demands of an optimistic framework understood as a strategy for action. The last section presents the concept of the promise that will be used in the remainder of the thesis, fragmented in parts to demystify the different investments that it comprises of: the one who promises because it has authority over the recipients of promises, and the recipients who have little capacity to negotiate the terms of engagement with the first, and are willing to postpone their politics in exchange of being taken one step closer to their desired relations of justice and fairness.

I. DEFENDING LANGUAGE FOR OPTIMISM

There is no consensus about how promises should look, or ought to; as I mentioned earlier, they are good things because they will change something in the present that is not right, although we do not always know exactly how that change will be achieved, nor how things will look afterwards. Promises are not acts of knowledge but pedagogical practices that reveal to us paradoxical relations established around them. In human rights dialogues, there is no consensus about the best suited actors to bring about progressive change and better futures (the courts, the law, the actors authorized by them, social

movements), nevertheless, there is a general acknowledgement that authority is required to bring about change, even if not every subject is entitled to share authority on equal terms. There is also a consensus about people wanting *something better*, that desire in itself can organise the central role of the law right there. There is a common desire that has historically run across various (and sometimes contradictory) paths that now have met in law in Latin America: law seems to promise to bring about something that individuals and groups have failed to secure through political or social processes (Sieder, Scholjden and Angell 2005; Uprimny, Rodríguez Garavito and García Villegas, 2006).

That statement of course, does not help us understand what this common desire consists of. The object of desire still needs to be determined, and in law we instrumentally produce fictions that occupy that place: we infer desire from our belief, faith and trust in political changes -we want rights, we want legal recognition-, even against the empirical evidence of the limited capacity of legal systems to deliver what they promise, and instead of a desire for a radical revolution or true emancipation. We witness today a proliferation of a strong global consensus around concrete images of change projected in the law that are vanishing into the deep political cleavages that separate the realistic possibilities of achieving them, yielding the place of local struggles to hegemonic projections of improvement (Santos 2002: 314; Sieder 2011), determined by a frantic rhythm of progress that rushes optimism into the succession of good events, a succession that has not yet created spaces of stabilisation and consolidation for sustained hope in politics and law (Santos 2002: 439).

The utopian distinctive note of promises is a fundamental departure point for those of us who want to formulate our desire for judicialization to be otherwise resisting authorized means to research it. Recognizing the utopian condition of desire is to take responsibility towards the object of study, and the object diffused throughout culture and politics, and towards the subjects who are supposed to be affected by it on their condition of lack and longing (see Levitas 2013). Judicialization as an object of study does not have to be an explanation (or justification) on the way courts contribute to culminate political processes of the past, but an evaluation of the present and the contradictions that are impeding our

capacity to imagine otherwise. In judicialization we can host a future-oriented approach, formulated to educate hope: to re-orientate knowledge away from what is and has been, to that which is not yet, that is to organize evidence, deduction and imagination, to prioritize an engagement with those elements of our desire that have not yet been fulfilled (Bloch 1996, 2000; Levitas 2007: 62; Zournazi 2002).

Hope and optimism are reclaimed as useful sources for the illumination of the path of action and thinking that will lead us to a better future (Bloch 1996: 99, 272), to the production of knowledge that refers not only to material conditions of possibility, but that describes the motivation of communities “to confirm their knowledge of who they really are” (Miyazaki 2004: 53). Hope is the unveiling of the ontological anticipation of “a not yet conscious knowledge of what will occur over there one day, in an ‘over there’ that has not yet happened” (Bloch 2000 [1964]: 145), that pushes us to scrutinize the conditions that have prevented that *over there* to arrive (Freire 1992: 60), projecting the rectification (and not the explanation) of our desires for it as guidelines for action (and not closure).

The revival of utopian thinking and hope in progressive politics is an effort to issue alternative, equitable and sustainable responses to local and global crises in holistic thinking and unconventional politics (see Levitas 2007). An effort also to rescue the promotion of wishful thinking and hopeful images in everyday life (and everyday dreams) in heavily fragmented societies observed in the midst of neoliberal relations (see Harvey 2000; Miyazaki 2002, 2004). It emerges also as a defense against those who still claim that utopian thinking should be sidelined or put out of circulation in critical thinking, because of a gloomy perception that optimism corrupts and compromises intellectual clarity with its lack of engagement in both practical knowledge and political intentionality (see Zournazi 2002: 45). The claim against it repeats the motto that advocates for the activation of intelligent pessimism against one’s own wilful optimism: “I’m a pessimist because of intelligence, but an optimist because of will” recommends the separation of the intellectual capacity to recognize structural determination of

processes (the possible) from politics as projects of collective will (the impossible)²¹. The statement discourages intellectual efforts from using the impossible as a resource because it inevitably leads to disillusionment, and requires extra effort in the explanatory justifications if we dare to allow for the possible and impossible to meet. In any case, the warnings against it depend heavily on fixed distinctive boundaries between them: the intellectual investments on one side, and the political passions on the other. The extension of the predicament of the intelligent pessimist put in those terms, David Harvey recalls, is one of the most serious barriers of progressive politics; for Harvey, the call for intellectual pessimism has to be discredited because of its consequences, and rephrased as political passivity (2000:17).

The pessimist knows that investing into an intellectual project grounded primarily in ones' own hopes and political passions can end up in an illusionary retreat that deceives theoretical resources and coherent knowledge. To use optimism and hope to expose and denounce errors of the present could be to fall into a trap of mystification, not only because of the hint of unrealism that it suggest but the methodological uncertainty that we confront when approaching those errors (there is after all an element of normative belief in the prophecies of pessimism). Hope is often co-opted by the normative and hegemonic prediction of a future good life, the other ways to predict the future that are designed by fit actors with the means to demarcate and reproduce good life, those whose only aim is *to include* the others in already established ideological projects of progress (Berlant 2010; Berlant and Warner 1998). Put in those terms, the rejection of hope becomes a critical intervention in itself (see for example Edelman 2004). The pessimist therefore calls to resist the hope that has been designed by an institution with authority to impose its models of good life: when the institutions impose their desire on you, *you should* be hopeful for economic development, *you should* be hopeful that peace will come, *you should* be hopeful for equality, *you should* be hopeful for rights.

I insist however that dismissing optimism is dismissing its potential in *knowledge*

²¹ The argument is extracted from Gramsci's Prison Writings from 1917 (quoted in Harvey 2000: 17). While it might not be representative of Gramsci's work, it became a common reference in dialogues on the reconciliation of intellect with politics in optimism (see also the interviews on Zournazi 2000).

formation and language production, both great chances to reverse the decline of progressive politics. Optimism does not belong to ideological campaigners; it cannot be discharged because of the type of fantasy that it anticipates when is promoted by actors with means (and power) to promote it. The reason to hold onto it is the argument that I have been insisting on, optimism does not depend on the object of the promised future, but on the unveiling of present lacks and absences: it is not objects of desire or scientific predictions of achievement that it champions, but the reconciliation of the subject with what exists (Bloch 1996: 149). To engage with optimism as a method of analysis here is an investment in a project that has as two main objectives, the first being the consideration of new forms of relationality in the political spectrum, imagined as possible projects of collective will (both possible and impossible in the words of the pessimist), carved by novel forms of social relations that actually re-define the objectives of the collective will. We ought to educate hope away from the hegemonic and unachievable prescription of good life, we ought to learn about variable expressions and plural desires, both as commandments for our personal practices and group identities, and as novel resources to observe law and politics (see Levitas 2010: 213).

Henrietta L. Moore's work contributes to our idea here with the promotion of new relationalities as sources of politics (2011) recognizing as new interpretative communities those groups that have emerged in alternatives political platforms (new information technologies), which not only facilitate networks at the operational level, but inaugurate political ontologies and relations between the self and the other around the world. In her work it is the platform what supplies conditions to imagine the future, which helps us not only to resist hegemonic politics when thinking about the future, but to relocate the space of politics all together. Jose Esteban Muñoz intervenes in queer critique evoking material utopias to repair the queer pessimism that predicts anti-relational and self-exclusionary identities (see Edelman 2004, Love 2007) restoring a collective relational longing of a desired queer identity. For Muñoz it is not only the platform that makes sense of politics, but its lacks, thinking optimism in the recognition of absences. Optimism for Muñoz compensates the lacks with aesthetic stimulation through "a type of affective excess that presents the enabling force of a forward-dawning futurity" (2009: 23). Also within queer

dialogues Michel Snediker (2009) defends queer optimism as the reconciliation with the historical violence imposed in queer identities, by investing one's subjectivity in the opportunities the present offers for something new to build, another utopian ambition based on brand new platforms that enable the detachment from that which has been, where the past does not determine our identities and our capacity to desire in the same way that which it does not yet. In these three interventions subjectivity and mobilisation stimulate knowledge generated through new interpersonal relations; we encounter the individual alone (I suggest from my own reading of the three projects) in her or his full ambiguity and indeterminacy, willing to identify oneself with that which is not here yet, and committed towards new social and sexual relations.

The second objective of the re-appropriation of optimism is to recuperate a method of inquiry that is not focused on listing conditions that enable (or cancel) actors' capacities to hope (the political opportunities that stimulate or censor the objects of hope and determine their appropriateness or suitability), but is focused instead on hope as the method of knowledge (see Miyazaki 2007: 2). In this *grounded optimism* wishful thinking is always interlinked with full action, utopian inspirations become in themselves social change (Levinas 2010: 230-31). To learn about political opportunities does not mean that we can replicate them because they do not follow coherent and predictable paths. The grounded optimism, on the other hand, not only justifies knowledge in the new relationalities and platforms that appear ambiguous and indeterminate to politics –or to law–, but to learn from those relationalities as events that inspire hope because they can be expanded and replicated in creative political encounters. In the new relationalities, subjects negotiate and reconstitute their own archaeological paradigms of inclusion, they encounter other subjects with capacity to negotiate and renovate a hope of changing meanings (see Cooper 2014). In other words, every individual can recreate its own past and re-evaluate that *which has been* and took her or him to *what it is now*, to then create collectively that *which ought to be*.

The grounded optimism is bound to a theoretical re-presentation of those events and relations where subjects renovate their hope, and the analyses of power relations -

discursive and epistemic- that condition (and authorize) the production of a *new language of hope*, that compensate for the differences separating us from each other in that *what it is now*. Grounded optimism becomes a choice (never a need) for the individual committed to change the conditions of the present, aiming to de-normalize the gaps, absences and contradictions of the present, willing to share what is yet to be committed to communities beyond her or his own established relations. The optimist who can assess what it is now, does so in order to enable other people to assess their own circumstances, that is not only activists, but people willing to engage in new relationalities based on pure ethical opening to others.

Democratization advances with the modernization of the institutions of the state, but that has not managed to prevent the precarization of conditions of life for an alarming number of people, either because of precarious conditions of labour or concurrent situations of poverty. One of the biggest contradictions of democracy is the recurrence of violations of human rights across the globe that has been normalised as a characteristic note of neoliberal modernity (see Mignolo 2000). In this contradiction we have enough reasons to reconsider the appeal of intellectual pessimism and yield to optimism: the further we advance in history we seem to have fewer reasons to defend it. The powerful images of what we want ourselves to be are being dismantled, seriously fragmented, depoliticized, or just postponed by the balance between the ambiguity of *that which is not here yet* against the certainty of the pessimistic reconstruction of the past that took us to a present where we do always not want to be in. But disillusionment cannot assimilate or explain political praxis or mobilization; it has not alienated people's hope and political agendas, if any, it has actually encouraged the production of new platforms and relationalities. Intelligent pessimism might be then more of a theoretical self-fulfilled prophecy than a well-sustained perception, because it does not engage with the creative tactics of political communities, the subjective processes of empowerment that keep restoring and producing creative strategies for political resistance.

There are reasons to assume that grounded optimism would not be easily assimilated in legal studies focused on Latin America, perhaps because of previous academic

interventions of projects of reforms in the legal and judicial systems that have reinforced formalism in the teaching and practices of law, without necessarily engaging with the possibilities for creative knowledge about the law as imagined by ordinary citizens whose epistemic references are excluded from the logics of the law. In transnational dialogues there has been projects defined abroad, like the Rule of Law project or the Law and Development movement, briefly mentioned in the introduction through the establishment of good practices and dictate of prescriptions for improvement at the institutional level if imported properly, transforming the local legal cultures and producing political stability for economic development (see Domingo and Sieder 2001; Trubek 2006; Trubek and Santos 2006; Trubek and Galanter 1974). In regional literature there has traditionally been more interest in engaging critically with the way law produces and perpetuates inequality and systems of exclusion (Novoa Monreal 2006 [1975]; Esquirol 2003) than with narratives that make of law a platform capable to host plural and diverse optimistic encounters.

Sociology, anthropology and cultural studies are well equipped to systematize the flexible meanings attributed to hope through the diverse relations that people establish with law, whereas legal theory first imposes its semantic authority over legal rationality as the only relevant way to exist before the law, leaving out the social territory that is not organized by the dichotomy of the legal and the illegal as an organizing principle (Santos 2007). We can study the sources of hope in the *Sem-Terra*, the landless movements in Brazil organised in the late 1980s to revert traditional regulation on tenure through illegal trespassing of property, producing informal community techniques and actions that work parallel to the state-led system of administration of justice (see Dinerstein 2014). Let us think about the National Movement of the *400 pueblos* [400 peoples] in Mexico demanding legal reparations against the economic and political violence of neoliberalism, projecting for decades its hope towards the same institutional scaffolding that they are originally fighting against (see Hernández 1991). Let us learn from the indigenous and campesinos in Mexico too who impose their own understandings of law simultaneously as a tool of oppression and a mean of resistance so they can use it to negotiate collective entitlements for land (see Jones 1998). And let us be inspired by the indigenous peoples

in Guatemala claiming for judicial processes against the perpetrators of crimes against humanity, processes that can only be enforced by the same authority that has historically denied their legal recognition (Sieder and Witchell 2001).

Let us consider Hirokazu Miyazaki's example. He uses hope as a method of inquiry to deploy the study of a disenfranchised and dispossessed indigenous group to conclude with the impossibility to grasp their identity on the legal relation, but on the hopeful process of action. He is trying to understand how a routine of disappointment plays with the constant restoration of hope for the ancestral land reclaimed by legal means. His work led him to assimilate the indeterminacy of the group's identity and its way to conceive the future: the hope for the law is perceived originally as the anticipation of a Western-determined project of good life, the failure to achieve it did not take them closer to that good life, but it did not explain either how it illuminated new possibilities of action and redirected the object of hope. In each failure the present is re-imagined, the conditions of possibility to reach the original object of hope are reassessed, and the group re-orientates its knowledge in a project of good life that emerges from self-knowledge (2006:167). Hope represents the strategic balance between the anticipation of a desire that is external, and the constant relocation of self-knowledge in an interactional and performative terrain (Miyazaki 2007: 72). Hope is never valued for the anticipation of that where it will take us, but is treasured for that which it teaches us about our relations and ourselves.

II. CRITICAL OPTIMISM

The Brazilian educator Paulo Freire calls academics and researchers into an exercise of *serious and responsible* understanding of the political and historical praxis of social claims and social transformation, declaring that the main task of academic endeavours is the production of language to anticipate a new world to come of vindicated justice (1992: 60-61). Freire, in line with Ernest Bloch's thinking, sees hope as a principle for action in an optimistic horizon, the utopian impulse of existential necessity to bring about social change and freedom, politicising hope in education conscripted to social agents, never to

institutions, because institutions have a different sense of temporality to social agents, and the education for hope as a transcendental project of emancipation demands a different sense of time. Freire is committed towards the pedagogical revelation of *untested feasibilities*, the political projects of action towards a future that we have yet to create, revealed in the ‘limit situations’ that negate and curve people’s capacity to hope or imagine the future²². Optimism is the pedagogical effort to reveal feasibilities in limited situations, through the socialisation of knowledge that can be used by people in such a way that they can acknowledge and name their own situations as frontiers and material borders, so they can demystify and transform them into direct critical actions towards the achievement of pragmatic possibilities²³.

“Untested feasibilities” is the official translation into English from the original “*inédito viável*” in Portuguese²⁴, which in English could have a literal translation along the lines of *viable and unedited*. The original phrasing suggests a more ambitious term than the translated version because it sets up different expectations. Although the difference is subtle: the expression in English, ‘untested feasibilities’ might bring to mind experiments that are imagined against tests that can determine their convenience, appropriateness, or feasibility; in Portuguese the term *inédito viável* suggests broader interpretations: it encompasses indeterminacy, incompleteness, inconclusiveness, and ‘*unfinishedness*’, something that has not been tested (or might not need to be tested) and yet is still accepted as possible. In English the term engages with identifiable constituencies that acquire public personality in tests, they need to be recognised by previously organized political/institutional exchanges with specific associations and criteria of membership. The language used in Portuguese is flexible enough to accommodate an ambiguity that transcends traditional politics (and law) and relates instead to the ontological recognition

²² This is a similar political project from Ernest Bloch’s “not yet”, the capacity to acknowledge oneself the conditions of the present that are impediments for the not yet.

²³ The project is similar that Walter Mignolo’s concept of *border thinking* (2000). Mignolo, however, expands this idea not just for people who have been denied expressions of hope but to a larger historical claim, replacing the material borders of limit situations with the postcolonial relation: where Western contemplations of hope (and suffering) are superimposed over postcolonial experiences. The project is similar, but my recollection of Freire’s work does not aspire for such historical dimension.

²⁴ The translation is made by Myra Ramos, and recognized explicitly by Freire in the English edition of the book.

of the being in philosophy, thus accommodating ethical language in the representation of political collective projects (Romão 2005: 15; see also Bohorquez 2008).

Paulo Freire coined the term in his 1968 classical work *Pedagogy of the Oppressed*. He is commonly linked to the work of Ernest Bloch through their utopian materialism, the tradition of defending “concrete utopias”: the study of the real and material conditions necessary to make a utopia possible, influenced by a neo-Marxist sensitivity towards the multiplicity of social relations and the power that organizes them hierarchically. But they both took critical distances with classic Marxism. As Bloch did, Freire explicitly distanced his work from the concept of false consciousness of historical materialism because on its treatment of class it organizes collective identities to settle a paradigm suitable for understanding claims for authority, inclusion and social relations, but it has only a limited understanding of plurality (see Giroux and McLaren 1997: 139)²⁵. The scientific pretension of the *inédito viável* is to resonate among pedagogues and development agents so they can address relations of oppression but never ambitioning the systematized representation of the experiences of those who are subject to it (Freire 2005 [1970]: 113-114), nor a simplified notion of oppression that can easily repeat restricted imaginaries of temporality with cycles of revolution or liberation that are presumed to provide historical closure(s) for oppression(s).

The dichotomy between false consciousness and real consciousness in Freire’s work is made visible to denounce the repetition of the artificial, mystified, and simplistic reality of the other, which simultaneously produces figures of representation -on behalf of explanations for academic jargon- and unintentionally un-authorizes subjects to represent themselves in the relations that academic texts recreate, or recognize only after the subjects *have learnt* to present themselves with the intelligible codes set by the observer (2005 [1970]: 177). This does not suggest an academic shift from the study of the experiences of the oppressed to the study of the experiences of the researcher, only a way to avoid appropriating all experiences of oppression (and the images of fairness that

²⁵ Bloch anticipated Freire’s claim resisting the assimilation of ideology with false consciousness. For Bloch, all ideology has emancipatory-utopian elements, but deceptive and illusory qualities as well, fixed on their archetypes, ideals, allegories and symbols (Bloch 1996: 149-150).

emerge from it) that academics cannot access without dismissing the ontological difference between themselves as observers and the people suffering material oppression.

The *inédito viável* offers to critical optimism a location for research that is not mediated by institutional predictions, and does not intend to represent anybody's hope but the researcher's. It is, however, a way to take ethical responsibility towards our observations on the hope of the others who mobilize in social struggles. Highlighting these two notes from Freire's concept in this first chapter is central to ground critical optimism as a positionality and a method of inquiry, because they support an optimistic frame that is not determined by tests of suitability defined by institutional constraints (certainly not by the expectations of coherence of formalist legal theory in Latin America), and it does not attempt to represent or offer a justification for the attachments that people develop towards the legal systems and the promises they make, but to acknowledge both, the restrictive legal formalism and the possible contradictions of the attachment to law, as vehicles for hope that can reorient self-knowledge. I cannot justify those attachments because they occur as praxes, and cannot explain judicialization only as a theoretical explanation because that would inevitably lead me to relate only to instrumental and homogenous fiction of the subject who approaches the law.

I have chosen to study judicialization because I claim that it promises something good, although I do not expect to reveal what it is that is so good, or to test it against its materialization. I study here, through my desire for a better Court, the relations that are triggered around the promise of good things that circulate across law and the new constitutionalism. In the same way that Miyazaki recognizes the way the identity of the group is reaffirmed in legal failure, I venture in this thesis to learn about a political community through its achievements. The risk to emulate the method is too big, but at the same time is a productive way to understand the events without compromising them towards a preset concept of the not-yet.

I have tried so far to present critical optimism as a general method of analysis that will help me later to present judicialization as a good way to restore the relations of citizens

with law, arguing that it has the potential to evoke desired forms of futurity. Nevertheless, it is a choice for the researcher to represent (or not) the way citizens engage with optimistic projects, because of the value attributed in optimism to the ambiguity of that which will come. Optimism does not depend on the validation of anticipated goals; it relies instead on the acknowledgement of the plurality of relations in which individuals relate to the future according to their own practices, needs, and identities. Optimism is a complicated act of knowledge, I cannot determine the desired future for individuals whose experience is unintelligible to me, we can only question what we know about it, who participates from that knowledge, what it means to participate from that knowledge, and why certain subjects are excluded from it.

To understand how people name that which is yet to come through law, we can evaluate the conditions in which they define the future, on the promises that they receive on behalf of that future. I move now to the concept of the promise. This second section helped to set up my position towards the optimism for which will come, but as I said, the mandate of the critical optimist is to study the conditions in which the language of a better future is negotiated. From now on I move then to the notion of the promise, the strategy to name an event that announces something better to come and produces shifts of knowledge about ourselves and the institutions that facilitate or prevent us from getting there.

III. THE CONCEPT OF PROMISES AS RELATIONAL ENCOUNTERS

A promise is the encounter of two different entities in which both *invest* in each other, hoping that something will be improved or mended, or that something good will follow from their encounter. In Hanna Arendt's *The Human Condition*, the promise is the resource of men²⁶ to overcome their crisis of identity: men cannot predict the direction of history -and therefore of their own destiny- and can only conquer uncertainty through the promises they make to each other and the bonds in their relationship (1958: 236). Men

²⁶ Hannah Arendt's text uses the universal masculine. All further references to men (as opposed to persons, humans or women and men) are references to the text and her language, not mine.

make promises to each other as means to surmount the present with the offer of projects of the future, projects that make sense because the two sides are bonded by attributing content to them, no matter how incomplete, uncompleted, and unfinished they are. In her own words:

“The remedy for unpredictability, for the chaotic uncertainty of the future, is contained in the faculty to make and keep promises (...) Without being bound to the fulfilment of promises, we would never be able to keep our identities; we would be condemned to wander helplessly and without direction in the darkness of each man’s lonely heart, caught in its contradictions and equivocalities –a darkness which only the light shed over the public realm through the presence of others, who confirm the identity between the one who promises and the one who fulfils, can dispel” (1958: 237).

The optimistic frame invested in this research comprehends a specific way to relate to the contemporary history of judicialization as an attempt to educate my own hope: there is something intrinsically good and positive about judicialization and the transformation of the courts, it is not just part of the logical sequence of development in democratization but a promise to bring us something that we did not have before, something that we cannot know for sure what it is but that is being brought to us all, the public and the political sphere, in unprecedented and creative ways. The rhetorical device of the promise enables certain queries for the characterization of judicialization that would not be otherwise authorised within formalist legal theory, rather more inclined to develop theoretical parameters that can guide local legal practices into the reasonable values inherent in the idea of the rule of law (Centeno 1994; Esquirol 2003: 42-43; 2009: 713; Rodríguez 2009: 95) because those will guarantee the stability of the democratic order (Pou 2011). The first of these queries is inspired by the future that judicialization anticipates (is the courts’ aim the transformation of the legal culture of rights?), the second by the resonance of judicialization for the subjects it claims to benefit (it transforms the legal culture of rights for who and how?), thirdly on the relations and attachments that are built upon (who do we sign allegiance to when we invest our hopes in the courts?), and lastly a query about their historical relevance (when and why do these promises make sense? How do they change history?).

The promise evokes a shift away from the appreciation of constitutional courts within their normative prescriptions, a calculated distance from the constraints of Latin American legal theory and its excessive reliance on logical rationalism and conceptual formalism, that avoids concerns on the ineffectiveness and the unequal hierarchies of political power that are allegedly sustained by the legal systems (Esquirol 2008: 698, see also López Medina 2004; Novoa Monreal 2006 [1975]). The limited versions of optimism in law (as happened with the Rule of Law and the Law and Development projects) are at the same time targeted to and authorized exclusively by judges and lawyers in the practice, by scholars and intellectuals in the reproduction of doctrinal teaching, and often endorsed by the social movements that promote in the law the most attractive frame of reference for mobilisation strategies. But the promise hopes to produce new language, exceeds formalism when it declares that the constitutional mandate of the Supreme Court, beyond its formal prescription, includes a commitment to reciprocate for those who legitimize the political power that has been trusted to it (the social movements and citizens that are attached to the Court and its authority) by expanding conditions of possibility for material experiences of rights and justice.

Along the lines of Hanna Arendt's promise, Paul Ricœur found in hope the coming together of men. Diving from Kant's hermeneutics of Christian theology, he describes hope as the fraternal attachment that inspires an ideal future that does not depend on its content or its chances for materialization; hope is not a maximum good but an inspiration to regenerate freedom. But in politics, Ricœur clarifies, hope is only an imitation of morals; because of this paradox political hope will always depend on a delicate justification (Ricœur, 1992 [1940]: 37-38). Arendt herself makes the explicit note that promises cannot happen between men and political institutions: it would be a mistake to allow political considerations to encroach upon ethical impulses.

For Arendt, the faculty of promising becomes real only when it is exercised in communities of equals by two (or more) men with identical capacity to exchange promises in *reciprocal relations*, and depends on the recognition of their plurality (1958:

243). The relation between people and governmental institutions would automatically be excluded here because of its non-reciprocal and calculated nature: no matter how democratic the relations in a participatory political community are -there is always going to be a constituted authority that the government and its legal institutions have and the citizens do not have-. Furthermore, the relations that happen in law are not based on plurality, but depend on complex technologies of authorisation that result in exclusionary relations. But despite the impossibility of the true relation of reciprocity, democracy is still based on the legal fictions of reciprocity of contractualism; the ethical relations established by the recipients of promises might only be absorbed by the fiction, maybe postponed, but not entirely annulated by an always-powerful issuer of promises. I am therefore borrowing only the structure (and not the full concept) of the narrative of the promise, adopting it as an opportunity for theoretical expansion and language production to relate to the attachments established between Latin American legal systems, legal activists and scholars, and human rights defenders.

III. 1. Political promises

Hanna Arendt's promises have the power to *stabilize conflicts*, to *resolve crisis of uncertainty* by anticipating a foreseen future, even if this power is just apparent and even if its effects have short life (1958: 243-onwards). That is what makes them interesting in our narrative, because it is also through promises that the transition of democratization has been promoted: the new political, legal and economic relations codified as electoral expectations or legal reforms, can take us closer to desired relations of equality, of historical events that announce the emancipation that is coming. This is how *constitutional moments* operate, the ruptures that divide historical cycles in the life of a constitution, moments where the mimic of the promise gets the same shape as the ethical formulation: when *constituted* power (constitution-making power, the source of production of juridical norms) is reinvigorated by *constitutive* acts that bond a community in a new (or renewed) political identity. The constituted power appeals to the already established authority of the one who invites the promising relation; the constitutive is the

production of something new, perhaps even the redistribution of authority over the setting terms of the promise.

The term ‘constitutional moments’ was coined by Bruce Ackerman to describe the shifts in the history of the United States, those extraordinary reforms of structural procedures that represented deep structural transformations and the historical landmarks through which the history of the constitutional order and nationhood of the US is more or less comfortably organised (1991). The historical organization of constitutional moments constitutes -like promises- the setting-down-on-paper of possibilities for the future that *make sense* of the present because they resolve its crises with agreements (more or less structured) over the changes they will bring about. The constitutional moments settle political relations of attachment, and organise them in a historical narrative of a nation coming into being. To witness the constitutional moment is to participate from the re-start or re-inauguration of the future project of the nation.

Just as the ethical promise is validated at the moment of the encounter of the one who promises and the one who receives the promise, the constitutional moments of judicialization reveal their optimistic nature in the constitutive act or constitutional reform, because they are then recognized by the general public. Both in the ethical (Arendt’s) and the political promise (the non reciprocal promise) neither the one who promises, nor the beneficiary, depend on the feasibility or the historical learning of previous moments, they depend instead on each other and their reciprocal relation of attachment (or a relation that feels like a reciprocal relation in a mutually agreed fiction). It is precisely the terms of the attachment that become the content of the possible future: the future seems fair inasmuch as it fosters a project that adds something to their current relation, which both believe in, and through which both reaffirm their identities.

Hannah Arendt grants a fundamental power to the new “beginning” in modern thinking (1961; (1998) [1958]) because it represents the conservation, or the renewal of something that helps making sense of history. And so we recognize constitutional moments as beginnings: they are events where the general public is unusually engaged with the

deliberation of public policy and political innovation; and happen under a general assumption of an elevated enthusiasm and commitment towards the changes they promise to bring about. Constitutional moments succeed through faithful attachments to the constitutional text, a militant constitutionalism invested towards what seems to be the beginning of something, the constitutive moment of new authority, whose effects (either symbolical or material) aspire to be proportional to the crisis they happen to resolve (or postpone).

But let us deliberate one last time on the great risk that comes with mimicking the ethical narrative. The replication of the ethical promise in politics can easily accommodate the lack of questioning of governmental authority by the general public. There are always assumptions that we need to subscribe to if we aspire to benefit from them. The moment of the promise is -for the one that receives it- the revelation of the desires, hopes and aspirations that she or he recognizes, validates and accepts from the other because she or he cannot satisfy them on her or his own²⁷. Those desires, when socialized by a group of individuals who apparently share a similar appetite for that which is yet to come, generate a collective attachment that diverts the desires of individuals in two simultaneous directions: towards the one instance/institution who issues the promise, and towards a collective identity that demands a sense of belonging for that group and the cancellation of the original diversity of the general public²⁸.

All desires in the political exchange get grouped in collective identities, and the balancing

²⁷ Hints of the power relation of the promise as seen by Nietzsche. There are in philosophy other possible references to relate to the ethical concept of the promise that highlight the impossibility of replicating them with governmental institutions and citizens. In his *On the Genealogy of Morals*, Friedrich Nietzsche talks about promises, and with closer consideration to political institutions (2008). For him, a promise is a relation in which the entity that issues it reaffirms its own identity: -I promise you something because I have something to offer to you, something that I have and you do not have, that frames our relationship around my authority and your submission to it-. There is a clear purpose in choosing Arendt's, and not Nietzsche's account of promise. He is using the concept of promise to address the authority of the institution who issues promises, who uses its institutional power (and possibly its promises) to maintain its authority, but leaves unseen the way the recipients negotiate promises, which I am interested in.

²⁸ This is not an original argument. In sexuality it has been one of the fundamental critiques of queer theory since Judith Butler's *Gender Trouble*, where she describes the process where one chooses a 'core identity and closes off to the plurality of identities and expressions on behalf of the attribution of cultural meaning with international resonance to them. (for the claim on "internationality" of those constitutions see Brown 2004).

of loyalties seems to demand equal commitment (and instrumental attachment) to both the institution that issues the promise and the group that receives it. In the ethical narrative, in order to validate a promise a person has to give legitimacy to both ends of the exchange: “I believe in you when you promise me something/you believe in me when I promise you something”. The promises that a group validates in politics take only an unidirectional relation “*We* believe in your promises because *we* believe in you, you believe in us because you recognizes us, in your own terms, as interpellators of your promise”, and there is not in this last formulation a “we believe in each other”. In order to *make sense* of the promise within a group, individuals ought to believe in political institutions, and authorize the group (and not individuals in their plurality) as the holder of determined desires, interests, or needs.

Promises are never completely fulfilled, and that does not demerit the meaning that is attributed to them at the moment of their formulation, or the identities that are created (or reinforced) by the process. Whenever we recognize promises we recognize ourselves participating, as Laurent Berlant illustrates, in a “scene of a fantasy that enables [us] to expect that *this* time, nearness to *this* thing will help [us] or a world to become different in just the right way” (2010: 2), and that fiction can grow so strong as to validate our attachments even when they widen the gap between where we are and our original imagined better world²⁹. That is why promises never fail, neither are they in vain, as Miyazaki argues, sometimes they take us to a destination we had not predicted, but they always reveal conditions of self-knowledge that bound us to the others.

CONCLUSION

Because of the strong attachment and the commitment that holds promises together *this*

²⁹ This is the main critique of Laurent Berlant’s work. She is trying to prevent the effects of the *cruel optimism* that acts upon us whenever we desire something that becomes an obstacle to our flourishing, because desire is wrongly invested in predictable comforts of good-life, of pre-set desires that a person or a world has seen fit to formulate (cfr. Berlant 2010).

time, we can always welcome new promises to substitute failed ones, repairing the optimism of a future project that has not been negated, only postponed. Promises, after all, always have the capacity to be renewed, to always restart the sense of possibility. That capacity represents at the same time the biggest opportunity (to reorient our knowledge) and one of the biggest alerts for critical optimism: the intensity of the attachment to the promise can divert all optimism to the future, postponing the analysis of the present when there are not enough resources to evaluate it, that includes the relations of power that determine the uneven distribution of such resources, at the material and epistemic level.

Because in political promises civil society has neither the same faculties to determine the conditions in which promises ought to be renewed, nor capacity to restart them, the renewal of promises depends of the state-led reinforcement of the relations of attachment between the two ends of the promise. Each time we trust in political promises, we might invest more of our political energy in the government, its legal institutions, and the liberal projects that confirm our affiliation to the groups recognised in the exchange, more than in the groups themselves and the relations that happen outside of the law, which separates us from the actors that do not have a share of these new political positions, to the plurality of civil society to which the ethical project of Arendt is committed.

Understanding promises as predictions of the future, or diagnosis of the present, is a choice for a researcher that has different consequences. For me the promise that is revealed in judicialization is a way to engage with political and legal indeterminacy, the revelation of a way to deal with the present. In Latin America that means the acknowledgement of the delay of democratic development that has been postponing in the last decades equitable conditions for people to describe their own *inédito viável* and what is there yet to come for them. In the introduction I claim that sexual rights are locations of enunciation that are outside the law, relationalities that create politics; in the happy judicialization, sexual rights dialogues have found a privileged location as recipients of a promise (I extend the argument in part II), which stresses the pedagogical responsibility for an independent scrutiny of the conditions in which the promise is delivered and the way it stimulates and censures optimism. The next chapter revises the

frames of constitutional moments in Latin America that will accommodate later sexual rights in their historical and political context, and is the second part of the theoretical grounds of the thesis, it presents the role constitutional reforms play as investments in the future, or versions of the future that change in each one of them, perceived by candid optimism as improvement, development, and progress, and by critical optimism as an opportunity to learn about a future that will come in unexpected shapes.

Chapter 2

THE PROMISES OF CONSTITUTIONAL MOMENTS

The promises of democracy in Latin America have been partially delivered through constitutional moments that established the patterns for restoration of the basic terms of the political identity of its countries, aiming to shift away from authoritarian governments and the ineffective implementation of the rule of law, and towards new cultures of rights. While constitutional moments never neatly conform to such a trajectory, they stimulate the political imagination of a community because of the unusually high levels of sustained popular attention, and the extraordinary questions they raise about the constitution and what it does for people. They interrupt the normal politics of apathy and selfishness (Ackerman 1991: 234-35) to renovate the identity that bonds a political community.

The study of constitutional moments here represents the materialization of a particular understanding of the political promises presented in the previous chapter applied now to the specific trend of judicialization. As I stated before, we can read the promise for the future that is yet to come in the relations of the present in which they circulate (or not), the relations in which we activate critical optimism to state that judicialization can evolve otherwise, without its inherent contradictions and lacks. In this chapter I want to explore that statement and how the relations of attachments that sustain the promises of judicialization can be understood. Not everybody believes in those promises, and not everybody identifies with them (or through them). The political positions announced by a constitutional reform narrow the ideal types of interpolators of democracy and subjects of rights, besides establishing not only the actual channels to access justice (like rules of standing in courts or any other form of access to constitutional control), but the very understanding of what it means to access justice.

The main statement of the chapter is that constitutional moments never target the whole of the citizenry; they restore the sense of identity of a nation state, but only by narrowing the exclusive sense of membership of its citizens. The judicialization of politics participated (and benefited) from the shifting path of constitutionalism in many countries (as it is evident in the Mexican case), but that is no indication of fairer relations of governance improving with each constitutional moment, nor of constitutions accommodating public deliberation about the kinds of nations people choose to become, or the kinds of promises that are suitable to the relations, needs and interests that circulate in Latin American legal cultures. At the beginning of the chapter I offer a short note on plurinational constitutions, affirming that while they represent a minority in the region (only two constitutions have included language on plurinationalism) they make evident the biggest contradiction of Latin American representative democracies: the epistemic erasure of its diversity, imposed with the establishment of rules of subordination to the hegemony of state law. I move on to reflect on the transnational dimension of constitutionalism, the way the constitutional moments of some countries have been welcomed by the legal imaginary in the whole region to instruct new legal sources in comparative constitutionalism and new ideas of rights, specifically in transnational sexual rights dialogues. The transnational dimension, I argue then, diverts attention away from the uneven political positions established between different groups in competitive hierarchies. Constitutional moments are always organized in linear narratives of progress, a new reform is always intended to improve (or correct) the previous one, and people's growing attachment towards them, I argue in the last section, tends to be explained by contractual premises of rational subjects and historical institutionalism, leaving behind the challenges that the recognition of political position raises.

I. THE PLURINATIONAL COUNTRIES

I present as the most important constitutional moments in Latin America those that have recognized the plurinational or pluri-ethnic states, where state-law acknowledges the *de facto* plural order that characterises most Latin American nations within their cultural

diversity, and appeases legal projects of improvement with the regional postcolonial history. Those reforms were conceived by social movements demanding the inauguration of rhetorical commitments towards the recognition of plural political communities, not only adjusting governmental institutions but repairing the (until then) permanent state of illegality that became normalized in the boundaries of the nation-state, to create a *state of rights* for indigenous people, campesinos and campesinas and others, redefining the identity of the nations in ways that can imagine alternatives to the prescriptions of the liberal constitutional state.

“The idea of Latin America”, as described by Walter Mignolo, is determined by dichotomies: the old and the new, the modern and the outdated, politics and culture, the civilized and the discovered (2005: 80-81). This idea is conditioned by the impossible co-presence of the two sides, where the prevailing side consumes the oxygen of relevant reality and cancels the other (Santos 2007). By 2014, Indigenous peoples represented more than 10% of the general population in Latin America, 87 % living in Mexico, Bolivia, Guatemala, Peru and Colombia³⁰, yet still, despite the history of mestizaje of our nations, they remain at the neglected end of dichotomies,. The “indigenous question” has only appeared as a constitutional concern, attempting to mediate the “implant” of indigenous cultures within legal language of minorities in order to address conflicts of land, language and culture, to confront substantive issues of exploitation of indigenous communities by other communities (including most evidently the exploitation of land and natural resources) or to mediate among different projects of justice and alternative conflict resolution regimes (see Gargarella 2013b); but only exceptionally it has been addressed as our history and our identity as mestizas nations. Only the constitutions of Ecuador in 2008 and Bolivia in 2009 have recognized the plurinational state. Those were not the only countries that have brought it to the public constitutional debates; claims to replicate those reforms, and the redefinition in those terms of the subject of rights that the constitution authorises, have been happening in Nicaragua since 1987, Colombia in 1991,

³⁰ Data of UNICEF available in Spanish in http://www.unicef.org/lac/pueblos_indigenas.pdf It is Mexico which has the largest indigenous population of the region with 10.45% of its national population, of whom 79.1% live in conditions of poverty <http://www.excelsior.com.mx/2012/08/07/nacional/852100> (all digital resources were last accessed August 11th 2014).

Paraguay in 1992, Guatemala in 1995³¹, Mexico in 2001 (where it was actually the main demand of the reform, and its biggest failure as I expand in the next chapter), and Peru in 2002; but these were resolved with discrete nominal recognition of the indigenous, as part of the population that should be *included* in the liberal legal imaginaries and should overcome by themselves the dichotomies that separate them from the side of progressive modernity of the law.

Plurinationalism could be recognized as the most comprehensive transformation driven through constitutional moments in Latin America because of its destabilizing power against both the exclusionary principles of liberal legal reasoning, and the hegemonic patterns of economic development (see Sieder 2010: 165). The constitutions of Ecuador and Bolivia opened considerations about a wide range of collective rights, but also officially acknowledged the (para)legalities that have coexisted in different parts of the region, with autonomous authorities replicating state structures in their own legal and administrative provisions, ensuring compliance in the setting of priorities for community rehabilitation by self-governing justice systems. This has not only granted recognition (or at least acknowledgment) to (para)legalities throughout the region, but it has demystified the homogenous assumptions of legal positivism (for a general review on the definition of legal pluralism see Merry 1988; for the challenges that Indigenous law raises to liberal legal imaginaries see Faundez 2005; Goldstein 2007; Sierra 2004). Apart from in Bolivia and Ecuador, paralegal systems did not become states of rights; they were not only ignored but also criminalized by state law; communitarian justice systems are still often perceived as an excess of the functions of the community on its expressions of customary law, and threats for the state (see Sieder 2010).

³¹ In 1995 the government of Guatemala (with approximately 60% of its total population being indigenous) signed with the guerrillas of the *Unidad Revolucionaria Nacional Guatemalteca* the Agreement on the Identity and Rights of Indigenous Peoples, where the government commits to a constitutional reform to recognize indigenous collective rights. The Agreement coincides with the negotiation of the peace process that would end thirty six years' armed conflict. The constitutional reform of 1998 included rich provisions that recognized indigenous rights and identities. Nevertheless, the new constitution was put to a popular referendum and in 1999, the expressions of autonomous indigenous rights were revoked and recognized as unconstitutional. (Sieder 2007). The Guatemalan experience is therefore left out of the record of promising multicultural constitutions.

The reforms of Ecuador and Bolivia are not representative examples. Most attempts to consider the indigenous question in constitutionalism do not challenge the identity of the nation. Instead, they reshape it and adjust it to what has been imposed and an homogenous ideal, efficient and liberal model of state, to which indigenous communities ought to adapt. Constitutional reforms, in general, are validated as relevant adjustments towards the rule of law, and promoted exclusively by political élites (or on their behalf) granting them access, for example, to the provisions of judicial review in constitutional courts. The provisions that prompted the judicialization of politics were explicit promises of constitutional rights, they were not efforts to socialize in the constituent space an ideal nation to be build together with all citizens, but promises that small civil constituencies will value because they had perceived them until then as an “almost entirely hypothetical” aspiration, given the record of judicial inactivity and courts’ indifference towards constitutional rights (Gargarella, Domingo, and Roux 2006: 1). Those promises however managed to contain the new authority of democratization in few hands with no radical changes in the structure of the state. That sense of constitutionalism can be recognised in the constitutional reforms in Honduras in 1982, El Salvador in 1983, Guatemala in 1985, Nicaragua in 1987, Brazil in 1988, Costa Rica in 1989, Chile in 1990, Colombia in 1991, Paraguay in 1992, Argentina and Bolivia in 1994; Mexico 1995, Dominican Republic and Ecuador in 1998, Venezuela in 1999, and Peru in 2001.

In the liberal perspective, the new constitutions lead their nations always to an improved future, unlike the plurinational constitutions, which might have attempted to divert the identity of the nations to make sense of the past and reorganize the economic and legal relations and political positions of all citizens. The distinction is, of course, artificially imposed, and separates the future and the past in dichotomies as if they cannot coincide in politics: one looks to the promising future that will bring emancipation, the other is deployed unthinkable for a principle of organization (Santos 2007)³². I cannot engage in full fairness with this paradox in this thesis. I will touch on it briefly later in this chapter in relation to the attachment to courts and constitutions, and the role they play in

³² At least that can explain the Guatemalan referendum. In the next chapter I will address the civil resistance against indigenous rights in the constitutional reform “of indigenous rights” in 2001, and the confrontation of the cultural narrative versus political progress.

progressive recreations of history. What I am trying to present here is the general argument used to capitalize this distinction. Constitutional reforms, after all, are always progressive steps towards the rule of law.

II. CONSTITUTIONAL REFORMS IN THE TRANSNATIONAL SPHERE

The new constitutions of the liberal, as opposed to the plurinational, state did not consider plural or any other radical conceptions of human rights. They were tailored as epicentres of a shift from the “formalist and anti-judicial review” legal culture to a “quasi-natural law and pro-judicial review” new orthodoxy (Couso 2010: 157; see also Peruzzotti and Smulovitz 2006), as progressive as they could get when it comes to human rights language. In the words of Diego Eduardo López Medina, constitutions used to be:

“...organic documents concerned with the regulation of the functions and roles of the different branches of the government, *but never* bills of rights or sources of fundamental rights of citizens when they claim them before a court (...)”

Constitutions motivated also a shift from statutory regulation as the main source of law to constitutional principles in the new political cultures, not only casting a legal project for the future, but also breaking traditions of the illegitimacy of legal systems. Following López Medina:

“...by the 1980s, the law-centred political theory was in trouble, Citizens were *sceptical* of the convenience and legitimacy of statutory law (...) [but constitutions are] now full of principles, and courts are in charge of applying them” (López Medina 2004: 414-15; my translation and cursives)

The trend of constitutional reforms that started in the 1980s found its main source in the *progressive transnationalism* to define patterns of transformation, in the rich and ambitious enunciations of human rights that motivated expansive frames of interpretation to guarantee their enforceability: workers’ rights and union protection started getting recognition as social rights, struggles for healthcare were filed in cases codified as the right to health, consumer rights as human rights recognised in the constitution, and the list goes on; the sexual rights struggles started to find

‘connections’ in constitutional language and advocate transnationally for cases on the right to life, physical integrity, the rights to health and social and economic rights.

Legal globalisation, originally a project derived from market-oriented development models and guidelines of structural adjustments (Santos 2002: 194-96), became a conflictive platform of sympathetic politics of rights. This opposed the conventional practices of courts and conservatism of legal commentators (Esquirol 2011: 1033) and provoked new competition among dominant actors in the neoliberal and neoconstitutional arena (e.g., economic reformers and constitutional courts judges, respectively), seeking to turn their views of the world into a global common scenario (Rodriguez Garavito 2011: 160). A new dynamic of competition and collaboration stimulated efforts to align local politics with transnational dialogues, in an effort to legitimize governmental institutions not in the economic global centres, but by a widening mass of engaged participants discussing transnationally the acceptable performance of governmental authorities (Esquirol 2009: 694; Sieder 2010: 163). I claim that the most salient feature of new constitutionalism is the new wave of rights and the expectations of enforceability that come with it, the projection of human rights that travel across nations but are fuelled only by the exceptional progressive responses in few national experiences, experiences typically overexposed so they can become comparative references, as if those can be actually replicated in structure and intensity across different legal cultures.

The cases of Argentina and Colombia became the most inspiring constitutional moments for the rest of the region. They both represent remarkable shifts in the profile of their constitutional courts that renovated relations between the citizenship and their government through the resolution of political crisis. The transformation of the Colombian Court with the Constitution of 1991 resolved an emergency of national unrest and a massive mobilization that managed to channel the political crisis into “constitutional fever” (García Villegas 2001; Lemaitre Ripoll 2009: 132-4), with a new court stepping in to fill the vacuum left by other political actors after decades of political

exhaustion brought about by political violence and guerrilla culture. In this fever, different forces within the diverse social movements allied to support the Court's intervention in the political life of the country, and were swiftly backed by broader sectors of the polity for whom it appeared "that there exists at least one power that acts progressively and competently" (Uprimny Yepes 2006: 129).

The Constitution installed the Colombian Constitutional Court when it was politically urgent the promotion of new actors willing to mediate the peace process. The new Colombian Court started dictating some of the most popular and progressive, and according to Julieta Lemaitre Ripoll, some of the most exquisite judicial decisions in Latin America than an activist court can produce (2009: 144). Despite the ambiguous formulation of social rights in the constitution of 1991, the Constitutional Court expanded its standards for interpretation, asserting the defense of social rights of groups that deserve special protection from the state: cases involving children, or forcibly displaced people protected by their right to dignity, mortgage debtors protected by principles of equality, same sex couples protected by their right to identity etc. (see Uprimny Yepes 2006). The judicial decisions that we have read from Colombia, and from no other place, were products of the particular historical process that unsettled the social meanings of law in the Colombian context: through a new semantic field of legal concepts linguistically rich, with enough strands of meanings available for litigants to use, and with courts under sufficient political pressure to expand those meanings (Rueda 2010: 27).

We can infer in the Colombian case a relation between the intensity of the political crisis and the political autonomy of constitutional courts, which in practice led its Court to judicial activism. Similarly, Argentina's Constitutional Court brought about political stability after a series of ruptures and discontinuities of the legitimate governmental authority³³. Despite the absence of radical new regulation of the judiciary that would satisfy the theoretical expectations of the constitutional moment, the constitutional

³³ Argentina suffered an overthrown succession in 1930, 1943, 1955, 1961, 1966 and 1976. Karina Ansolabehere provides two explanations for this continuum: a situation of hegemonic ties between different factions of the same ruling class (that produce in turn the need for a third, the army); or the absence of a strong right wing party (2007: 101).

reforms in Argentina were characterized by general consensus, and by the non-controversial role that the Court have played in politics. Since the late 1980s and throughout the 1990s the Court's reforms were seen as docile adaptation to the new programmes of economic and political modernization of the country (Ansolabehere 2007: 107), until it was confronted during the political crisis in 2001 when it actively had to reclaim its own legitimacy in political terms (which included the political trial of two of its own members), and had to reclaim as well the expansion of opportunities for intervention for different political actors. The Court did not fully recover a restored image of legitimate authority, citizens' lack of faith in the Courts' efficient capacity to resolve their disputes never vanished, but it intensified the process of judicialization and the centrality of the Court in the Argentinean legal transformation (Smulovitz 2005: 162, 2010: 238).

There is no homogeneity in the constitutional models that were promoted through the list of constitutional reforms in the region. The provisions for constitutional review did not evolve uniformly in the region. What counts as the innovation of Latin American constitutionalism is its audacity to test the limits of any previous theoretical categorization: with hybrid systems of adjudication of constitutional control invested in constitutional courts, supreme courts, or special courts or chambers, but with "rare efficacy" (in comparison with the European and US models) to build consistency. Latin American constitutionalism has more plaudits for achieving political readjustment than for presenting a coherent legal path of restructure (Navia and Ríos Figueroa 2005: 192-3). Constitutional reforms rarely represented a radical shift of constitutional order, nor did they lead to breakthroughs in clearly distinguishable cultures of rights accountability; only exceptionally did they represent a shift of political will of activist judges in constitutional courts, and they certainly were not enacted with the same intensity in all countries. But they are still rhetorically capitalised *as if they do*, and accepted *as if they are*, largely in relation with the crisis they are expected to resolve. Small constitutional reforms (or mere adjustments) sometimes claim a symbolic share of constitutional moments for political purposes. Small institutional adjustments, like the nominal inclusion of specific minorities in constitutional language (including ethnic or sexual

minorities), the enablement of new tools for constitutional control and rules for standing have the potential –if they are capitalised in human rights language– to restore trust in the constitution and its original authority.

New constitutions, constitutional reforms, and progressive decisions of a court, easily suit political strategies aimed at re-building the status quo of the new democratic institutions, profiting from the judiciary’s capacity to restore public perceptions about the state’s capacity and credibility (Domingo 2004: 110). The combination of constitutional moments and small reforms evoke the transnational “justice cascade” (Sikkink 2005): an expansion of the interpretative framework of rights that harnessed –at least in appearance– the power of courts to routinely promote individual and collective rights “including for the weakest groups in society even against the most powerful” (Wilson 2009: 60).

The constitutional moment, in general, produces not only the possibility, but *the need* to anticipate responsive courts as an effective alternative path for participation in political processes (Wilson 2005: 47-48). The transformation of rules for standing in courts was a crucial response of the judiciary to this appreciation. Traditionally constitutional control was an exclusive license of the executive and the legislative, under the premise of the democratic objection that affirms that effective representation already covers the citizens’ interests with democratically elected representatives, so the new rules for standing in courts became focal points for the facilitation of innovation in political practices. The new constitutions started gradually appointing new *expert tutors* with extra-political authority, not democratically elected, independent from the police or criminal justice systems, and entitled to challenge the decisions of the legislative (see O’Donnell 1993). These new actors got standing faculties to raise political controversies, to file cases in constitutional courts, and mediate conflicts with the courts. They are ombudspersons, *Procuradores Generales* or General Attorneys, *Defensores del Pueblo* or people’s defenders, or, as in the case of Brazil, Public Ministries. These mediators mitigate the danger of *depoliticizing* the new positions of constitutional courts, the perception that open access to the court could empty constitutional control of its content. The expert

tutors absorb the political burden of judicialization. They present cases that the legislative or executive would avoid for reasons of electoral calculation; and thus protect legal regimes from any collective or populist attempt to destabilize the judiciary, and the whole of the democratic political system (Adelman and Centeno 2002: 156; Esquirol 2009: 723; see also López Medina 2004). With the depoliticization of the court already prevented by the tutors, the versions of social change that circulates in courts but that not ascribe to the strict demands of legal epistemic structures are also indirectly dismissed (Santos 2002: 445). With strict formalist adherence to the judiciary, the performance of politics is diverted to the new authorised actors.

The participation of competent and objective mediators determines the appropriateness of rights claims before they arrive in court, and the format in which they will arrive (Oquendo 2009: 273). Their role is to mediate between a representative government that has not delivered justice or accountability, and an unskilled citizenry who cannot address the law -in lawful terms- to voice rights claims. At least that is the premise in which they have appeared in the history of judicialization, a theoretical premise that, by the way, does not address the political role these figures actually play in the communities where they intervene. Daniel M. Goldstein has made the claim that *Defensores del Pueblo* in Bolivia continued to perform politically as extensions of the governments' authority, misappropriating human rights rhetoric and representing rights as a governmental imposition of liberal legal conceptions over communitarian law (see 2007: 69-71). These empirical observations tend to be dismissed, the legal theories in Latin America that venture into sociological observations tend to do so only by external accounts of the operation of state law avoiding accusations of malpractice against political elites (Esquirol 2012; Dezelay and Garth 2002).

Constitutional moments can resolve crises of uncertainty with anticipation for a better future. They become powerful because of the attachments created between the government that formulates them and those for whom constitutional language makes sense: constitutional moments work because the citizenry recognizes them as such. But I have not yet focused enough attention on the way the attachments are structured, on the

techniques that authorise some actors, and not others, to make sense of constitutional promises. The role of critical optimism in the revision of constitutional moments is not to overestimate the formal principles written in a constitution, but to ground the promises they make and understand how those promises make sense at the moment of their formulation, asking what constitutional moments do for political crisis: for the institution that articulates them, and for the political groups that are directed towards that is yet to come. Critical optimism leaves traceable marks on the *anticipation* of a good future, on the enablement of language that represents the way different actors calculate the investment they make in the one who promises; it poses questions about the capacity of a constitutional moment to enable further promises (beyond the crisis that they aspire to resolve), and about the investments they make in those who are outside the promise: is there any potential in expanding the promises to those who have not been originally addressed by them?

III. ATTACHMENTS AND THE THEORETICAL AUTHORIZATION OF POLITICAL POSITIONS

The promise of judicialization in Latin America gets its material content from the provisions that enabled constitutional control and from the new regulation (or practices) of standing, the formal opening of the judiciary towards the citizenry (in fact, towards the expert tutors, competent and objective mediators). But its major asset is the two-fold investment that happens in constitutional reforms. First, with governmental institutions representing (and capitalizing) reforms as pure constitutional moments capable of overcoming political crises and resetting the public perception of the state's capacity and credibility in terms of the delivery of the rule of law (see Domingo 2004: 110). And second, with civil society's hope that those reforms are effective channels that will bring them closer to desirable ideals of politics, informing new conceptions of law and of what can law do for them.

The governmental investment in constitutional reforms can be easily explained as the projection of a progressive evolution of the political regime across (or towards) democratization. In those terms it has become an object of study in legal and political theory as the coming together of democracy, and at the centre of analysis of judicialization of politics. Less scholarly attention is given to the investments that civil society makes in those shifts, and the meanings attributed to those investments by the people who develop relations of attachment towards constitutional courts. The field of legal consciousness of legal theory in the United States has not yet produced a prolific chapter in Latin America: the questions about the social meanings attributed to law today still needs to expand its interlocutors. In his account of the development of Latin American legal consciousness, Arnulf Becket Lorca traces the regional dialogue back to the early periods of transition to democracy that focus on the resistance against economic models, developmental programmes, and global relations of dependency by evoking regional integration and national developmentalism “to assert [legal scholarship and legal practice’s] belonging to the international legal traditions” (2006: 295). The recurrent references in those dialogues to belonging to the international tradition have always been focused on the repertoire of experiences and ideas of international law in the history of legal thinking³⁴, but the critique of the contemporary practices of law according to autochthonous experiences of the nation remains evasive, and intra-regional differences are dismissed (Becker Lorca 2006: 297-98).

From its origin in the 70s and 80s, few critiques emerged against the political passivity of legal theory, against the way it using transplanted theory to legitimise the very core of political hierarchical and elite driven power. Left-leaning critical theory was produced with a political impulse to incite opposition against the governments that were appropriating democratic narratives and the ideas of the rule of law to impose their authoritarian agendas (see García Villegas 2002: 26). The most striking cases of passivity, according to Mauricio García Villegas (2002), were those tales of the rule of law in states

³⁴ Becker Lorca emphasizes the tendency of Latin American scholarship to use as its justificatory frameworks the historical-political foundational frame. The work on aspirational constitutionalism of Mauricio García Villegas, for example, is full of references to the French Revolution and suggestions about direct bridges linking it to the Colombian Constitution of 1991 (2001).

with established formal democratic institutions, but an almost permanent state of exception (Colombia being one of those before the 1991 Constitution). This inconsistency was sustained by a *de facto* hybrid institutional setting of constitutionalism (the formal democracy) and authoritarian regimes (the actual state of exception) that forced the production of polarized politics that could only be explained in dichotomies that set up the border that distinguishes the legal from the cultural features, where inconsistencies are attributed to the cultural element. Only a minority of critical legal theories in the region have tried to address this paradox, and mainly in theoretical frames detached from the optimism of the new constitutionalism and the historical path of democratization.

The work of the Chilean jurist Eduardo Novoa Monreal in *El derecho como obstáculo al cambio social* [Law as an obstacle for social change] became a classic testimony of those academic tensions. Novoa Monreal wrote the book during his exile escaping the Chilean dictatorship; it was published in Mexico in 1975. The book is a strong statement of Socio-Christian ideals³⁵, it denounces the ideological agenda and the *internal disassociation of law* in Latin America, the contradictory understandings of the sense, goal and structure of the law: the coexistence of a pro-social legislation (what he called the *new law*), and the traditional codes and regulations (or few organic rules) imported from European liberal projects (the *traditional/basic law*). The *new law* represents for Novoa Monreal the (often misplaced) efforts of social movements for legal reform inspired by organized groups of workers and campesinos, and by the politicized sectors of the middle classes inspired by the Mexican revolution (and Mexico's 1917 Constitution) that started coordinating legal mobilization *on behalf of "the disposed"* in different parts of the region. This *new law* illustrates the proto-history of contemporary

³⁵ Many leftist activist were influenced by the theology of liberation in Latin America. This encounter grew stronger in the mid 1980s with a popular call among certain circles within Catholicism for a radical commitment in the struggle for social justice. The theology of liberation had a major input to critical scholarship, contrasting the two great traditions of human rights in the region at the time: one inspired by modernity and illustrated by individual entitlements in law, the other grounded on the Christian tradition whose primary allegiance was towards ethical relations (see Dussel 1986, 1998; Herrera 1987: 296-297; Sánchez Rubio 1994) Paulo Freire identified the movement as a prophetic perspective where theology accommodates empowering narratives within religious practice, where mobilization takes a "preferential action for the poor" while it demands a scientific knowledge of the world as it really is (1985: 138).

human rights movements, the claims for formal conditions to enable legal associational activity, the institutional expansion of lawful relations through the recognition of new political positions aimed “to constrain and compel the state to acknowledge the legitimacy and legality of certain forms of associational activity” (Baxi 2006: 69).

In Novoa Monreal’s story of the *new law*, the working class and campesinos had equal capacity to anticipate a new order of legality based on the recognition of rights of security, assistance, social prevision, of improvement of general life conditions, authorizing for the first time the states’ intervention in the administration of social and economic life on behalf of a better distribution of wealth (2006 [1975]: 23). But while new law *made sense* for these groups in the production of political language to identify their political positions in opposition against the government, the *traditional law* claimed for itself the only reasonable source of legitimacy in the political system, as the only law that was true to systematic roots:

“allowing development in every direction needed (...) commanding general terms in all situations of conflict (...) and therefore reaching the highest prestige among judges, jurists and lawyers, because it expresses a pretension of fullness and accomplishes a degree of systematization, harmony and scientific solidity that only few could deny (...) [the traditional law] represents the summit of the national juridical development” (2006 [1975]: 24)

And that is why, according to Novoa Monreal, traditional law became very early in history an obstacle to social change.

In this distinction, true legal reasoning is authorised through its coherence in relation to state regulation and coincides with the state’s institutions -no matter what the political profile of the state is. New law (like modern attempts to challenge legal reasoning) apart from always missing the careful theoretical elaboration of the organic core of traditional legislation, always implies a political confrontation against the capacity of the state to authorize new lawful relations and political positions. The pro-social legal reasoning, political by nature, ends up inevitably crashing against democracy, as the only narrative with power and authority to formulate promises is the state (that is supposed to include promises from *all progressive social and political* tendencies), and any other sources of

promises threaten the destruction of the ideas that democracy defends and protects (Novoa Monreal 2006 [1975]: 26), or at least the ideas of democracy elaborated exclusively by human rights elites and entrepreneurs³⁶.

Consequently, the study of *new law* never made its way into law faculties (see Esquirol 2009; López Medina 2004), and, at best, grew to inform only a theory of iusnaturalism as some form of dualist theory that ambiguously tries to conciliate natural law and positivism, without ever relating the two in a unified system of law beyond the theoretical enunciation of moral principles or tests of universal justice³⁷. The critique of exclusionary authorisation of elitist traditional legal knowledge was never fully internalised. The paradigm of law as an emancipatory tool proved to be an unpopular frame of reference during the following decades in legal scholarship for various reasons: the resistance of judicial actors and legal operators, the resistance also of law schools who chose not to participate from the dialogues of the new law, and the general impediments for the expansion of the epistemological frames of the law avoiding to welcome the knowledges about law of those in political positions of disenfranchisement or oppression.

Only one small group of scholars and practitioners engaged deeply with questions of legal consciousness and (theoretically) resolved the problem of attachment. In the middle of the 1980s a new generation of lawyers in Brazil initiated the movement of the Alternative Usages of Law, also known as the *gaúchos judges*³⁸. They did not only

³⁶ We ought to calibrate Novoa Monreal's comparison of *new law* and *traditional law*, and the emphasis on the critique of traditional law, as a critique of authoritarianism that immediately preceded democratization. I recall the reference acknowledging the different dimensions of political power that historically separates his critique from other critiques in this chapter; however, I also acknowledge the continuation of authoritarian power in presidentialism that kept rigid legal structures in democratic governments in which the comparison holds its relevance, where traditional law still claims the monopoly of authority over human rights.

³⁷ Iusnaturalism was transplanted to Latin America via the Italian jurist Norberto Bobbio and his popularity in Spanish scholarship. The proposal is to build a bridge between the natural law theory of Hugo Grotius and contemporary positivism, of a rationalism grounded in the contemporary understanding of individual rights. The model has several flaws, mainly the assumptions of general regime of values and systems of measurements that are used as anachronistic assumptions (Becket Lorca 2006: 290-1; see also Herrera Flores 1987). I will further expand the notions of regime of values and measurements in this chapter to address the critique of historical institutionalism.

³⁸ Gaucho is the gentilic noun of the people from the state of Rio Grande do Sul, where the movement originated. The word is popular in different South American countries to refer to the mestizo peasants and

respond to the moral (and political) call to bring the law into communities in situations of disadvantage, but to a perceived political imperative to transform the epistemological foundations of legal theory under its concrete historical circumstances, denouncing the specific legal practices of the Brazilian state (and the constricting exhaustion of positivism) (see Ferraz Júnior 1985: 96; Palacio 1993: 130-31). The movement promoted the law from the optic of *juridical pluralism*: the Law as it is spoken of in the streets, “*el derecho que nace del pueblo*”, and the meanings attributed to law and its emancipatory potential that are not determined by law and its interpellators. (Faundez 2005, Goldtsein 2007). Human rights in pluralism are understood as the production and application of imaginaries of law that emerge from communitarian social practices, at the very heart of social conflict, even in the margins of state-law.

As Joaquim A. Falcão claimed, in ‘third world countries’, like Brazil, it is the shifting legitimacy and the crisis of the political regime that explains the emergence of paralegal, extralegal norms, and all other forms of juridical pluralism, and not the lack of a ‘proper juridical culture’ that has been evoked in engagements of exceptions of failed states (cfr. Falcão 1984: 61-85)³⁹. Also of Socio-Christian inspiration, the group attempted to shift legal principles motivated by principles of justice, facilitating the presence of campesinos to present their own rights cases to domestic tribunals, acknowledging that only they, as legitimate direct voices of the conditions of poverty in their societies, could balance law in their favour. In order to rationally formalize the project, to produce concepts in which to accommodate these juridical pretensions, the movement created an instrumental explanatory tool: it animated a *new social actor, the poor* (a theoretical actor and not a representation) located at the centre of the new legal paradigm. ‘The poor’ as a category distances itself from the expressions “proletariat”, “subaltern classes” “subjugated peoples”, or “victims”, because of the connotations that in sociology, politics, and criminal law these concepts had acquired already. The image of the poor is nothing but

campesinos. The Royal Academy of the Spanish Language also recognizes its connotation of nobility and bravery, all coming from the campesino stereotype.

³⁹ Lédio Rosa de Andrade ironically points out that the practice of law in Latin America is in itself an alternative, because of the non tolerable distance between the juridical and the social, with norms that are never executed, and the idea of accountability as a revolution in itself (quoted in Herrera Flores and Sánchez Rubio 1993: 89).

the image of someone who has been formally and materially impoverished in his or her rights (De la Torre Rangel 2006b: 21).

The *gauchos* explicitly rejected authorizing legal practitioners to speak on behalf of, or to represent/appropriate the experiences of, people in conditions of poverty, essentially intelligible for the law. In their theoretical expressions the poor came to replace the abstract and private liberal mythical subject of law, and became the *new* and *collective* subject: the subject of the alternative law movement is neither new nor collective in the same way as those who embody *a priori* cognitive subjects (defined for example by race, gender, sexual orientation, class, ethnicity, religion, need, etc.), but is new as a living and acting subject who *comes to occupy* specific locations (axis of needs, conflicts, demands and opportunities) where emancipation is formulated; and collective since it express her or himself in a plural collective, through the ethical relations she or he establish with other social actors (Wolkmer 2003: 11).

With the call for ethical mediation of the *gaucho* judges there is a possibility to start suggesting some form of reciprocal relation in the scenario of the promise of judicialization: the encounter of the different social experiences of the law mediated by *the poor*, the beneficiary of the alternative judicial practice “who can test” the legitimacy of the new legal paradigm, assessing the rationality of the law. This represents a significant departure from the law being self-mediated and self-legitimised and only open to test by the skilled actors of democracy that it recognised. If we make the theory of the *gauchos* our theoretical point of departure, the references to the movement may even invite us to leave the question of attachment all together: it is not the subject of rights who deserves to be observed in the ways she or he gets attached. Our research should focus on the way legal systems and their operators adapt themselves to deal with the images they use of the subject of rights.

Legal theory of democratization seem to have dismissed the critical scrutiny of the subject of rights at the core of all legal research, particularly when this subject is in a situation of disenfranchisement, choosing instead the comparative patterns of

international law: the Washington Consensus of legal globalisation, the Rule of Law movement, to set up the priorities of legal scholarship (see Carothers 1998, 2000, 2009). And now, the turn to law (Couso, Huneeus and Sieder 2010; Sieder 2010) and the transnational locations of legal scholars (see Dezalay and Garth 2011) again shift the priorities of research to new constitutionalism, without even becoming detached from the consequential comparisons and transplants of models of consciousness imported from Europe and the United States, leaving the dialogues dependent on an overreliance on formalist tradition (that facilitated the transnational commonality) (Esquirol 2012).

Legal theory remains distanced from the question of why people turn to law, and why people develop attachments to law in full awareness of its unpredictability, and despite the historical experiences of ineffectiveness in a context like that of Latin America (Lemaitre Ripoll 2007-2009). At the same time that legal scholarship in the region remains hostile to engagement with creative conceptions of the subject of rights (like the poor of the *gaúchos*) capable of shaking the foundations of legal thinking, individuals keep navigating through the theoretical and political obstacles and contradictions of the law. Individuals who engage in legal mobilisation find in it different sites of knowledge about themselves, constantly reorienting their desires and practices (see Miyazaki 2004), but legal systems remain partially insular to the kind of knowledge that can be generated in those locations of enunciation. We confront at this stage a paradox: individuals adapting the frames of their struggles on behalf of the opportunities that law offers to them, or the political contexts that impose frames on them, that is, the search for emancipation that is transformed into a search for regulation (Molyneux 1985), the search for freedom that is transformed into a search for protection from harm in the law (Miller 2004), the search for redistribution converted into claim for recognition. All these different expressions of the paradox operate at times because of apparent legal restrictions in the framing of political claims, but also sometimes because of conflicts of interest at the political level that determine the legal expressions of political knowledge. In these contradictions, where people desire the law even though the law restricts categories available and denies the plurality of people, it becomes impossible to gain easy access to the theorization of the nature of this attachment. We do not know how, when

people turn to law and have faith in courts hoping to be represented by them, they could still imagine ways to radically transform the structures of the legal system. We do not have enough resources to theorize attachment in order to produce new language to imagine the engagements with the law otherwise.

IV. RATIONAL FRAMES: POLITICAL OPPORTUNITY STRUCTURES AND HISTORICAL INSTITUTIONALISM

The theoretical frames to which we could resort in order to respond to the question about the attachment often return to two explanations: the premise of a rational subject capable of calculating her or his investments in law, and the premise of the coherent historical development of progressive political relations played out by new political identities. But if we are to adhere coherently to either premise, the representations we make of the subject who believes in the promise or its historical development inevitably force us into reductionist images that erase the diverse positions that different people occupy in relation to the law, unintentionally assimilating a differentiated ranking between individuals, their needs, and the kind of rights that should be sanctioned by the state (Mignolo 2009: 13), dismissing altogether the lesson learned from the *gauchos* about the possibility of setting up the principles and standards of the law on behalf of the disenfranchised, who are located outside of the epistemic borders of the law .

In a first explanatory attempt then, we can invoke a first premise by replicating the classical claim that all individuals are attached to law in their condition of *rational subjects*, historically grounded in the realm of universal legal rights protected by the rule of law, and with full capacity to choose the right means to achieve their own ends (see Hunneus, Couso and Sieder 2010). A theoretical exercise within this frame could promote the identification of structures that can be converted into resources for the maximization of social movements' agendas, of resources in law and politics that could enhance (or inhibit) people's prospects of undertaking collective action and affecting mainstream politics.

These grounds are common references for the *political opportunity structure* literature commonly used to represent the strategic relations social movements establish to profit from incentives for collective action, including those that come from governmental institutions (McAdam 1982; McCann 1991; Tarrow 1994: 85). The premise of the rational subject here relates to the person who can calculate institutional constraints, can estimate or predict courts' responses, and negotiate there his or her own political agenda. The political opportunity frame in judicialization literature has produced indicators about the evaluation of prospects of success in legal strategies applied in the judiciary, ranging between the identification of the political profiles, experiences and perceptions about the court (Gloppen 2008), the contingent interaction between courts and other political forces like the executive (including the elitist mediation of electoral rhythms in the judiciary) (Helmke, quoted in Hunneus, Couso and Sieder 2010: 13), the economic and legal incentives to access courts as a feasible strategy for the general public (Wilson and Rodríguez Cordero 2006), the presence of allies within political institutions, etc.

This theoretical frame requires ideal-type categories for political and legal analyses that are measured by indicators created theoretically as problematic systems of representation, problematic inasmuch as they are relevant mainly for static, or more or less stable, relations between individuals, groups and legal institutions, and do not represent accurately the indeterminacy of resources for mobilisation in law (Khanna 2012: 164). The frame cannot give account of the way the groups who lack political clout get excluded from the politics of social movements, undermining all human rights engagements that embrace basic ethical commitments of solidarity. The legal opportunity structure adapted to understand judicialization often leaves unexplored the fact that structural opportunities are mainly instrumental. Aspirational constitutions can prosper also in situations of great unconformity with the present even if a strong belief in the possibility of a better future exists, even in the absence of either effective instruments or the institutional conditions for the materialization of new instruments (see García Villegas 2003).

The main problem with the foundation of the premise of the rational subject who profits from political opportunities goes even deeper in the epistemic assumptions of legal practices. The rational subject appears in theory under a contractual fiction that establishes that the rational subject identifies herself or himself with a general and fairly stable regime of values. The subject undertakes opportunities that take her or him closer to a common good recognized by a general will, based on the principles through which sociabilities and social practices are aggregated (see Connolly 1987: 127). This regime of values in democracy is explained as liberty, equality, autonomy, subjectivity and solidarity, but all those are subject in modernity to a symbolic overload, where they will always be achieved by common means, they will be made to correspond in an homogeneity that gives them all an excess of meaning that has trivialized (and neutralized) the possibilities of engaging individually with each of those values and attributing individually ethical potential to them (Santos 1999: 10-11).

We have also available the *historical institutionalism* frame to deal with the attachment to images of hopeful politics organized in a desirable pattern of causality. This frame has been explored in sociology and political science to explain the collection of events and structural conditions organised in a way that justifies a logical progressive continuity throughout historical junctures. Still extending premises of rational choices, the frame recognizes in social, political and legal institutions the capacity to generate and hold consistency over roles and rules in a political community, providing content to identities, preferences and interests of the actors within (Hall and Taylor 1996: 939-42⁴⁰). The objective of the frame is to identify and narrate the junctures, contingencies and overlapping processes that produce a path dependent line of development of governing authority and the abrasions that work for such path as sources of dynamism (Pierson, quoted in Smith 2008).

⁴⁰ The “rational choice” approach in historical institutionalism is just one trend or specific choice of method within the field of political science. ‘Rational choice’, ‘historical interpretative’ and ‘historical institutionalism’ eventually merge in the ‘new institutionalisms’ mixing elements of all three. I am placing emphasis on the rational element, pushing for the continuity with the rational subject and the political opportunity structure. For a detailed presentation of the different developments of historical institutionalism see Smith 2008.

The tradition of historical institutionalism in law has been explored in the contemporary dialogues of constitutionalism, more critically in the United States than in Latin America. Amy Kapczynski (2005) tracks down the way the legitimacy of constitutionalism in the United States has been built in history: constitution and nationalism always run hand in hand, and the first represents a redemptive investment -made at a specific time in history- that fulfils the needs of the second. Kapczynski adapts Walter Benjamin's notion of *redemption* to qualify the images of agreement in history that are read as the coherent order of constitutionalism, and an assumption of an objective meaning of its development (from Benjamin's second thesis on time from *On the Concept of History* of 1940). For Benjamin the image of redemption is indissolubly bound up in our conceptions of happiness, it is because we pursue happiness that we establish a secret agreement between past generations and the present. In that agreement we produce an inevitable and homogenous certitude of progress that leads us to happiness: "a secret agreement between past generations and the present one [that establishes that] [o]ur coming was expected on earth. Like every generation that preceded us, we have been endowed with a weak Messianic power".

The *agent of history* of Benjamin, the individual *speaking the history*, depicts an event in the present as revolutionary because it is supposed to *close* the past. The secret agreement positioned him or her where he or she is in order to overcome the fights and oppressions of the past, but by doing so, on behalf of the ordered certitude and the objective memory that his or her own happiness requires, she or he sacrifices in the present the suffering of defeated past generations. The image of happiness that brings Kapczynski to Benjamin relates to the demand of history reconstructed through constitutions and constitutional reforms. Her work resonates with the Latin American experiences in the way constitutions are organised in history as nationalistic ephemerides, as the rebuild of a nation -that has now been not only surpassed but improved-, capturing the imagination of the present with a "redemptive mode of constitutional history [that] holds a dynamic, creative promise" (Kapczynski 2005: 1117).

The difference with the previous frame is the emphasis on institutions and their capacity to hold a coherent pattern of development, and not on individuals or collectives actively attributing meanings to progressive causality, a strategy that has proved effective, or even necessary as a pedagogical tool in the rush of new constitutionalism in Latin America: where the institutional adjustments and the new political referents (transnational ideas of rights, neoliberalism, etc.) make the case for a compulsory reference to the historical legitimacy of a constituent power and the continuum of its unquestioned authority (see García García 2013). That continuum is necessary to ensure that citizens will keep channelling political behaviours along the path dependent-lines of the unified nation across the different political expressions of the state: “Constitutions are making a better country, we are *becoming* more democratic as a nation with judicialization”.

In the frame, as Kapczynski warns, in order to engage with that happy promise, we need to commit to a foundational linear narrative of progress where constitutional reforms are read as temporal indices of improvement, as the exercises of emancipation of the civilizing order of the nation. A co-dependent relation between constitutionalism and nationalism automatically reduces all expressions of attachment to the civilizing form of the nation state, ignoring the “status-based exclusions from citizenship” upon which the constitution is actually founded (Kapczynski 2005: 1117). We ought to be careful now with this last statement, because the evolution in historical institutionalism does not depend on premises of exclusion and its alleviation in history. A form of exclusion is always going to be characteristic of the criteria for membership in nationalism, therefore we need to clarify which form of exclusion we refer to here. There are some who recognize themselves in situations of exclusion and have to be able to describe their situation in the language offered by the new nationalistic identities, they have to struggle to be included in the nationalistic identity so they can achieve the means to participate in any other political project; but once they have legitimized the historical validity of their claims (Santos 1999: 14) they can participate in historical improvement and the momentum of redemption of the nation. This endangers the possibility of engaging ethically with different expressions of exclusion, because the one just mentioned is heavily determined by the overloaded values of nationalism that will try to make all

forms of exclusion correspond in homogenous strategies and common means. Let us think about exclusion in another way, based on the desire for autonomy of indigenous peoples that is not mediated by indigenous peoples' struggle to be included in the nationalistic paradigms of citizenship but is still conditioned by the way in which indigenous people are materially excluded from and deprived of their own resources. Let us think also about people in situations of poverty, for whom the transformation of nationalistic values will not alter their economic exclusion, and the notions of liberty, equality, autonomy, subjectivity or solidarity, cannot be fully expanded in their ethical capacities so they can interrupt the history of institutions in order to rethink the permanent and normalized state of exclusion to which they are subject.

The historical endurance of the forms of exclusion that are not codified by the nationalistic values, like the historical inclusion of indigenous people (when they are perceived to have no capacity to rule themselves autonomously), or the precarization of life (the nationalistic values that fail to alleviate the urgent needs of people in situations of poverty), becomes unintelligible in the always-evolving conception of the rule of law, and replaced by the same rhetoric of redemption, happiness, progress and development. I am talking here of the Western-based paradigm of modernity that has been imposed as "that we cannot not want" (Spivak 1993: 45-46) a common trajectory of history dictated for all individuals, fixing the state as the centre for all political stories, with a limited understanding of exclusion that can only be redeemed through the progressive history of our institutions (Mignolo 2005: 14). The progress of history, then allocates selective entitlements, allowances or sanctions to different subjects, but not to all in their radical diversity (Bhabha 1983: 23; Mohanty 1984: 334-335). We are talking about the modern liberal expression of political obligation and its history, where the idea of emancipation has been appropriated by fairly homogenous notions of exclusion and by the paradigms of regulation: that is the incorporation, cooption and assimilation of all experiences of violence as legally intelligible, the demand for all rights claims to comply with the necessary epistemic connections to be considered in programmes of emancipation (see Santos and Rodríguez Garavito 2001).

There are two more assumptions in the premise of historical institutionalism for Boaventura de Sousa Santos: the system of measure and the privilege of transnational time and space. From the general regime of values described earlier we can deduce a system of measurement “based on a conception of time and space as homogeneous, neutral, linear (...) that functions as common denominator for the definition of relevant differences” (Santos 2002: 448), and for the eventual definition of projects of future and paths of action suitable for everybody (disregarding peoples’ radical differences). The system of measurement is not reduced to a historical metronome, but has consequences for the way strategic action is defined and the criteria for mobilisation for social justice is determined, redistribution, and ultimately, solidarity itself; it imposes artificial homogeneity for the evaluation of economic and cultural [and sexual] practices as ideals of progress that claim to be attributes of time organized in a bound seriality (see Chatterjee 2001). Under the other assumption the nation-state’s time-space loses its primacy. The symbolic overload of transnational projects of modernity settle the notion of progress in spatial temporal frames that compete with that of the nation. The narration of progress segregates the rhythms, durations and temporalities of both national and transnational spheres, dismissing from the former the elections and their relation to legal promotion, the time-frame for collective bargaining, time frames of courts and national memory, etc.

What I am trying to summarize here is the main challenge for historical frames when they attempt explanations for the attachment people develop towards law and constitutions. While historical institutionalism has an enormous pedagogical potential as the linear narrative that holds the authority of the liberal state together, we still have to determine what the object of that pedagogy is. The historical narrative of progress through constitutions will always be determined by an inescapable assumption of *coherence and fullness* in the history of the nation-state that surrenders its premises to transnational characters. Such a story includes only those *agents of history* who identify themselves with its trajectory, participate from the progressive regulation that has brought it about, and quite possibly benefit directly from it. Constitutions in historical institutionalism can separate the agent of history from the “object of national pedagogy”: the subject in the

making who is not yet included in the coherent path of the nation's destiny and still needs to be instructed on how to achieve that enterprise (Bhabha 1990). Historical institutionalism returns us to the dichotomic ideas imposed on a nation, those that divide modern from pre-modern, progressive from conservative, the state of rights from the permanent state of illegality, the liberal state from the rest.

Both the historical frame and the assumptions of rational subjects require coherence for an accurate narration of the parallel evolution of regulatory norms and of actors' perceptions and behaviours in democracy, in a logic that resonates only in the fictional context of static equilibrium that omits all non patterned expressions of change, all that which does not fit under codified normative ideals (Courtis 2008: 392). In the building of a theoretical paradigm to produce an explanation about attachment, the two frames feed a motivation to actively discourage all those ideas of change that are imagined (or promoted) by "non-rational" actors who are objects of pedagogy, those who misunderstand legal and judicial authority, and therefore –in a theoretical account– endanger their outcomes through false or illusionary attachments. Moreover the two frames do not address the fact that all legal institutions lodge different meanings according to the different political positions in which different actors have been unevenly accommodated: the vast majority of civil society (excepting a few authorized legal actors) has in fact little power to intervene or negotiate the content or the terms of attachment towards the law, and the enthusiasm for strategic litigation (or for strong images of nationalism) in both theoretical frames clouds that perception.

CONCLUSION

We do not all participate, nor benefit, from the promises that law makes, and not everybody's needs, interests, and identities are considered in constitutional moments. In the previous chapter I committed the theoretical framework of the thesis to the critical optimism of a serious analysis of political praxis. Still, the apparently optimistic linear evolution of democracy (the rights cascade, the new constitutions, the turn to law, constitutional control and judicialization of politics itself) confirms to us that we are

better than we were before, that we are closer to those fair relations that we so much desire. But there are problematic assumptions with that form of optimism and the way it projects in history the rational subject as the subject of rights, the *we* that confirms *us* better, the *we* who might be attached to the political (and epistemic) opportunity, and is not fully qualified to act in detachment from the conditions with which the state delivers it promise.

I have tried to open with this chapter a theoretical framework based on a promise, claiming that something good will come -or can come- with constitutional moments, with the institutional adjustment of courts, and with their progressive decisions, and that will always be conditioned by the values that determine nationalistic ideals. The good thing which is yet to come could be defined on different fronts by people who, though different, all stand in privileged political positions in relation to a constitutional court, or Law in general, and who have an advantage through their ability not only to preview that which is yet to come, but also to see who is not being integrated in the promised change. Since it is not a reciprocal promise (the people in those positions cannot promise back to the court), the attachments that are produced when we engage with that promise should be carefully evaluated. Only in the Brazilian movement of the alternative usages of law was this relation of reciprocity imagined, but it did not penetrate the model of regional integration patterned after the rational choices of the subject who navigates in linear history.

In the following two chapters I will make use of this presentation of constitutional moments, expanding the premise that the strength of the attachments they generate is proportionate to the intensity of the political crises they resolve. The next chapter discusses the narration of Mexican constitutional moments, the national ephemerides of the constitution and the images of progressive future that emerge from it. The contextualisation of constitutional courts and their decisions, the critical evaluation of the present in the language of the critical optimist, will reveal to us more about the politics of a determined space and time than about a linear development of rights. The sexual rights movement has been represented not only as the historical beneficiary of opportunities,

but as a product itself of emerging opportunity structures in democratization (see Díez 2011; Garcia and Parker 2006; Salinas Hernández 2010), that suggest that it can only be conceived of in terms of the historical-political intersection of institutional adjustments of democracy (see Marsiaj 2011; Pecheny 2010; Wilson and Cordero 2006). But by renouncing the premise of the rational subject we can enable new expressions of solidarity by the mere fact that the space of enunciation of sexual rights can attempt to break the dichotomies of the legal and illegal, the political and the cultural, and reconcile ethics and critical imagination. Judicialization has not widened the channels to access justice, at least not as much as could be desired, it has been mainly an expansive programme of recognition of some actors. With that in mind, let us try to represent the contemporary history of Mexican constitutionalism, mindfully suspicious of the assumption that a constitutional reform is always better than the previous structure is organized, and let us try to reevaluate the epistemic impositions that such historical trajectory carries within itself.

PART 2

DEMOCRACY AND

JUDICIALIZATION IN

MEXICO

Chapter 3

DEMOCRATIZATION IN WONDERLAND

“In Mexico City we are living in Wonderland: we are celebrating having an opposition in government that reinvigorated the political dialogues in the country. We have now unprecedented political pacts, much more open and transparent legal procedures, and broader channels for citizens’ participation, both in law making processes and political decision-making. Mexico City is the product of the convergence of various political processes that enabled a new dynamic political life that we do not see anywhere else in the country. Only in the city can we map the adjustment of power(s) and the establishment of the new democratic institutions of the last decades, the peculiar way in which the rule of law was strengthened for the whole country... that is at least in the public imaginaries of Mexico City, because we are enjoying a rule of law that has little to do with the national political, electoral and militarized reality. The progress of Mexico City/wonderland is a progress that runs isolated from the country’s reality”⁴¹

We can embrace this characterisation made by Carolina B., a young sexual rights and feminist activist, and narrate the progressive transformation of Mexico City as part of a tale of Wonderland, evoking Lewis Carroll’s stories to accommodate the simultaneity and overlapping of events, their disordered unfolding, and the contradictory explanations attributed to them. In Mexico City’s recent history we can indeed recognise the convergence of some of the most distinctive characteristics of the democratic development in Mexico in a way that we cannot elsewhere in the country: the redistribution of institutional authority –after the dispersal of political power held (until the mid 1990s) almost exclusively by the president-, the implementation of more inclusive policy and law-making processes in the city, dismantling an established tradition of exclusion that kept most social groups distant from the corporatist structure of

⁴¹ Interview with Carolina B. in July 2010 in Mexico City. The name used is a pseudonym and the translation to English by the author.

the democratic order (Díez 2012: 41), the gestation of effective opposition in the party system; and of course, the judicialization of politics and the visibility of the Supreme Court as a possibility to repair the atrophied legitimacy and credibility of governmental authorities.

The progressive legal reforms in sexual rights were unfolded in Mexico City in a way that could not have happened elsewhere in the country. They were the successful result of the mobilisation of the feminist and sexual rights movement, but only to a certain extent: the political adjustments of a new culture of democratic opposition, the competition for legitimacy between powerful political parties disputing alliances with social movements (in exchange of political opportunities for activists), can teach us more about their success than a coherent narrative of historical development of sound human rights claims. Expanding that statement, this chapter presents the story of the democratic unfolding of a new rights culture in Mexico City, a story that starts with the establishment of autonomous status that made the city politically independent from the federal government since 1993, and then passes through the different stages of leadership of the left wing *Partido de la Revolución Democrática* (PRD) that rules the city, and culminates with the legal reforms on abortion and same sex marriage.

An awareness of the story of the party, and the electoral temporalities of contemporary politics, are key elements for the understanding of political resonance of sexual rights. As the most powerful force of the left in institutional politics, their decisions have funnelled, slowed, or repressed access to law for different activists and social movements. The authority of the party has been transformed to depend largely on the inclusion and membership of activists from different social movements who, in turning to partisan politics to profit from the PRD's platform, enabled the reforms through bargainings that reclaimed support for the party's electoral projects (see Alvarado and Davis 2004; Ortega Ortiz 2010).

The events presented here all contributed in different ways (some out of strategic calculation and some accidentally) to produce the legal and political conditions that made

Mexico City the ideal platform from which to launch the progressive legal reforms on sexual rights. The distinctive character of these reforms is the way they managed to make their way in the legal arena, despite the contradictions that emerge when those contrast against observations of general lack of compliance of legal systems with basic bureaucratic procedures and norms within state agencies, of bureaucratic inefficiencies that result on an ambiguous and arbitrary application of the law, recognised as a spread note across Latin America (Comaroff and Comaroff 2006; Esquirol 2009; Morris 2009). Legal systems, in general, can tolerate differentiated access to public policies, inequalities, patterns of exclusion, leaving gaps of legal uncertainty left to political and judicial actors to cover, but with no effective counterweight to moderate their authority; in the field of sexuality those gaps have allowed the imposition of personal ideologies promoting certain conducts, practices and identities, restricting and punishing others (see Cook 2010).

The trajectory of progressive legal reforms has to acknowledge that progressive legal reforms do not mean the same to everybody. Different citizens negotiate their encounters with law in multiple and overlapping normative systems, ranging from the customary systems (Herrera Flores 2000; Santos 2002) to the formal institutions of the state, and in this last one with varying degrees of attachment towards their authority, or negotiated, fetishized premises of their efficacy (vid. Lemaitre Ripoll 2009; Rodríguez Garavito 2012). By determining strategic relations with their legal systems (and calculating their attachments), citizens bargain with legal operators' conditions to produce opportunities for empowerment that indirectly privilege some groups over others, and grant symbolic power to some legal achievements whilst dismissing other ways to imagine progressive development. The democratization of wonderland aims to highlight the distance that separates on the one hand the optimistic path that fulfils aspirations for the enjoyment of human rights made possible through the strengthening of the rule of law, and the renovation of basic grounds of legitimate authority of governmental institutions; and on the other hand, the effort to hold on to a critique of the continuum of personalistic political traditions, against the omission of the disordered means of legal and judicial practices in theoretical enterprises, in brief, to hold to human rights' hope for justice and

emancipation in a democratic development thought otherwise.

With democratization came the establishment of a competitive opposition that has been the determinant for success of progressive legal reforms. A critical analysis of the new partisan opposition can offer insights about the flexibility of sexual rights' movements to incorporate (or not) transversal narratives of human rights into their principles, beyond political opportunities, and their capacity to separate their historical trajectory and core struggles from that of the partisan development in democracy. The PRD, the main opposition party of the left, was created in the 1980s in an unstable political culture marked by violent repression of radical antagonism, and by the absence of institutional structures available to challenge the then unbeatable ruling party in Mexico. Its historical development represents, at its outset, one of the most solid shifts of political aperture, not for all oppositional politics but those suitable within the new partisan politics, and it represents in the later stages of democratization one the strongest allies of sexual rights movements (Bruhn 1996). But those alliances have not always been the PRD's priority, in the same way as the investment of social struggles in party systems and electoral politics reflect only the later development of sexual politics. We need to understand how these stories overlapped in order to defend the independent location for enunciation of sexual rights.

The PRD foundation came as the cornerstone of Mexico City's autonomic government, and also as the first realistic opposition against the one-party state in the country. I start the chapter in that moment, with the first democratic elections of Mexico City, the setting up of a position for a democratically elected Head of Government in the city, and the predictable projection of future presidential candidates for the PRD than the office inaugurated, setting up the politics of opposition in the capital city in relation to the federal government predominantly as electoral projects. I move on to present the institutionalisation and appointment of expert tutors in Mexico that contained the burden of politics in the democratic adjustments: the *Comisión Nacional de Derechos Humanos* (National Commission of Human Rights, CNDH), I claim, is set up to moderate the new human rights culture of the country but it is installed in the middle of paradoxes of

presidential control, institutionalisation of rights narratives, and personal appointments in the share of power and conceptions of justice. I stop then in the narrative with the federal election of 2000, because that year represented the end of the PRI regime, and also the biggest governmental promise of change directed to citizens since the revolution of 1920. The 2000 represented a peaceful transition away from the monopoly of a one-party ruling; it rushed a new human rights culture with the promotion of institutional reforms in the country, with promises that eventually fall short compared to the great expectations of change that they brought with them. Throughout the transition, the PRD navigated its way through electoral opportunities, carefully establishing political alliances and profiting from them slowly, assimilating social movements' language as the city's social agenda. Mexico City today ends up being promoted as the *city of freedoms*, as I narrate in the final section, the paragon of democratic progress in the country that holds sexual rights as its proud distinctive identity. This city of freedoms emerged too fast and the rest of states could not keep up with the rhythm of its development, it overlapped political claims of human rights, the formalist development of the rule of law, and the different trajectories of different social movements, but more importantly, determined its politics largely in opposition to the federal government under electoral priorities in ways that other states did not.

Sexual rights narratives are thought primarily in a transnational dialogue that articulates with sharp-edged clarity how state obligations and internal legal systems ought to regulate sexuality (International Council of Human Rights Policy 2009: 12). With a celebratory spirit, progressive reforms of sexual rights cases tend to be written in lists of international ephemerides inspired by the possibility to build capacity of cooperation and solidarity networks. But in their transnational dimension, sexual rights say little about the way specific actors promote legislation, and have little resources to explain why reforms succeed in one place but not others besides observations overshadowed by moral conservatism. The main aim of this chapter is to provide grounding to understand the historical-political relevance of sexual rights in Mexico City; through the introduction of the actors and the institutional setup of relations that suggests at the end that there is actually a prevalence of sexual rights over other human rights narratives, that sexual

rights have gained a privileged location already.

I. THE AUTONOMOUS CITY AND THE PRD

Mexico City gained its political autonomy from the federal government in the constitutional reform of 1993 that inaugurated its own governing authorities. Before that, the President of the Republic had among his *metaconstitutional* powers⁴² the authority to designate a Regent in charge of the coordination of the Assembly of Representatives [*Asamblea de Representantes*], then the organ in charge exclusively of the emission of ordinances, edicts, and police and good governance rulings. In 1993, with the Political Reform of the Federal District⁴³, the Assembly was granted recognition as a governmental organ with independent legislative faculties; and in 1996⁴⁴ the *Asamblea de Representantes* finally became the *Asamblea Legislativa del Distrito Federal* (Legislative Assembly of the Federal District, henceforth ALDF) as we know it today, composed by democratically elected deputies representing the main political parties⁴⁵. Mexico City, the Federal District, unlike the other 31 states in the Republic, is ruled by organs of government and not by powers (executive, legislative and judicial); because it already hosts the Powers of the Federation, it has neither full sovereign authority, nor its own constitution, and it is only exceptionally autonomous.

In 1997 the city celebrated its first democratic elections, the role of the Regent was replaced with the Head of Government, and Cuauhtémoc Cárdenas Solórzano's became the first leader representing the PRD, the same party that has since remained in office

⁴² The euphemism of metaconstitutional was coined in the context of Mexican presidentialism, characteristic of the PRI regime, to describe the unwritten, yet generally acknowledged, *de facto* power granted to the president. The tradition consolidated the authority of the executive above of the other two branches of the state, and above the constitution (Serrano Migallón 2006; Madrazo Lajous 2006).

⁴³ Constitutional Reform of article 44th, published by Official Decree in the Official Gazette on October 25th 1993.

⁴⁴ With a new Decree published on August 22nd August 1996 that modified the article 122 in the Constitution.

⁴⁵ Almost 70% of deputies are elected in direct vote, the rest are elected through proportional representation. For a detailed account on the transition towards the autonomous authority of the city see Azuela 2007; Briseño Becerra 2009.

with a relative majority in the Assembly⁴⁶. The PRD was founded in 1989 by Cárdenas Solórzano as a space of coalition for social movements (independent peasant groups, urban popular organizations, labour confederations, etc.) and small parties from the left, most of them created through ruptures inside the PRI –which, having retained the presidency since the PRI’s foundation in 1929, was then practically the only source of *professional politicians*–, and a few of its members joined from the radical communist and Trotskyist left of the 1980s. The professional politicians here were the individuals who then participated in both social mobilisation and institutional politics, as a form of activism understood within the parameters of “normal” politics (as opposed to protesting, rioting, etc.) that recognises social mobilization as the complementary form of action to institutions (McAdam et al. 2001; Tarrow 1998).

Unlike the small radical opposition parties, the PRD always had a clear electoral ambition, which benefited from the experience and networks of those who joined after leaving the PRI and brought the institutional stability lacked by other parties. The structure of the party was more similar to the PRI than any other leftist movement: apart from being constituted in part by professional members with experience in the administration of the ruling party, it depended on a centralised leadership (in the person of Cárdenas), different from the parties of the left that were born from political crisis and social unrest and always had more horizontal leadership in their constituencies. Opposition was formally organised in the electoral reforms of 1973 and 1977 enclosing in political representation the radical struggles who had until then performed in urban and rural guerrillas, in universities’ unions, and largely by activists imprisoned after their involvement in the students’ movements of 1968 and 1971, and the resistance to the ‘Mexican dirty war’⁴⁷

⁴⁶ Only in 2012 the *Tribunal Electoral del Poder Judicial de la Federación* (special organ of the judiciary in charge of resolving electoral controversies) ordered the revocation of the absolute majority of the PRD following a debate around seats in the Assembly gained with party alliances during electoral campaigns and not direct voting (see <http://www.adnpolitico.com/2012/2012/09/12/el-tepjf-quita-al-prd-mayoria-absoluta-en-el-congreso-local> Nov 25th 2013).

⁴⁷ Mexico City has had few famous instances of dirty war, of low intensity military and policy repression against opposition from the mid 1960s to early 1980s. The two most famous violent events were the student massacre of October 1968 (that stop a long protest of students and several workers’ unions just in time for the city to host the Olympic games), and the “*Halconazo*”, or the Corpus Christi Massacre, another sanguinary repression of a student protest in 1971. The responsibilities for the *halconazo* and the students’ massacre still enjoy impunity to our days.

(Ortega Ortiz 2010: 230).

Among the other parties, The Revolutionary Workers Party (PRT *Partido Revolucionario de los Trabajadores*) was the first to include what we now would recognise as the sexual rights movements. The PRT was based on Trotskyist principles, created mainly by teachers and students of the National University, and had as its main political agenda accountability and justice for the victims of political violence in the dirty war. According to its constituent rules and as it happened with other parties, its membership depended on the double militancy of members being an active part of social movements. It became the first political party in Mexican history to recruit individuals from feminist, lesbian and gay, and women's movements (for a detailed account of those alliances see De la Dehesa 2007). In the seventies and a large part of the 1980s, small parties had to build coalitions between themselves to ensure minimums for electoral registry, and with different social movements of civil resistance, workers and campesinos to inform the ideological struggle of the parties. That was the case of the United Socialist Party of Mexico PSUM (coordinated by the Communist Party), the immediate precedent of the PRD.

While it was being consolidated as the strongest front for oppositional politics, at the end of the 1980s most of the party coalitions gravitated around the PRD, and some of the founders of the smaller parties started to join it. Those are the politicians that to this day still represent the ideological core of the party and maintain its historical links with the radical left. Later on, new social groups joined the leftist activists, motivated to an extent by disillusionment with the *status quo* in Mexico, but to a greater extent by the possibility of defeating the PRI for the first time in the election of 1988. This election represented one of the most violent shifts for the Mexican left, it imposed electoral politics over all other forms of oppositional politics; it defined, inside the PRD, a condition for supporting members who had to start prioritising their primary affiliations with the party and professionalize in politics in order to become a real oppositional block, severing their alliances with their original movements. Such members came to form almost one third of the party, and in doing so they lent the other strong pillar of legitimacy for the party in the larger political scenario (Özler 2009: 126).

Occupying the office of Head of Government in Mexico City, the PRD brought about a new political culture: a culture full of promises for the locals, but full also of contradictions within the party. In the city, the PRD promoted the institutional organisation of popular and neighbourhood associations as a way to grant its legitimate authority (working with popular urban movements, the victims of the 1985 earthquake, the *barrio* assemblies, among others) (Sabatini 2007: 274). But those participative processes and alliances, I insist, were not happening in the rest of the country; grassroots movements were not closely related to Cárdenas, and the societal infrastructure for the flourishing of new ways of civilian organization was actually avoided. The PRD did try to replicate its participative schemes from Mexico City elsewhere in the country, proposing to the National Congress the reform of structures for civic participation, but having had only a minority in the Congress, encouraged the resistance of the other parties who rejected a constitutional reform that could transform the national ideal of citizens' participation that the fragile democratic fabric was perhaps not ready to cope with yet (Alvarado and Davis 2004: 179)⁴⁸.

But the promotion of institutional association that for the PRD was a valuable electoral currency with the presidency in mind, was not the priority of the people actually participating in these new structures, whose interests lay rather in new and fairer urban policies for the city's inhabitants, not in a transformative model that could resonate nationally as a way to transform the meaning of grassroots support for new federal leadership. And the new professional politicians who left their grassroots organisations for the party were positioned to mediate the promises that the party had made to the citizens (legitimised by their past political involvement as activists), but the expectations invested on them were actually to focus their attention on the federal legislative processes (Alvarado and Davis 2004: 181).

⁴⁸ It was the PRI who most vehemently resisted the idea of empowering citizens at the local level, insisting that their only role should be to advise in spaces led by governmental authorities. Later in the chapter I will expand on the PRI's programme that favoured the empowerment of local legislatures instead, with President Zedillo's plan for the new federalism.

Since its foundation, the biggest dilemma of the party has always been to choose between fulfilling the expectations of those who see in it the possibility of a leftist platform and a realistic capacity to transform the Mexican political system with fair democratic competition, or to prioritise a platform for presidential candidates (Bartra 2007; Ortega Ortiz 2010). The politics of Mexico City cannot be thought of as outside this dilemma. The popularity and support given to the PRD in the City increased in parallel with the deterioration of the once uncontested authority of the PRI at the national level, fuelling the PRD's electoral ambition and its alliances with the rest of the Mexican left. Since the declaration of autonomy in the city, all presidential candidates of the PRD have first been Head of Government in the City. Therefore, the inclusion of activists, the support of community-based organizations, and promotion of social movements, can be reconstructed historically accordingly, to the electoral priorities of the candidates and Head of Government political trajectories, as opposed to an unconditional commitment towards the restructure of citizens' participation. The apparent contradiction between long term projects and short term outcomes of the party was not a problem of strategy but a problem of structure that the PRD has not managed to overcome in his history. At this stage, however, because of the strong leadership of Cárdenas the problems were not yet so evident. I will return later in the chapter to clarify this point, in presenting the moment when Cárdenas lost his place at the head of the electoral list, since that was the most evident public sign of internal fragmentation of the party, and the original identity of the PRD somehow crumbled.

When Cuauhtémoc Cárdenas Solórzano became Head of Government in 1997 he had already twice been candidate in federal elections, in 1988 representing the *Frente Democrático Nacional*⁴⁹ and in 1994 running as the PRD's first presidential candidate. Many people saw in 1988 the first realistic chance to win the presidency from the PRI, a general sense of opportunity for change that brought about an unprecedented alliance from the radical leftists parties and created a strong climate of opposition giving citizens a solid trust on the feasible possibility of a victory for Cárdenas. But in the immediate aftermath of the electoral process, the operating system employed by the government to

⁴⁹ National Democratic Front, an alliance of small left-wing parties, yet another predecessor of the PRD.

count the votes suddenly collapsed, in the full sight of observers and the media, reverting the numbers that were favouring Cárdenas to give an unexpected victory to the PRI's Carlos Salinas de Gortari. In the following elections in 1994, the candidate of the PRI (Luis Donaldo Colosio) was murdered in a public rally only four months before the vote, triggering a period of political chaos that culminated with the victory of his substitute, Ernesto Zedillo Ponce de León, and another failure for Cárdenas.

But the authority of the PRI was already in decline in the eyes of the common citizen. Having to deal with its dilemmas, different interest groups and internal conflicts, and with a strong support in the city that had no equivalent in the rest of the country, the PRD of Cárdenas was not adjusting fast enough to the political transformations of the time, and it proved to be ill-equipped to handle the political promises it had already offered to social movements' leaders in the city, having lost the presidency. Above all, it could not expand its constituency across the country because social groups at the national level were well aware of the cost of investing in partisan politics⁵⁰, all the efforts invested in electoral politics and representative democracy in the capital had not paid off, that disillusioned potential new supporters and the large majority of Mexicans excluded from the liberal national project.

Beyond the party members and outside the city, the majority of civil society who supported the PRD only committed to it via short-term electoral alliances, and did not provide the support, the experienced leadership, and the channel of communication with civil society that the party needed (and indeed pretended to have) in the depth required to provide solid political structure and identity. The struggle to incorporate social actors outside the city was a symptom of the general deficit of participatory democracy at the time. It is crucial to remember that in the period between 1988 and 1994, before the consolidation of competitive electoral regimes, few coalitions with civil society could be sustained in any political forum and the PRD was only an exception. Mexico was living

⁵⁰ I mean here the contrast between the electoral priorities of oppositional parties, the demand of structural adjustment and economic restructuring of governmental institution, and the withdraw of social demands and social justice as privilege agendas in the political scenario. The revitalization of social movements and new actors concern those in direct relation with the institutions of the state, but not to all those expressions of political identities are not institutionalised (see Jelin 1994).

under a democratic culture where the only option other than the low risk of assenting to a highly hermetic bureaucratic system, and submitting to its clientelist culture, was the much higher risk, and cost, of making an investment in opposition politics, including the risk of getting murdered for standing against the PRI authoritarian leaders (see Bruhn 1996: 201-202, 210-212; Fox 1994: 155).

II. THE NATIONAL COMMISSION OF HUMAN RIGHTS

While the PRD invested its political efforts internally in conciliating its members and externally in consolidating its support basis, President Carlos Salinas de Gortari created in 1990 the *Comisión Nacional de Derechos Humanos* or CNDH). It was opened as Mexico's official human rights organ, as a promise to improve systems of enforcement and administration of justice with a new monitoring system that would become an institutional space of interpellation to civil society. It was inaugurated as a response to the large campaigns of accountability triggered by the immediate aftermath of violent confrontations involving the use of police force. The promise of the CNDH was something that the PRD was not qualified to accommodate, for instance it received cases to monitor claims of accountability for the dirty war of the 1970s that the PRD did not find salience for in the party system. Its first *ombudsman* was Jorge Carpizo, a well respected jurist in high public esteem, who soon started receiving high-profile cases at the request of Salinas, and urging in print that the government address the dirty war, gaining with that the trust of the general public (see Uildriks 2010: 118-119).

The CNDH worked first directly under the economic auspices of the president but was soon de-centralized, gaining economic independence from the executive⁵¹ and

⁵¹ Decree by which the National Commission on Human Rights is created as a decentralized agency of the Interior Ministry], June 5, 1990 "The CNDH now prepares its own budget and submits it to the Ministry of Finance and Public Credit (Secretaría de Hacienda y Crédito Público, SHCP), which incorporates it into the annual federal budget. The executive presents the federal government's budget to the House of Representatives, which has the exclusive authority to approve it. After approval, the SHCP informs the CNDH of its budget for that particular year" (Human Rights Watch 2008: 11).

constitutional status with the reform of the article 102, Section B in 1992⁵². The same constitutional status, however, reveals one of its most crucial paradoxes: it was gained with the addition of the subsection B in article 102, an article that regulates the Federal Public Ministry (*Ministerio Público de la Federación*), the office responsible for the investigation and prosecution of federal crimes directed by the General Attorney (*Procurador General de la República PGR*). The PGR⁵³ is the office of the executive branch that has the remit to oversee the interests and human rights of citizens. The difference of directives between the PGR and the CNDH is clear, the first one has a persecutory mandate and the second one is an organism of conciliation.

The CNDH is entitled to issue recommendations but it has no legal authority to scrutinize the work of public prosecutors in criminal investigations, it cannot promote reforms or secure remedies to improve Mexico's record of dismal of human rights cases, nor impose the implementation of its recommendations in administrative investigations, it can only monitor and publicly criticize them. However, as Emilio Rabasa noted, the constitutional formulation in the subsection B was Salinas de Gortari's proposal, and coincidentally, most of the cases that the CNDH started to accept were precisely against the violations of human rights committed by the PGR itself (Rabasa 1992: 577)⁵⁴. Hence, the CNDH began its functions with a fundamental ambiguity, the same ambiguity that sustains Salinas' commitment towards human rights. It was institutionally paired with the PGR (with the leadership of both appointed by the President according to the constitutional mandate), it was set up with no consultation with non-governmental activists, and it opened at the time when Salinas de Gortari was simultaneously dealing with a massive crisis of legitimacy (due to the perceived fraud in the elections), and negotiating the

⁵² "The Congress of the Union and the legislatures of the States, under their respective jurisdictions, will establish agencies for the protection of Human Rights granted by Mexican legal order; they will hear complaints against or omissions of administrative nature on the part of public authorities who violate these rights, except for the Judicial Branch of the Federation. They will make autonomous public non-mandatory recommendations and file claims and complaints with the respective authorities".

⁵³ The acronym PGR in Spanish stands both the office (the *Procuraduría*) and the General Attorney himself (the *Procurador*). In the rest of the thesis the context of its usage will indicate the difference.

⁵⁴ Besides, they were clear connections between the president and the two institutions: Jorge Carpizo was the president of the CNDH until 1993, when president Salinas appointed him as a General Attorney. He was replaced by Jorge Madrazo Cuéllar at the CNDH, who was also later appointed by president Zedillo as General Attorney in 1996.

North American Free Trade Agreement (NAFTA) with Canada and the United States, the most controversial trade agreement in Mexican contemporary history. The CNDH opened in just 48 hours, only a month before Human Rights Watch was to publish a report on impunity in the country that could have endangered the negotiations of the NAFTA (Human Rights Watch 2008: 11). It still took a few years before it got perceived as an independent institution, although, there are political coincidences that continue to link it firmly with the executive (as I argue in chapter 5 where the disorganised intervention of its president indicated the support of the executive agenda on abortion).

III. THE 2000 ELECTIONS. NEW DEMOCRACY, NEW RIGHTS.

Cuauhtémoc Cárdenas Solórzano resigned as the Head of Government of Mexico City in 1999 to run, for a third time, in the presidential election of 2000. He was replaced by his Governmental Secretary Rosario Robles Berlanga, who became the interim Head of Government until the following local election. She was famously promoted as the first woman to hold this office in the history of Mexico City, and as presented later in this chapter, she was the promoter of the first reform to extend the regime of exceptions for criminalisation of abortion in the city. The elections of 2000 were the famous elections where the PRI lost for the first time, but not because of the PRD who did not manage to restart the strong coalition it had, for example, in 1988. Cárdenas lost decisively to the *Partido de Acción Nacional* (National Action Party PAN), the political force of the centre-right. The PRD got only 16% of the votes, and lost one third of its places in the Congress. Vicente Fox Quesada, a former businessman with well-known conservative tendencies, became the President of the Republic having managed to put together an ambitious media campaign sponsored by personal funds that started long before the PAN had its internal elections, practically imposing his candidacy in the party. Fox did not have a support network within social movements, and originally did not have the support of his own party, but ensured strong coalitions with the economic elites, and got the vote of the middle classes who, this time, recognized him as the only viable means of defeating the PRI, having perceived the instability in the PRD's inner tensions of

simultaneously running ideologies of the radical left while pushing its coalitions through Cárdenas' insistence to become the president.

The main political capital of the PAN in the early years of its presidency was the burnout of the PRI and the political promise of “institutional cleansing”: the reestablishment of institutional order after the decades of publicly perceived impunity and corruption of the PRI regime. 2000 was not only the end of seventy-one years of heavily centralised control over almost all public offices across the government, but also seven decades of a version of democracy that kept the country cohesive and with no major mishaps. The PRI had left a country well organised under the terms of a “democracy within reason”, a technocratic regime ruled by a political elite that led the country into legal, political and economical modernisation, lately sustained by faith in the neoliberal expert, without the help of the military or significant increases in the use of systematic terror and state-sponsored violence on the scale experienced in other Latin American countries⁵⁵ (Centeno 1999). The “democracy within reason” of the PRI laid the foundation of the modern path of political development that the country took in following years, a path that managed to divert all radical institutional opposition, media and academic critique with promises of institutional adjustment and modernization, which later became, by general consensus, the historical calibrator of Salinas' regime (Gil Villegas Montiel 1996: 159).

Therefore, for its institutional cleansing the PAN had to start by targeting corruption and impunity, or defining them, receiving the leadership of a system that had been structurally working as an effective democracy in political and economical terms; corruption and impunity then had to be given sense among public perception. In the seven democratic decades of the PRI, the political infrastructure of the state was organized around a client culture (expectations of superiors dispensing favours), and heavily restricted by authoritarian political interactions. Nevertheless, according to Booth and Seligson (1984), authoritarianism in Mexico was (and in many ways still is) perceived as a *psychological characteristic* of its citizens, and only incidentally related to

⁵⁵ That does not minimize the effect of the violent repression of social movements like the massacres of 1968 and 1971. The argument only supports the comparison against Latin American dictatorships.

the process of democratization. Authoritarianism in this view is more the profile recognised in the Mexican ill-suited *civic culture* than the defining characteristic of its legal or political institutions. This position sets up a natural boundary between the internal (or specific) and external (or general) elements of the Mexican legal system, the internal belonging to the perception of lawyers and jurists (including also law schools), and the external including all the growing use of law and legal language by a wider range of political actors⁵⁶. The institutional cleansing by president Fox disproportionately targeted the external element. The transformations in the new democratization were very limited, and did not attempt to alter the political elite's monopoly (and expert authority) over the means of the constitutional democracy that were carving the appearance of a restart under new leadership.

Human rights became a priority in the PAN's presidential agenda, but understood only as part of an endemic problem for the state to address: rights language got used as a common mean for horizontal accountability and institutional transparency; the idea of the post-PRI national identity won the place of the symbolic overload that human rights principles could have attained, with no input or intervention of grassroots human rights organisations. Besides, the promotion of cleansing from corruption in a country that remained organised by a clientelar tradition, trivialized the hope for a radical replacement of the regime of values of the nation. The human rights intervention of Fox consisted mainly on the promotion of programmes of professionalization of bureaucratic offices, aiming to promote the efficacy of the already established governmental bodies (Sabatini 2007: 274). The renovation or replacement of bureaucratic bodies with the PAN effectively reinstated the circuits of clientelism in politics, giving new legitimacy to the democracy within reason, just replacing the national leadership. I go back to this period of history in the next chapter to talk more about the regimes of values that were left out in this change, the indigenous values mainly. Now I will return to talk on Mexico City and its leadership, to set up first that local map before moving on to national politics.

⁵⁶ For discussion on the internal and external elements of a legal culture see Couso 2010; Friedman 1975; Kapiszewski 2010; Ríos Figueroa and Taylor 2006.

IV. MEXICO CITY AFTER THE PAN

Having failed to establish a strong network at the national level in the federal elections (and actually losing some of the supporters gained in the previous elections), the PRD kept strengthening its political leadership by networking with social movements in Mexico City. Holding on to its legitimate leadership in the capital, the party kept balancing the promotion of untested social policies with electorally motivated confrontation, aimed at producing strong symbolic markers to distance the left wing roots of the party from the conservative presidential (new) authoritarianism of the PAN. With Cárdenas trying to recover his own leadership in the party, the interim government of Rosario Robles Berlanga attempted to settle the party's crisis with important promises, particularly directed towards feminist and sexual rights activists.

Robles Berlanga managed to reinforce the networks of support giving greater visibility to social movements in the city. She famously promoted the *Ley Robles* of 2000 on abortion working closely with the feminist and women's movements and with the support of the PRD majority in the Assembly. The Robles Act became the most progressive law on interruption of pregnancy the city had ever had: it extended the regime of exceptions for the criminalization of abortion in cases of a health risk in a woman's pregnancy, foetal malformation, and non consensual insemination. Whilst the Act only reformed the criminal code of the City, it was promoted nationally in the context of a feminist and women's movements' campaign for the decriminalisation of abortion, triggered by the highly publicised case of a 13 year old girl, arbitrarily denied access to a legal abortion by medical authorities and forced to continue her pregnancy, despite the exception from criminalisation in the case of sexual abuse already contained in the criminal code of her state⁵⁷.

Robles Berlanga went on to become the president of the Party after being Head of

⁵⁷ The "Paulina case" pushed legal campaigns that followed Mexico City's lead in extending the regime of exceptions in the states of Morelos, Estado de México and San Luis Potosí in 2000. There was no reform in Baja California, Paulina's home state (see Lamas 2009). More details on the process are presented on chapter 3.

Government, promoting strongly women's networks and links with feminist and other women in politics. But in the subsequent elections she soon found herself implicated in a corruption scandal involving bribes in exchange for governmental posts for local candidates, as well as excessive expenses incurred in her public affairs and communications office⁵⁸. Robles Berlanga quit the party, and only years later she came back to politics to join the opposition⁵⁹; but the scandal did not drastically affect the links between the PRD and civil society. For sexual rights activists in the city, the advantages of an alliance with partisan politics were already paying off in the form of feasible projects recognised as human rights issues in the local Assembly, and partisan politics were also offering professional opportunities for the activists who were getting involved in the reforms and policy processes (not only in the sexual rights movement but in general).

In the election of 2000, Robles Berlanga's replacement got elected at the same time as the next presidential election, where the loss of seats for the PRD in the National Congress was compensated for by the overwhelming majority in the Federal District of Andrés Manuel López Obrador, former president of the party. Soon after taking office, López Obrador became one of the most popular figures of the contemporary Mexican left, enabling him to transform the ideological profile of Cárdenas in the party into a new form of populist politics on a large scale. López Obrador's communications team orchestrated a powerful campaign promoting an image of austerity, friendliness and accessibility. He implemented important welfare policies in the city to benefit the elderly, transformed the urban landscape by building roads to ease traffic congestion, offered daily press conferences as proof of his commitment towards the new culture of transparency and

⁵⁸ See <http://www.jornada.unam.mx/2004/03/05/006n1cap.php?origen=capital.php&fly=1> Last accessed April 13th 2014.

⁵⁹ Years later, she publicly supported the PRI candidate in the 2012 elections. She was part of the platform "Women committed to Peace", a group of supporters of the candidate Enrique Peña Nieto (see <http://www.adnpolitico.com/2012/2012/04/28/rosario-robles-indica-que-apoya-la-candidatura-de-pena-nieto> last accessed 29th April 2014). As of 2014 she is part of the Peña Nieto cabinet as Secretary of Social Development, in which role she has been criticized because of her authoritarian reproductive health programmes, accused of violating women's reproductive rights, particularly those of indigenous women and women in conditions of poverty <http://www.jornada.unam.mx/2014/05/03/politica/006n1pol> and <http://www.animalpolitico.com/blogeros-punto-gire/2014/05/05/rosario-robles-y-su-oportunidades/> Last accessed May 29th 2014.

accountability, and as a result of such actions he rapidly gained the loyalty of citizens and the support of critical media at the local and national level. He soon achieved higher levels of popularity than Cárdenas.

In the run-up to the next presidential elections, López Obrador quit the office to stand in the coming presidential elections of 2006. For that he defeated Cárdenas in the party's internal election. I announced earlier in the chapter that the replacement of Cárdenas came as the ultimate evidence of the fragility of the ideological project of the PRD. This replacement made manifest the fractures of the institutional design of the party, that outside of its ideological core of members of the radical left in Mexico, has been promoted mainly as a platform for groups to access places for leadership in the party leading to candidatures. The rigid leadership of Cárdenas had kept, until this point, in the hands of the minority core group, the mandate to guard for the long term objectives of the party, without having achieved a high level of institutionalization capable of promoting the party into a self regulatory institution capable to maintain the stability and permanence of its members. I claimed earlier that the contradiction between the possible long-term projects and the short terms outcomes of the party was not a problem of strategy but of structure. Since the processes to select the leadership of the party have remained to be highly politicized, the party's capacity to hold on to an ideological project outside of personalistic politics could not be sustained, neither could the establishment of control mechanisms of party members at the lower level of leadership, especially in the Head Governmental office of Mexico City that started imposing its political projects over the whole party (Palma and Balderas 2004: 63-64).

López Obrador's candidature came with a new political scandal that still highlights the political manipulation of the leadership of the party. His project of candidacy got threatened by a political move -at the time popularly perceived as if it was orchestrated by the PAN government- attempting to ban his candidacy following a judicial action that called the Supreme Court to investigate him after an *amparo* initiated by the PGR,

ordering the withdrawal of his political immunity (or *fuero*)⁶⁰ therefore blocking his candidacy. Andres Manuel López Obrador was accused of disobeying a judge's decision to halt the construction of a road to a hospital that interfered in private property on its way. The Supreme Court originally granted an *amparo*⁶¹ to the landowner, and that was supposed to put a stop to the works commanded by the city but it did not. The landowner then presented a legal action against the government of Mexico City. López Obrador's communications office rapidly started circulating a narrative about a political "*complot*" against López Obrador, comparing the Supreme Court's decision and the PGR intervention with the political violence of the 1968 and 1971, politicising his victimhood to exploit the images of the PRI's historical abuses and authoritarianism, triggering massive protests in support of the candidate, openly discrediting the legitimacy of the federal government, and worst, of the Supreme Court, accusing it to be biased against him in support of the status quo of the presidential authority. The Congress approved the *desafuero*, and López Obrador got legally barred from presenting his candidacy, but after intense political mobilisation, including massive social protests and even a call for a public referendum to revert the Court's decision, Vicente Fox's government stopped the process, and the Attorney General was forced to resign. The political resolution of the *complot* was publicised and heavily contested by jurists and political experts, who interpreted it as a clear case of politically motivated contempt of Court, but also as evidence of the fragility that comes from the lack of clarity about the political role of the Court at that moment⁶².

The process represented one of the first events in this period in which the Court's legitimacy was severely damaged because of the political consequences of its

⁶⁰ As Head of Government he could not be subject to administrative procedures unless there is a direct order for the Congress or any other extraordinary procedure, as it was the Supreme Court decision in the case.

⁶¹ The figure of the *amparo*, or injunction, is explained in the second part of the next chapter.

⁶² On the one hand, the intervention of the Court in similar cases was unusual, and perhaps even unprecedented; the facts of the case therefore pointed towards an evident selective application of the *desafuero* within the Court. But the whole process was surrounded by legal irregularities: the Legal Assembly of Mexico City presented a *controversia constitucional* (to understand the concept see next chapter) accusing the Senate of exceeding its faculties (Controversia Constitucional 23/2005). The Court rejected the *controversia* not because of its content, but because of the lack of clarity from the ALDF regarding its capacities to stand in the Court (for a juridical analysis against the process see Flores 2006).

intervention, the perceived passivity of its decision, and the lack of independence in the resolution of political conflicts in the eyes of the general public. But the most powerful outcome of the process was the extraordinary publicity given to López Obrador's coming candidacy, perhaps because the electorate empathised with his narrative of political victimhood, or perhaps it was because the process touched a general sense of political discontent against the PAN, against the Attorney General who had a close relationship with the executive, and even against the Supreme Court who got seen as if it was acting in unison to prevent the revival of popular leftist politics. The controversy, therefore, consolidated the new leadership of the Mexican left of the period, in a confrontation between a call *to respect the law and the Court*, and the call *to respect the political achievements of the long path towards democracy* (namely the democratization installed in Mexico City by the PRD) (Téllez Parra 2003: 329). This became a process of political legitimation that replicated the same personalised politics on the left that Vicente Fox used for the right to gain the presidency, with not enough consistency regarding the institutional respect of the Court, and not much coherence according to the formalist predicaments of the rule of law.

In any case, López Obrador lost the following presidential election of 2006 against the PAN candidate Felipe Calderón Hinojosa. But the PRD secured the highest number of votes since its foundation⁶³, and it finally consolidated officially its place as the third political force in the Congress. But the presidential vote was too narrow for comfort between the PRD and the PAN, and many people attributed the results to another fraud similar to the one in 1988. López Obrador demanded a full recount, and called (again) to the general public to mobilize in the streets, to invalidate the result, and to dismiss the authority of the President-elect. Another wave of massive demonstrations took place in Mexico City, including a *plantón* (protest camp) that strangled the city for weeks.

After the election, López Obrador created a symbolic “Legitimate Presidency”, with a

⁶³ In various elections the PRD had formed alliances with other smaller parties. For the 2006 elections it created a joint candidacy with the Workers Party and the new party *Convergencia*. The majority, therefore, ought to be understood in the context of the alliances and the investments that smaller parties made in the PRD as the only realistic possibility to gain presence in the Congress.

group of politicians in resistance standing as his shadow cabinet, recognized by his supporters as a parallel government but mainly perceived as a “non partisan” force of opposition against the presidential authority of the PAN. Throughout the whole period, from the *complot* to the Legitimate Presidency, the PRD struggled to handle its internal fractions, and also had to respond to those members who were formerly social leaders and now were pushed into the new profile of the party. As described by İlgü Özler (2009) the process became a dispute about transparent personalised politics that dismantled “the promise of partisan politics” which had underpinned the PRD’s legitimacy for almost two decades. Some of those actors could no longer find a place within party politics anymore. The electoral process overtook the new left, imposing an intense space of allegiance to López Obrador as opposed to the articulation of professional politicians with an ideological party base, reinforcing a new version of clientelism in Mexican politics. This new clientelism, with its added twist of participation from the left, trumped both the rule of law and the arrangements of representative democracy.

V. MEXICO CITY BECOMES THE CITY OF FREEDOMS

In making new connections with social movements, carefully calibrated in line with his electoral priorities, López Obrador as Head of Government avoided all public commitments with the feminist, lesbian gay and transsexual, and sexual rights movements. He insisted that sexual policy and law making on issues of sex and gender were decisions that should be subject to popular referendum and postponed bills on civil partnership and same sex marriage (also reforms on abortion), contradicting his politics with a political decision to “leave minority rights in the hands of the majorities”⁶⁴ in what Rafael de la Dehesa sees as the effective block of sexual rights proposals “behind the public face of direct democracy” (2010: 161)⁶⁵. Nevertheless, a great number of sexual rights activists saw themselves as allied to his electoral project and his promotion of

⁶⁴ Interview Francisco P. summer 2012, Mexico City.

⁶⁵ See Antonio Medina’s column on Letra S “AMLO: ¿Conservador o liberal?” In http://www.notiese.org/notiese.php?ctn_id=5476 (Last accessed Apr 14th 2014).

populist dialogues focused on reforming union systems, pro-poor regulation and the guarantee of workers' rights, and even the consideration of ideas of welfare benefits in Mexico. However, after the 2006 election and his claim of electoral fraud, as predicted, all his politics were defined as an opposition against the president⁶⁶, and the gap between conceptions of democracy in legal terms, and conceptions of democracy in the streets (by López Obrador's supporters) widened.

The sexual rights agenda was inherited instead by his successor. After he left the office to prepare for national elections, he was replaced in interim by Alejandro Encinas for half a year before the next election. Encinas had no option but to keep a low profile, given the level of controversy that surrounded the elections. Marcelo Ebrard Casaubón succeeded him in the next election in 2006. Ebrard had a modest political profile; he originally contended against López Obrador with a small political party in the local elections of 2000, but cancelled his campaign in order to join López Obrador's candidacy in a party alliance on his favour, and was later invited to become the city's Chief of Police. Once he became the Head of Government, he compensated for his lack of personal links with social movements with an intense promotion of the mainstreaming of gender, non-discrimination policies and diversity discourses that up to this point had been put off the party's agenda. With Ebrard came an important promotion of those party members previously involved in the sexual rights movements, particularly those with links to the lesbian and gay movement.

It was his office that promoted the legal reform for the decriminalisation of abortion of 2007 and the reform of same sex marriage of 2010. Those are the reforms that triggered the appeals of unconstitutionality to the Supreme Court by the General Attorney and the President of the CNDH. Chapters 3 and 4 in the next part of the thesis will refer only to this period, but now with the precedent set of the consideration of the PRD legacy that Ebrard inherited, and of the stage of rupture and the postponement of democratization as

⁶⁶ Soon after the elections the state of Tabasco, where López Obrador is originally from, suffered a dramatic flood that attracted the attention of most politicians but not his. Also the "war on drugs" initiated rapidly by President Calderón went almost unnoticed by the new partisan left who joined the civil mobilization against it only later.

the (still not achieved) consolidation of the rule of law, of accountability and justice. Ebrard Casaubón started promoting Mexico City with the slogan of “*La ciudad de las libertades*”, or “the city of the freedoms”, a slogan drafted by his communications team for an advertising campaign anticipating his self-promoted presidential candidacy for the PRD in the federal elections of 2012⁶⁷.

The slogan was welcomed by some social organizations, inside and outside the PRD, organizations who decided to embrace it with pride as the city became the example of respect for human rights and promotion of the expansion of “more civilised, human and equal relations”⁶⁸, presumably compared to the rest of the country that was by then suffering the rampant insecurity and extreme violence of president Calderón’s war on drugs. *La ciudad de las libertades* is the illustration of the outcome of the history of the democratization of the autonomous Mexico City, the development of unprecedented participation of civil society in institutional (partisan) politics, the priorities given to social policies over the aggressive economic development that marked the presidential agenda (more notably after Carlos Salinas’ neoliberal project), and recently in Ebrard’s record, the unedited lead taken in sexual rights dialogues by the PRD policies⁶⁹. After Ebrard gave up his mandate in the city to dedicate all his political work to the coming presidential campaign (and this gives a bad closure to our trajectory of wonderland with Heads of Government projected towards electoral competence) but the PRD decided to give the candidacy once again to López Obrador in the elections of 2012. This time the PRD lost against to the candidate Enrique Peña Nieto, who returned the presidency to the PRI. López Obrador responded again with a call to reject the electoral results⁷⁰.

⁶⁷ Interview with Jorge V., Mexican journalist, summer 2012, Mexico City.

⁶⁸ See <http://www.paginaciudadana.com/la-ciudad-de-las-libertades-o-de-los-derechos/> and http://www.razonypalabra.org.mx/Comun_Javier%20Carlo/2012/222012_Comun.html Last accessed April 9th 2014.

⁶⁹ The motto continues is still in use today in the city, and with the same symbolic impact. For example in March 2014, the new Head of Government (Manuel Mancera) hosted a public ceremony where he acted as the “best man” for the marriage of fifty eight same sex couples, who celebrated the event as “yet another event in the city of freedoms”. See <http://www.proceso.com.mx/?p=367796> Last accessed April 5th 2014.

⁷⁰ He quit the PRD and in 2014 founded MORENA, the Movement for National Regeneration, a civil movement that gained its register as a political party in anticipation for the local elections in Mexico City of 2015.

When I was reconstructing with Carolina B. and her colleagues, the idea of the *ciudad de las libertades*, and her notion of wonderland (in the same conversation that opened this chapter) she expanded:

“When I say Wonderland here I am only talking from an intuition (...) I talk about Wonderland because this is the only way that I can understand the achievements of the [federal] government and the City since 1997, achievements that nevertheless left us in a military state! (...) the war [on drugs] is not part of our sexual rights dialogues, neither has it been assimilated in the collective imaginary of the city (...) I wonder then how good those rights were from the beginning, are they really strengthening the rule of law? It feels as if all the rights we have been winning will eventually bounce back on us!”⁷¹

The presidential elections were celebrated only a couple of weeks after we met. Not only had López Obrador rejected the results, but there were massive mobilisations around the country, organised both within the oppositional party structures and by a national youth movement of no political affiliation (known as #yosoy132). On the day when Peña Nieto took the constitutional oath 92 people were arrested in Mexico City after they clashed with police preventing public riots, mostly young protesters and a couple of journalists documenting the civil unrest. The National Commission of Human Rights of Mexico City reported 22 arbitrary detentions and investigated 4 claims of torture⁷². The new Head of Government, Miguel Ángel Mancera, was severely criticised for publically supporting the police intervention and the judicial processes against the detainees. The PRD in Mexico City then drafted a bill that restricts all forms of social protest to “perfectly legal means” to prevent “all detriment of public peace and public tranquillity” (enacted in December 2013).

What Carolina’s concern was before the election is what was pointed to me as the main lessons of Latin American activists: the disconnection between the progressive development of democratization (understood in this case as the institutionalization of electoral competition and empowerment of leaders within partisan politics) that promises

⁷¹ Interview with Carolina B. June 2010 in Mexico City.

⁷² <http://mexico.cnn.com/nacional/2012/12/06/derechos-humanos-del-df-investiga-torturas-a-detenidos-el-1-de-diciembre>. Last accessed Sept 10th 2014.

to bring us closer to the rule of law, and the optimistic promises of rights (and freedoms) imagined by grassroots social movements, that promise social justice, emancipation and accountability. The disconnection between the two however is not absolute, they remain synchronized in the political imaginaries of both professional politicians and activists, but when the means and the ends of social justice merge in one same narrative of an imagined better future, that tends to favour the narration of the rule of law with authority to determine which projects of improvement are subject to regulation and which ideas of exclusion are considered in legal and political slang (Santos and Rodríguez Garavito 2001), and which conflicts can be made intelligible with liberal, legal language (Merry 1982).

The synchronised disconnection of the two narratives of progress, the progress that is announced with the consolidation of partisan institutions and the progress of the social movements imaginaries for emancipation, plays a very specific tension in Latin America. Ana G., a lawyer and feminist activist summarized it as the continuum diagnosis of Latin American human rights struggles:

“If there is something that makes the Latin American processes of rights activism so peculiar, it would be that in our work we ought to consider that with the rights we win, other rights (and sometimes the same) will be taken away from us, always depending on the shifts of political profiles of our governments and allies; the Latin American bargaining of rights offers no opportunities to ensure their permanency or expansion”⁷³.

The progress of human rights is never linear. A right that has been won can come thanks to a better state or a better legal system to grant it, but may also without either of them, but our observations on legal reforms however still tend to come supporting images of the state that seem to be prefigured in anticipation of our desire for legal reform. If I claim that the narrative of progress and improvement of the institutions of the state in the rule of law overshadow radical desire for emancipation of grassroots mobilization, it is because the first one owns the means that represent progress, and apart from profiting from their electoral capital, it uses those means to temporarily resolve (or postpone)

⁷³ Interview Ana G. in July 2010 in Mexico City.

political crisis: the metronome of progress is appropriated by elections and political leadership, it can be stimulated by constitutional moments (I dedicate the next chapter to expand this claim), and is shaped by ephemerides of progressive legal reforms. What we have sketched in this chapter is a suggestion on how in the Mexican scenario the social movements started gravitating towards the desires of the state as well on their attachment to the state. I have not gone deep into the history of social movements, but the few notes shared have been suggesting a shift from carefully negotiated alliances with parties of movements identified with long ideological leftists traditions, to social movements partially immersed in demands of professionalization and the political opportunities given by partisan politics. I have been suggesting, so far, a careful analysis on the current context when politics have turned to the law, and partisan politics have become normalized as common means to achieve homogenised goals heavily dependent on the overloaded values of new nationalistic identities, or as it is the case of Mexico City, new identities as the markers of modernity and novel expressions of citizenship.

CONCLUSION

The story of *La ciudad de las libertades* led us to the moment where the legislative reforms in sexual rights were made possible, but also to the historical time when it finished. To read the success of sexual rights language in Mexico City outside of its geographical and temporal borders is to postpone the history of assimilation of grassroots human rights activists into partisan politics in Mexico, normalising it as a basic condition for political resonance and political opportunities. It is the postponement also of a critique of the continuation of the personalistic style of politics left behind by the PRI in the country, and the new populists politics that separated leftists politics from their original ideological components, determining heavily the new political opportunities by electoral priorities and personalistic leaderships.

In specific historical conjunctures certain human rights narratives gained momentum, and so did the sexual rights movement. On that momentum social movements foster the

development of *some* new political relations: partisan politics, professionalization of activism, even abortion and same sex marriage as markers for progressive citizenship in the City, but there is great risk in accommodating those momentums as ideas of progress if we do not question first the competing political forces that determine the way progress is conceived, and what the criteria are to feed it. In order to celebrate the sexual rights of *La ciudad de las libertades* it seems that we need to participate from the way it closes the historical fights of social movements for recognition with a legal reform, because it did it despite the postponement of the politics of many others, as I emphasize in the coming chapter. The claim to articulate, for example, sexual rights and the right to protest as intrinsically related (in the very same fashion that sexual rights were conceived in the first place in Latin America⁷⁴), seems to be losing its connection when progress is fragmenting agendas according to the limited opportunities that institutional politics offer.

In this chapter I have sketched of a map in which I introduce the political precedents of the momentum of sexual rights reforms, indicating the appearance in Mexican politics of key actors that will be recognised when they return in the following chapters (the Head of Government of Mexico City, the presidents of the Republic, and the expert tutors represented by the CNDH and the PGR). I suggest that each one's trajectory in the decades of democratization will give an insight into the way they intervened in sexual rights reforms as they did. We have tools to infer why Rosario Robles promoted the first reform on abortion in the context of the specific demand of legitimacy from the social movements, why López Obrador broke relations with the sexual rights agenda, and why Marcelo Ebrard restored them as a strategy to enjoy the legitimate recognition of social movements who see themselves represented in electoral promises; we have tools also to start imagining why the constitutional reforms of judicialization made sense at the moment they did. It is crucial then for the next chapter to keep in mind the indirect relation between electoral cycles and judicialization, to start making sense of constitutional reforms, why certain authorization preceded others, and to also understand why the sexual rights agenda became on its moment an incipient sign of judicialization.

⁷⁴ I am talking here about the early mobilisation of reproductive rights as spaces of resistance against dictatorships and authoritarian states, presented in the introduction.

I organized in this chapter my own historical account of judicialization through different phases or cycles. I have attempted to explain my sketch of political precedents in the chapter with references to the *sexenios*, the six years of a president in office, convinced that the electoral cycles have mediated in Mexico the different promises for change. I have started to pay more attention in this chapter to the PRD's path across the last four *sexenios* to illustrate the institutionalisation of the opposition in Mexico, without talking about the emergence of smaller parties in the opposition, but only because I am aiming to emphasise the contrast between Mexico City's progressive reform and the political agenda of the executive, the relation between the PRD and the PAN. I have suggested that the PRD can be seen today as the main ally of sexual rights activists; the presentation of the case studies in chapters 5 and 6 will contradict this statement revealing the ambivalent commitment the party has had with the agenda, always because of its electoral priorities. It is still relevant, I argue, to focus on the PRD because it is the party that ultimately claimed the success of the reforms as its own merit, while reproducing the main vices of personalistic politics that indirectly boosted the sexual rights agenda.

Chapter 4

CONSTITUTIONAL MOMENTS IN MEXICO

I explained in the last chapter that the contextualisation of the sexual rights cases as the diagnosis of a new rights culture in Mexico requires the careful narration of the immediate history of democratization that precedes them. The narration, however, has to avoid being simplified and presented as a certain agreement over history that we cannot not want, because if we present it as the development of an inevitable and homogenous certitude of progress we will necessarily depend on the excess of meanings attributed to the values of the democratic nation, and that means neutralizing both the power of history and the desire for the future as exclusive attributions of the legitimate power of the state. The story of democratization that precedes the happy judicialization of sexual rights then has to be broken, for the purposes of this section, into at least two different stories. The first of these covers the political encounters that happened in parallel to the institutionalisation of sexual rights that the previous chapter touched upon: elections, new party leaderships and oppositions, the turn to law that attracted all political action to law. The second is the story of the Mexican Supreme Court and the inauguration of judicialization through constitutional review, the attribution of values over the hope for the new culture of rights recognition. The story of the Supreme Court ought to prevent the enthusiastic linear representation of a series of events and junctures unfolded to make sense of -and to establish consistency with- the path of judicial reforms and institutional adjustments of the Court. We have to assess the story of the Supreme Court, and the expert tutors that intervene in it, before we assess the role that sexual rights play in Mexican history.

The events that build the story of the Court coincide with the history of *La ciudad de las libertades* in junctures that both set up the rhythm of political development of Mexican

institutions, and appealed to the hope and expectations of citizens during the transition from the “democracy within reason” of the PRI to the contemporary culture of rights. But the story of the judiciary and the Supreme Court deserves to be told on its own, because only presented independently can we suggest the way in which the promise of judicialization could fill the lacks and gaps of legitimacy of institutional authority that the story of judicialization kept deferring. The discontinuity of the story of judicialization, different from the general story of democratization, is the demand of the analysis of the independent trajectory of the Court to break the assumed aspirations of structural coherence of democracy, and demystify as well the explanatory arguments about the authoritarian legal culture as a permanent condition that leaves Mexican culture always ill-suited for the establishment of the values of the rule of law⁷⁵, which still depends on overloaded values, dismissing, and postponing, the actual enablement of political authority in judicial institutions.

Since the beginning of the process of democratization in the mid 1990s, marked by the end of the PRI presidentialism in Mexico, while the executive had been investing most of its political resources into the restoration of political authority (responding to the unprecedented competitive opposition and the decline of the legitimacy of the party), and the legislative had been focused on the establishment of electoral alliances for new democratic opposition, there has been an enormous potential to look at the judiciary as if it “appeared” as the most competent governmental institution capable to balance the democratic order (for legal and political thinkers), and as the most suitable recipient of the projection of new lawful relations also the best equipped to host the promise of a new rights culture. The promise of judicialization materialized firstly in the constitutional reforms that equipped constitutional courts with rhetorical protections for rights and substantive justice and tools for constitutional review (Couso 2010, López Medina 2004), and secondly, in the citizens’ hope for the Courts’ capacity to repair the presidentialist tradition of authoritarianism, metaconstitutionalism, and centralization of political power; the patterns of belief that hope inaugurates that depend on the (most of the time

⁷⁵ See from last chapter Esquirol 2003, 2009.

unrealistic) hope for the Courts' efficacy (see García Villegas 1993; Lemaitre Ripoll 2009).

The chapter replicates somehow the historical trajectory of chapter 3, but with exclusive attention to the Court and its own institutional transformations. I suggest in this chapter 4 that constitutional review was promoted in the Mexican Supreme Court when Mexico reached the peak of judicialization, at the same time as it was receiving the sexual rights cases. In this momentum the Court got more political attention than it had ever experienced or knew how to handle, so it later moved towards the narrowing of constitutional control to moderate the political expectations it raised: it was put at the centre of public scrutiny receiving the most controversial cases in Mexican politics, which made it retract with self-restraining decisions and ultimately call for a last constitutional adjustment to narrow its capacities in the last reform revisited in the chapter. There is only so much the Court could offer to Mexican politics, but social movements demanded much more from it, if not as a direct and calculated demand to the Court, then to the whole of the legal system to which the judiciary was only opening unexplored routes of access. The opening of the Court in most processes of judicialization has always been exclusive to political elites, and the impression it gave in Mexico of a wider opening (with activists adjusting claims to the tools of constitutional control available) was quickly censored.

The chapter is organized around the chronological narration of Mexican constitutional moments. I have talked about them in chapter 2, they represent the organization of the national history through the constitutional reforms that attract exceptional attention on state politics, stimulating political expectations about the country's return to normal politics after periods of conflict and agitation. I have selected the few reforms that gave the Supreme Court the shape it had at the moment it received the cases on abortion and same sex marriage. I have paid attention to the external political bargaining of the role of the Court in the transition from presidentialism to democratization, to the way it came to occupy the gaps of legitimacy that other political institutions left, and also the way it came to alleviate political crises with promises, replicating (in the theoretical depiction)

the symbolic power constitutional reforms have achieved in other countries (as I have mentioned before, the role that constitutional reforms had in Argentina, Bolivia, Colombia, and Ecuador).

I start by addressing the concept of constitutional moment to reflect on the place it might have in Latin American politics. I emphasize the excessive frequency with which constitutional reforms are now called, trying often to imitate the spirit of constitutional moments to renew the hope for political transformation while maintaining the legitimacy of the legal system. I start the trajectory in 1994 when Mexico was getting ready for its first play of democratic opposition and had to set up the constitutional court and the rules of a new federalism, distributing unedited authority between different political actors assuming that this would have them spontaneously taking over the new systems of checks and balances after the presidential figure lost its unquestioned monopoly of authority.

A second important moment came when for the first time an oppositional party defeated the PRI in the 2000 election for President. The shifts of representative authority of the executive and within the Senate were assimilated as the most progressive outcome of the time, because the civic mobilization in support of Zapatismo (which I argue has been the very first attempt to conceive a new model of the state from below in contemporary Mexico) was dismissed as politically irrelevant to constitutional affairs and the imaginaries of change of the nation. The promises of rights in 2000 reduced the project of rights to an investment in transparency for public institutions, and that included having the Supreme Court at the centre of the political arena. This is the time when Court processes started to attract the attention of civil society, and the formalist limits of the judiciary started to be perceived as failures of the old judicial system for which the new Court was expected to compensate citizens.

The celebration of the sexual rights cases that infer a progressive profile in the Court overshadows the formalist restrictions of the judiciary (the judiciary cannot intervene in political processes) and at the same time sidelines those other cases that could suggest instead the rebound of the human rights culture. I list in the chapter a few important cases

that implicated the Supreme Court before the abortion arguing that those were stimulated by the “justice cascade” that brought some of the most controversial cases in Mexican politics to the Court, even if the Court was not prepared (or qualified) to provide salient responses. Before moving to the next chapter and the presentation of the case studies, I present the conclusion as a *democratic objection*, exposing the theoretical resistance against the activism of the Mexican Court, against the expectations of critical optimism fixed on its capacity to reimagine the democratic order by imposing juridical content on the constitutional rights of citizens, even over theoretical prescriptions about its relation with politics. The critical optimism explores the possibility of the Court relating to notions of democracy perceived by social movements, assimilating the notions of rights as conditions of possibility for subjective empowerment.

I. CONSTITUTIONAL MOMENTS

Constitutions in Latin America represent the most powerful object of hope in the new democracies. They signify the fundamental source of identity for the state and its communities: in political contexts of turmoil and uncertain transformation it is presumably constitutions that keep nations coherent and connected with their future. They represent the most ambitious investment citizens make in the law: they reactivate political energy and inspire desires of emancipation among those who have been materially excluded from the state and its institutions, as a possibility for inclusion in the lawful relations⁷⁶ of the modern state (see Gargarella, Domingo and Roux 2006; Peruzzotti and Smulovitz 2006: 13). Mauricio García Villegas illustrates the spirit of new constitutionalism in Latin America confirming “we are well acquainted with the idea that the destiny of our societies depends in large part on having good constitutions. It seems natural to us to link social progress to the promulgation of a political constitution” (2002: 353). When we talk about judicialization we talk about the instrumental materialization

⁷⁶ I have used the concept of lawful relations and political relations from the introduction. It speaks of the semantic authority liberal legal theory has to determine what constitutes an appropriate relation that is intelligible for legal systems imposed as the only relevant forms of existence before the law, which excludes all form of pluralism and alternatives to normative systems (Santos 2007).

of the promise of the constitutions, suggesting that it is what keeps alive the aspiration for a change that will come through the law.

Now, we have to make the investment in constitutions as vehicles of hope somehow harmonize with the awareness of their limited emancipatory potential, because that is the characteristic paradox with which all legal systems operate in the region: the same institutions that have used their power as a repressive means to establish exclusionary hierarchies have for the last four decades of democratization been using the very same tools to creatively produce prospects for the full exercise of citizenship (and inclusion in the structure of the state invoked by some of the weak and marginalized), and to creatively regulate rights that will be enforced in the near future to bring about social change (for the critical appraisal of the paradox between regulation and emancipation see Sieder 2011: 241; Santos 2002, 2007).

Judicialization can be characterized as the regional spread of a willingness to make use of courts to enforce constitutions, inspired by the utopian promise of quasi-natural entitlement of rights to direct new priorities of regulation in the state. It is because of its capacity to inspire symbols like those that judicialization became so lucrative (or capitalizable) for the new institutions of democracy. The most heated political junctures in the region frequently involve the drafting of a constitution (or constitutional reform) to reinforce the strong belief in the possibility of a better future (García Villegas 2001, 2002); but constitutional reforms in Latin America do not resolve the power struggles that precede the constituent moment, they only postpone them through their symbols (see the discussions in the edited collections of Dezalay and Garth 2011, and Domingo and Sieder 2001). Constitutional reforms often target institutional adjustments and political commands dictated by a legal transnational agenda (as opposed to participatory processes where constitutional meanings open for socialisation in local communities) (Santos and Rodríguez Garavito 2005). This agenda can only be imported by local elites (the selected legal and political actors *authorized to speak to the law*, or on behalf of the law, with authority to mediate the conditions of inclusion for the other actors who desire it). The paradox of new constitutionalism consists of the way the hopes of democracy shared by

citizens are translated by local elites as assumption of willingness of the citizens, *object[s] of democratic pedagogy* (Bhabha 1990), to learn the *idées fixes* that have been settled as the objective precepts and values of the rule of law.

Because of the way the political decisions that have articulated the process of judicialization have been taken in Mexico, the story of judicialization has been organised by political elites as *constitutional moments*, so it can be codified in such a way that it can rescue the hopes of their promises and legitimize the Court through ensuring citizens' attachment to it. Presented in chapter two with Bruce Ackerman's work (1984), constitutional moments occur as those rare historical junctions of exceptional politics and profound ruptures that push institutional reforms as necessary -or unavoidable- in the context of civic unrest, or any other political occasion that engages the general public in an exceptional fashion. Theoretically, constitutional moments are determined by the adjustment of institutional policies as consequence of collective deliberation: they reconcile competing claims with constitutional resolutions, and they fabricate (or renovate) constitutive visions of social pacts to alleviate the desire of citizens for a renovated political identity. Politically, constitutional moments are the shifts that are justified rhetorically by *fictions* of collective deliberation and projections of desire for state law. In the *right political context*, constitutional reforms are embraced as such even when they do not produce new legal forms, or when they do not offer realistic possibilities of significant change in the medium or long run, but only because of the way they imitate the symbolic promise of change, already overloaded with the excess of meanings of democracy that is forced in a determined historical moment (see Miller 1993: 1064; Ríos Figueroa 2007).

Latin American constitutional moments have been mostly led by interest group-dominated politics. That counts for Ackerman as normal politics and not constitutional moments (1984: 1022). However, I claim that Latin American new constitutionalism expresses itself through constitutional moments because of the way those expand the domain of legal-bureaucratic regulation. The most powerful constitutional reforms in the region, and particularly in Mexico, become *ephemerides* of contemporary legal and

political history (like Ackerman's in the history of the US), and somehow represent the constituent spirit of the revitalization of constitutions at the centre of democratic politics, the renovated legitimacy of the governmental authorities that promote them and provide for their enforcement (vid. Ibarra Olguín and Magaloni Kerpel 2008).

Throughout the region, constitutional moments have proved their ability to unite in a same historical event 1) the rhetoric of governmental promises for new social pacts in the spirit of the new constitutionalism (the restoration of nationalist identity through material stimulus of constitutional control) (García Villegas 2001); 2) the reparation of national identity after crises of legitimacy and security (see García Villegas 2003: 33); 3) the satisfaction of theoretical expectations of legal scholars interested in the promotion of the common features and the ideological principles of an efficient rule of law (see Uprimny 2011: 1589); and 4) the development of human rights language in the constitution that is made available to citizens so they can set up new grounds for strategic litigation and expand (or contract) their investments in the constitutional interpretation of human rights (Morales Aché 2008: 169, 177). These four features are always jockeying amongst themselves for predominance, or modifying one feature to make it fit the pattern of the others, permanently changing in each constitutional moment, always depending on the intensity of the crisis each aims to resolve, and the actual authorisation of social actors to participate in the deliberation of the common terms of engagement.

Constitutional reforms became a political strategy to restore governmental authority and a recurrent resource since the 1980s in the region: between 1978 and 2009 the region's total of 18 countries has produced 15 new constitutions, and a total of 326 partial reforms have been promoted. In Mexico the excesses of constitutional reforms started with Carlos Salinas de Gortari's immediate predecessor: Miguel de la Madrid Hurtado (in office from 1982 to 1988), who altered the frequency of constitutional reforms approving 66 in just 6 years. Before him the average was sixteen reforms per presidency, and after him the average almost quadrupled to a minimum of 60 reforms per president⁷⁷. The strategic

⁷⁷ The highest numbers of reforms were implemented by Felipe Calderón with 110, followed by Ernesto Zedillo who approved 77.

alteration of the Mexican Constitution of 1917 -one of the oldest constitutions in Latin America, but also the most reformed- proved to be an effective strategy to postpone conflict, to fulfil the imaginaries of political identities, and to produce strong symbols capable of compensating for political crisis. In the literature of new constitutionalism, not enough theoretical attention has been given either to the lack of implementation -and routine postponement- and what that says about the promises contained in the texts (Uprimny 2011: 1609)⁷⁸, nor to the frequency of reforms as a dependent variable and theoretical determinant of judicialization. There have been studies in comparative politics focused on patterns of constitutional design, on the role of constitutive power in national identity, and some interest in the outcomes of institutional reform in political junctions, and in the evaluation of exceptional success that informs a generalized idea of the progressive character of constitutionalism⁷⁹; but not enough light has been thrown on constitutional reforms as a means to produce fictions of constitutional moments.

II. MEXICAN CONSTITUTIONAL MOMENTS

The Mexican constitutional reforms that occurred between 1994 and 2001 were all state-led attempts to put the constitution back at the centre of political life, reclaiming its normative status after being displaced for decades as a true juridical norm (Carbonell 2006: 229). They were triggered by the urgent need to resolve and postpone political crises (and not by a political will for substantive transformation), and materialized with new human rights language, with the Supreme Court left in charge of their materialization with the tools for constitutional review: the *acción de inconstitucionalidad* [appeal of unconstitutionality], *controversia constitucional* [constitutional controversies], *recurso de amparo* [amparo writs], and the *facultad de investigación* [faculty of inquiry].

⁷⁸ There are, of course, exceptions, among those the work of Uprimny himself, Pilar Domingo, Roberto Gargarella, Christian Curtis, and the frames offered by Boaventura de Sousa Santos, all referred to in different parts of this text.

⁷⁹ For a literature review and statistic analysis on the frequency of constitutional reforms see Nolte 2011.

Beyond the practical character of constitutional control, I characterize three Mexican constitutional moments in the chapter through the following features: 1- historical events that have not been produced by open public deliberations, but instead executive-led readjustments of governmental institutions (originally aimed at refuelling presidential legitimate authority), 2- moments triggered by exceptional political events, but not representative of exceptional politics; these were savvy political routines of the executive that were used in fact to reorder crisis into normal politics, 3- moments which have not represented major shifts in the Mexican culture of rights, by comparison with the unprecedented utopic aspirational promises they make, particularly to those disenfranchised in the current structure of the state. As I have already stated, Mexico has not had *proper* constitutional moments in the last decades, but the three that I present here have been particularly ordered in Mexican contemporary history as the ephemerides of democratization, *as if* they have had transformative effects over human rights culture.

The reform of 1994, whose main rhetorical promise was to reinvigorate tools for constitutional control and promote the judicial independence of the Supreme Court, represented politically the last burst of executive power at the end of the presidentialist regime of the PRI. From the three constitutional reforms this is the one that had the most substantial effects in the transformation of political relations in Mexico, not because of its legal prescriptions, but because of the historical context in which it was urged. The second reform of 2001 was a political reaction against the emergency of the Zapatista uprising. This reform was going to shake the constitutional establishment because its original ambition was the recognition of Mexican plurinationalism, the assertion of control over resources and justice systems that rule *de facto* in some parts of the country, and the opportunity to reimagine the meaning of human rights in the country. But the reform was used instead as an early lesson to the citizenry about the insularity of the constitutional text, the impossibility of using it as a tool for emancipation for those who do not belong in the liberal project of democratization. Nevertheless, at the same time that it reconfirmed the exclusion of indigenous people from the national project of modernisation, the reform of 2001 became one of the crucial constitutional pillars for sexual rights claims later on. It was definitely a market for the coming culture of rights,

moulding the coming projects of rights now included in the brand new nationalistic imaginary, and emphasising the exclusions of those pedagogical objects of democracy whose presence has been ignored in democratization.

With attractive capacities of constitutional review that appeal to new social actors (and I am saying they appeal to them, not that they were made available to them), and an unprecedented demand for intervention from civil society, the new popularity of the Court soon felt the stress of its political paradoxes, starting to attract highly politicised cases that compromised its position as an independent court: some of those the Court could neither have resolved, nor have not received because that in itself would have been a political choice, to not attract the cases that no other legal or juridical institution would attract. The opening of the Court at the end of the trajectory of judicialization called then for an urgent moderation of its capacities, to lower its profile in order to hold on to its legitimacy.

II. 1 1994. The end of presidentialism.

The constitutional reform of 1994⁸⁰ inaugurated the trajectory of judicialization in Mexico and of our account of constitutional moments, it granted for the first time legitimate and effective authority to the Supreme Court of Justice in Mexico, but also because it initiated a rushed project to establish a “new federalism” in the country, or actually, it set in motion the basis of a federalism never before consolidated in Mexico (García del Castillo 1996: 100). In his inaugural speech that year president Ernesto Zedillo Ponce de León celebrated:

“Today, more than ever, Mexico must be a country of laws . . . It is necessary that the authorities function in the framework of the law, that rights be acknowledged, and differences resolved according to the law . . . We cannot set our expectations on guarantees . . . The time has come to liquidate centralism and to contribute to the deployment of the strength of the different regions that bring identity, energy and

⁸⁰ Published in the *Diario Oficial de la Federación* [the Mexican Official Gazette of the Federation] on December 31st 1994.

plurality to Mexico. Because it is the demand of Mexican people, we will advance towards a new Federalism where the states and municipalities are stronger, and all decisions are taken by deliberation on benefit of the communities (...) Mexico demands a reform, grounded in the widest political consensus, in order to dissipate all suspicious and recrimination that tarnish electoral processes (...) and electoral legality”⁸¹

Zedillo became the president only on December 1st 1994; the constitutional reform was already planned before the oath of presidency and was his first political action. In his statement, Zedillo practically acknowledged the absence of the rule of law in Mexico and hence placed judicial reform at the top of his political agenda, and he indirectly recognized the type of authority and electoral irregularities that had maintained the PRI in the government with an urgent call to reform -not because he aimed to bring new or modern structures of legality- but to reconcile his authority with the very basic conditions of the rule of law whose reform his predecessors in the party had not thus far taken as a priority (Buscaglia and Domingo, 1997; Jones 1998).

Zedillo was therefore the first president of the PRI who embraced the task of redeeming the authority of the party in democratic terms, in conditions of extreme fragility after the political turbulence in which he took the presidency. He replaced Carlos Salinas de Gortari as president, who had won in 1988 in what has been perceived to be the most fraudulent elections in contemporary history; he also assumed the PRI candidacy only after the murder of the original candidate Luis Donaldo Colosio⁸²; on January 1st of 1994 the Zapatista uprising started, when Salinas had signed the NAFTA; besides, only a few

⁸¹ Reproduced in Spanish in <http://zedillo.presidencia.gob.mx/pages/disc/dic94/01dic94-2.html> Last accessed Jan 14th 2015.

⁸² This was not the only assassination perceived as politically motivated at the time. Luis Donaldo Colosio Murrieta was assassinated in March 1994. In May 1993 the Cardinal Juan Jesús Posadas Ocampo was also murdered; the Attorney General (and former president of the CNDH) Jorge Carpizo concluded in an investigation that the cardinal was mistaken for the leader of a drug cartel in a vendetta dispute, a very unpopular conclusion among the general public. And in November 1994, the month before Zedillo took the Oath of Office, José Francisco Ruiz Massieu, Secretary-General of the PRI, was shot dead in Mexico City. The three crimes were publically perceived as political crimes, and were politicized as an outcry against impunity in the country.

weeks after he took the presidency, on December 20th he had to announce the devaluation of the Mexican peso, halving its value and setting off a severe recession in the country.

The constitutional reform shook the political tradition of the party with the decentralisation of power and the suggestion that this would end the monopoly of the authority of the state. Zedillo appointed a “special assistant on new federalism”, who had no political career within the PRI, in order to ensure objective observance of the separation of powers in a real system of checks and balances, outside of the familiar personalised politics of the party (Díez 2012: 43). The project transcended the simple administrative decentralization. The new federalism included the redistribution of economic resources and the ascription of new political capacities to the municipalities, who previously had no effective power in law making functions which were concentrated in the capital (MacDonald and Mills 2010: 187). The municipalities were targeted as the new fulcra for the party, seeking not only to strengthen the efficiency of public finances through more effective ways of managing local budgets, but also to share responsibilities with the central government regarding the demand for participation from civil society which was then boldly demanding a role for itself in political processes and decision making (García del Castillo 1996: 102).

The process has been perceived as the personal project of president Zedillo to “let go” of part of the meta-constitutional reins of power of the PRI. In those terms it was mainly a strategy to empower new leaderships in ways that the old monopolies of the PRI regime could not have been able to allow, but that the political turmoil of the mid 1990s could not afford to postpone anymore (Ward and Rodríguez 1999: 685). But it is important to remark, that it was Zedillo’s project: the reform did not have a participatory consultation; we are talking of a project of decentralization -designed in the centre- that did not necessarily address the needs (or interests) of the political offices that were supposed to benefit from it, rendering the project (in principle) of little relevance for the municipalities. In practical terms, in 1994 the president did relinquish meta-constitutional authority, decentralize political power, strengthen local authorities, and eventually started

promoting greater plurality, transparency and new rules of electoral observance⁸³. Nevertheless, with a certain element of cynicism the project did not address the rebuttal of the “old” form of federalism in Mexico, it was motivated by the “pressure to make new promises about power sharing into realities” (Merchant and Rich 2003: 662), but with no practical measures that would have made possible the repair of closure of the stories of authoritarianism in the history of impunity in the country.

The promotion of the new federalism and the effective leadership in the states and municipal authorities, originally aimed at meeting demands for political and economic infrastructure, did not target the uneven conditions of power of the different actors to access the new resources. The promise for new legal cultures in the municipalities did not substantially alter presidential authority, either at the federal or the states level, maintaining the uneven capacities of activists to access legislative channels that were still heavily dependant on the states’ executive offices. The intervention of the judiciary in the federal order was not of much significance for the municipalities at this stage; municipal authorities were already accustomed to the hegemonic power of the President and the routines of constitutional reforms destined to mediate their conflicts of interests; access to the Court did not offer a more effective means to resolve the usual clashes of authority (Ugalde 2009).

The political project, therefore, was not relevant for the internal agendas of the municipalities. And the economic project, on the other hand, did not produce financial independence from the central government, modifying only the relations of dependency towards the president. In the middle of the economic crisis and in part because of the lack of experience of self-management within the municipalities, the new federalism increased local debt and the reliance of local governments on Zedillo’s new programmes of social development (García del Castillo 1996: 109), ultimately reinforcing the attachments and loyalty of municipalities towards the PRI through conditioned social projects.

⁸³ Zedillo promoted a big constitutional reform in 1996 to regulate the Electoral Federal Institute (created earlier to observe the 1994 elections), to set up the rules for equal electoral competition, and for the establishment of the Electoral Tribunal of the Federal Judiciary, and a branch of the judiciary in charge exclusively of dealing with electoral disputes (releasing the Supreme Court from that task).

Furthermore, since the project of de-centralization never secured adequate citizens' representation, citizens were pushed to the bottom of a scale of the new hierarchical relations of dependence, and within that level, social relations accommodated poverty, ethnicity and gender according to the now escalated conditions of dependence to access the resources of the new federal state (see Molyneux 2006).

II. 2. The judiciary

By 1994, the judiciary was by far the least developed of the governmental branches (Ward and Rodríguez 1999: 702). At the federal level, almost the full weight of judicial authority was held by the *Tribunales Colegiados de Circuito* [Circuit Courts] responsible for *amparo* writs and remedies of protection for individual rights; but beyond that, the other scant tools of constitutional control nominally in the hands of the Supreme Court were out of circulation. The Court's public image was determined by its lack of autonomous administrative management, and known among the general public mostly because of the typical delays in the delivery of sentences. Nevertheless the judges of the Supreme Court, known as Ministers (*Ministros*) of the Supreme Court (not to be confused with ministers from the Executive cabinet), had blocked previous proposals of reforms because they saw them as threatening the internal constituency of the Court and their personal interests. Judicial adjudication used to be controlled by the plenum of the Supreme Court, sustained under the principle of self-governance that had degenerated into a relation of *clientelism*, where Ministers negotiated each others' votes, albeit always under the surveillance and support of the president (Carpizo 1995: 819).

The reform altered the constituency of the Court to ensure its efficacy and independence. From its first designation in the Constitution of 1917 eleven Ministers composed the Supreme Court. Over the years and because of the lag of cases the number had augmented to twenty six, which actually did not prevented further lags because the administrative burdens of the Ministers had been left untouched. As I said, Ministers had been requesting a reform on the burden of work of the Court, but the risk of changing its constituency was too great for most of them, who had been using the Court to boost their

careers in public service. The reform of 1994 was aimed to bring back an efficient Court and to improve its public perception as the highest tribunal for justice administration. The reform reduced the number of Ministers again to eleven in observance with comparative models of constitutional courts and only three of the previous Ministers remained in the new Court. Through this change, the President absorbed a great part of the responsibility for the new process of adjudication. Whenever a replacement is needed, the President presents a group of three candidates, who have to appear in front of the Senate and be approved by a two-thirds vote. The Senate is entitled to reject the set of candidates, in which case the President has to present a new one. Only in the case of the Senate rejecting for a second time the whole set, or not choosing a candidate in the time limit and with the with the specified proportion of votes, can the President adjudicate directly⁸⁴.

The Candidates are selected from among members of the judicial branch and also, albeit more rarely, among juridical scholars. They have to be younger than 70 years, having completed their juridical studies at least 10 years before selection for candidacy, and once selected they can occupy the post for fifteen years, unless they reach the age limit or are removed from the office in case of a trial of political responsibility⁸⁵. Each of the Ministers also has the opportunity to be elected President of the Court for four years, in charge of representing and administering it. In order to prevent the Court being used as a political career ladder by its Ministers, the new regulation forbade candidates in the 2 years preceding their candidacy from holding office as elected Senators or Deputies, members of the executive's cabinet, General Attorney at the federal level or in the federal district, State Governor or Head of Government in Mexico City⁸⁶.

The Court was set to work in the Full or in Courtrooms (*Salas*). The Full of the Court is in charge mainly of jurisdictional tasks (*acciones de inconstitucionalidad, controversias constitucionales*, and some *amparos*, etc.) and integrated by the 11 members (even if it only requires seven Ministers to officiate a session), and organised to decide with majoritarian votes. The two Courtrooms are composed by 5 Ministers each, the first one

⁸⁴ Art. 76, fracc VIII in the Constitution.

⁸⁵ Art. 94 c.

⁸⁶ Art 95 c Fracc VI in the Constitution.

is in charge of civil and criminal affairs, the second one administrative and labour affairs. Both the Full and the Courtrooms have a capacity to create interpretative criterion in their decisions via jurisdiction. The Full always keeps hierarchical authority over the Courtrooms, and therefore it always receives the most public and controversial cases of amparos, that are part of the jurisdiction of both.

The new Court and its 11 members (only two remained from the previous Court) assimilated the new tasks of constitutional control. In order to reduce the administrative burden of the Court the reform created the *Consejo de la Judicatura Federal* [Federal Judiciary Council] as an entity responsible of the government and administration of the Judicial Power of the Federation, the control and adjudication of circuit judges and *Magistrados de Circuito* [Circuit appellate judges], and the vigilance and discipline of the whole of the judicial system, except the SCJN.

It has been reported that the reform was not welcomed within the top hierarchies of the Mexican judiciary. Judges, magistrates and ex-ministers expressed private misgivings, because breaking the relation of dependence with the executive also threatened the stability and career interests of the ministers of the Supreme Court (Carpizo 1995: 818). Besides, the reform still left a lot of discretionary power to the President, without a transparent regulation for the selection process, and no intervention of the citizenry throughout. While the president has to justify the choices for each of his candidates, there were still some ambiguities left about the partisan alliances established to support the President's choices; there is no way to regulate the exercise of political pressure imposed in partisan alliances in the voting system, and the mere fact that the President can re-present the same individual candidates for selection after failing an initial vote implied the possibility for the executive to insist on his personal nominees: the President is obliged to change the set, but it has always been unclear if that means changing all of the three candidates or if the set is acknowledged as a new one with only one new candidate. In practice a lot of rejected candidates have been re-presented until elected.

The SCJN nevertheless reinforced its authority as a *maximum organ of constitutionality and legality of the norms* by reviving two of the tools of constitutional control that were designed to mediate and resolve political conflicts and controversies of jurisdiction: the *controversia constitucional*⁸⁷ and the *acción de inconstitucionalidad*⁸⁸. Both tools already existed in the constitutional text, but were used only in rare and unimportant cases; therefore they were left untouched and unregulated until 1994 with the promulgation of the regulatory statutes that followed the reform⁸⁹. The *controversia* is the active capacity of the SCJN to resolve conflicts of jurisdiction between two or more public entities, including states, the Federal District, the governmental branches of the 31 states, and the municipalities. The *controversias* can be presented to the Court in the form of a judgement by one entity suggesting the unconstitutionality of general norms or concrete acts of another, requesting their invalidation or the moderation of the power of the states. Whenever a *controversia* is presented by an institution against a law applicable in one state, the decision of the SCJN will not be applicable in other states and only works on a case by case basis, which means that while *controversias* can be effective mainly for political confrontation, they do not resolve structural problems with jurisprudence.

The *acción de inconstitucionalidad* (appeal of unconstitutionality) will become the most important of these tools for our sexual rights analysis. It was through *acciones* that sexual rights accessed the Court with the cases of abortion and same sex marriage. The *acciones* already existed in the constitution, but in 1994 the standing right to submit *acciones* was extended to the CNDH and the PGR⁹⁰. After the reform, the standing rights in the SCJN for *acciones* were authorised when presented by one of the following three groups:

⁸⁷ Art. 105c.

⁸⁸ Art 105, clause I and II, and its regulation.

⁸⁹ Ley reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos.

⁹⁰ Art 105, clause I and II, and its regulation [Art 105 y la ley que reglamenta los incisos I y II de dicho artículo].

1. The equivalent of thirty three percent of members of the Legislative Assembly of a state (or of Mexico City), when the controversy is against the laws approved by the same Assembly⁹¹.
2. By the PGR, when addressing laws from the federation, the states, and the Federal District⁹².
3. By the CNDH and the Human Rights Commission of the Federal District (CDHDF), when addressing laws from the federation, the states, and the Federal District that violate individual guarantees protected in the Constitution⁹³.

Both the *controversias* and the *acciones de inconstitucionalidad* opened unprecedented access to the Court: the first targeting mainly municipalities and states' authorities, very visible at that time in national politics because of the project of new federalism; and the second for the PGR and CHDH as expert tutors in charge of mediating the new cultures of rights with the citizenry. In general, the outcome of the reform and the emphasis on the two "new" tools has been largely attributed to a reconciliation between the Mexican legal system and the "essence" of constitutionalism, the enforcement of what was then only an implicit assumption of constitutional control and the capacity to effectively limit governmental power. So only after 1994 the power of the constitution is consolidated as the test of validity for all juridical norms in the Mexican system (Zaldívar 2008: 686-687).

Genaro Góngora Pimentel, former Minister of the Supreme Court in office from 1995 to 2009, celebrated in retrospect the 1994 reforms of the judiciary both because of what they meant at the institutional level (in the pursue of the effective rule of law and coherent constitutional order), and what they represented for the broader political culture as core priorities for the new federalism. On the one hand, he claims, the reform finally clarified the different competences of the three branches of the government, and the exact role of the Supreme Court positioned between them; but on the other hand, it was only after having an effective, accessible and credible Court that citizens in Mexico could finally

⁹¹ Subsection E on Clause II [Punto E del Inciso II]. The first appeal of unconstitutionality against the *Robles Law* on abortion in Mexico City in 2000 was presented by two political parties (The PVEM and the PAN) under this clause.

⁹² Subsection C on Clause II [Punto C del Inciso II].

⁹³ Subsection G on Clause II [Punto G del Inciso II].

recognize the constitutional federal regime as it was originally envisaged by the 1917 constitution. The reform not only informed the new constitutionalism of the region, but instigated a “local constitutionalism” to be appropriated as the political identity of citizens at the municipal, states and federation levels (cfr. Góngora Pimentel 2007).

As I have already mentioned, before the reform came into force the only operative instrument of remedial law in the Constitution was the *amparo*⁹⁴. The *amparo* has been in the Mexican Constitution since 1857, and it has also been one of the most important contributions by Mexican constitutionalism to other Latin American constitutions. Originally, the *amparo* was intended to defend the constitutional order and its founding principles from the possible despotism of the state, but it slowly became the main instance for protection of citizens against all forms of arbitrary assault on civil and political rights executed by the authorities in the immoral exercise of their power (see Fix Zamudio 1981; Sánchez Mejorada 1946). In the Constitution of 1917, the *amparo* became explicitly linked to claims of workers’ rights, subsequently adopting the shape they have now with the regulation of the *Amparo Law* of 1936, as the means most immediately available to those citizens who can demonstrate that their juridical interests are affected (or threatened) by a law or a public authority. The *amparos* work similarly to special injunctions, as exceptional procedures with remedial effects: they prevent the violations made by a law perceived to run against constitutional principles, repair the acts or omissions made by a public authority, and declare the inapplicability of a law whenever this has already been enacted but in violation of constitutional principles.

The Supreme Court of Justice only hears *amparos* as second or third instance to confirm, invalidate or modify judicial decisions taken by courts of inferior hierarchical rank; although in exceptional circumstances, the Court also received cases directly. The Amparo Law of 1936 (Article 76) states that the sentence of an *amparo* case can only affect individuals, and will only protect them in special cases, with no general declaration on the law or act that motivated the case unless jurisprudence is created. Article 192 states that jurisprudence can only be created after five consequent and consistent

⁹⁴ Art 103 and 107 of the Constitution.

decisions on the same subject, published as '*Tesis sobresalientes*' [outstanding thesis] to guide further interpretation. In *amparo* cases, the Supreme Court is not obliged to issue a general declaration on the law or act that motivated the case; and therein lies its main weakness. Because of the way the jurisprudence is settled, the Court can in fact deliver its sentences in a way that disperses and fragments their criteria, with little reference to constitutional principles to guide further interpretation, and with theses published as independent statements that omit the reasoning behind the original sentence.

Being the most immediate resource to access to the judiciary, the *amparos* have historically failed to establish precedents in practice (Magaloni 2011; Magaloni and Negrete 2001), and yet they are kept as a priority in judicial structure. Unlike the other two tools which appeared as constitutional novelties, the *amparo* has been constantly reformed and evolved together with governmental institutions, and has managed to stay relevant in the judiciary; or more than relevant -in the words of Góngora Pimentel- it has been one of the greatest judicial instruments because it “cancels illegal and arbitrary acts of the authority, resolves the inapplicability of all treaties, laws and rules that contradict the fundamental norm [the Constitution]; besides, it interprets the constitution’s content and secondary legislation, and it resolves the contradictions of criteria” (Góngora Pimentel, quoted in Tena Suck 2006: 148)

“All debates on constitutional justice always start and end in *amparos*” (Zaldívar 2008: 687), but ironically, their centrality in the judicial culture was as important as their omission was strange in the 1994 reform. Even though the implementation of *controversias* and *acciones* was never perceived as urgent by common citizens (and the credibility of the PGR or the CNDH as their mediators was not impeccable), they were supposed to fulfil the symbolic expectation of the reform because they were the only resource that was already familiar to citizens (see Fix-Fierro 1995). With that, among the few procedural adjustments of 1994, none addressed any amendment on behalf of a more efficient response to human rights cases through procedures already familiar to people. In any case, the reform only complicated the status of human rights in the constitution, and

the model of constitutional control adopted by Mexico in the new judicialization. Arturo Zaldívar, Minister of the Supreme Court of Justice, noted:

“Perhaps derived from the forgetfulness of the *juicio de amparo* in the constitutional reform of 1994, the members of the Supreme Court (...) considered, wrongly, that what constitutes the truly transcendent function of a constitutional court –as the Court has subsequently repeatedly maintained– is the resolution of *controversias constitucionales* and *acciones de inconstitucionalidad* (...) [which means that] throughout the years, constitutional justice has been built in a way that privileges the solution of conflicts between governmental branches over the constitutional procedural law governing the development and protection of fundamental rights” (Zaldívar 2008: 688.)

In those terms, the reform of 1994 carefully authorized a design for the Supreme Court and a concept of human rights that was manageable under that design. The reform set a low value on the *amparo*, favouring instead the *acciones* and *controversias* as the only channels “worthy of attention” of the Court, defining the priorities of constitutional control in terms not of the protection of citizens’ human rights but of the mending of norms (Magaloni 2008: 272). Constitutional review targeted only institutions, the structures that were relevant for the new actors authorised to interfere with the structure of the deferral state. *Amparos* were the simple procedure of citizens that they used to target concrete claims for reparation, and that was not the priority of the President. The 1994 inaugurated judicialization as a project of institutional actors, it was not contemplated in the first instance as being accessible or relevant for citizens.

The emphasis on the *controversias* and *acciones de inconstitucionalidad*, following Zaldívar’s argument, determined a perception of progressive judicialization exclusively recognized at the horizontal level, within the interaction between the different branches of the government that configure the democratic system, without opening a dialogue about the expansion of meanings attributed to human rights or the recognition of actors capable of such expansion. More attention has to be given, therefore, to the theoretical challenges that the promise of the constitutional reform failed to produce in 1994: first the challenge to think in terms of constitutionalism and to imagine the “local

constitutionalism” (as described optimistically by Góngora Pimentel), a challenge against the historically centralized discipline of federalism; second, the challenge to align the new constitutional order with the technologies of authorization that favoured the CNDH and the PGR over other actors.

Historically, constitutional theory in Mexico has represented the systematization of the narrative of the integration, functioning and organization of constituent power in Mexico: the historical consciousness of the Nation state throughout its constitution (and its reforms). Constitutionalism clarifies the basic normative structure of the state and the limits of its actions, but always with a central –and exclusive– reference to the federal state and the political decisions that emanate from it, and not from the thirty one sovereign states that compose the Republic (see Valadés 1988). Whereas the references to “new federalism” and “local constitutionalism” might evoke local appropriations of the promise of decentralization, they depend on a project carefully crafted by the president, and not by the political impulses or independent relations of each state with their own constitutions. Decentralization in Mexico as a process was initially led, and moderated, from the centre.

The centralized process of decentralization implies the negotiation of allegiances, or the authorization of those actors who will keep a formal rapport with the central state. As I suggested in the previous chapter, a closer look at the adjudication of expert tutors in judicialization would reveal political relations that structurally have little to do with the constitutional promises, and a lot to do with strategic favouring of some actors over others. The choice to favour the authorisation of expert tutors and the *controversias y acciones de inconstitucionalidad* was articulated in a way that ensured –intentionally or not– the coherence of the hierarchical status of the institutions in the PRI democracy.

In the first part of the chapter, I presented the political context in which the CNDH was born in 1990 under Carlos Salinas de Gortari’s auspices. I suggested that there was an element of a political strategy to control the decentralisation in order to prevent the fragmentation of presidentialism. Now, it is important to keep in mind that the relation

between the president of the Republic and the president of the CNDH -and in similar terms the PGR-, even while contradicting their decentralised structures, never became fully detached from ambiguities perceived as extensions of personal exchanges between them. The relations between the four have been the object of scrutiny and accusations of lack of transparency, starting with complaints against the non democratic designation of the leaders of the decentralised institutions⁹⁵, passing through allegations of non democratic exchanges between the PGR and the CNDH after observing patterns of irregularities in cases against the PGR accepted by the CNDH⁹⁶, and taking us to accusations against the CNDH's lack of transparency and avoidance of any form of external controls, accusing it of never having managed to consolidate its legal basis (Ackerman 2006). Those accusations were repeated in the cases that were most politicised, where the passivity, the avoidance, or the procedural irregularities of the CNDH feed the connections still made between the ombudsman and the executive's agenda⁹⁷.

The constitutional reform, understood as a political strategy of president Zedillo, has been given different interpretations. Within the optimism of the progress towards the rule of law, Zedillo's agenda to empower the Court, and thus break its traditional dependence on the executive, was seen as a counter-logical strategy that fragmented the political power of the president in unintended ways (Magaloni 2003, Rios-Figueroa 2007). This critique suggests a certain narrative of democratic development driven by the judiciary as if it were growing democratically without the presidents' authorisation, as if the judiciary developed out of its own political will or constitutional coherence without the president

⁹⁵ Until 2011 the Senate was in charge of presenting the candidates for Ombudsman and its Advisory Board. The complaints that I am concerned with here refer to the rotation of leadership between Jorge Carpizo and Jorge Madrazo Cuéllar in 1993 and 1996, a rotation that suggests a continuing strong control over the leadership of decentralized institutions.

⁹⁶ Antonio López Ugalde coordinated statistical research that suggested constant irregularities in the PGR in the areas of procedural irregularities, unlawful detentions, violence and threats, etc; but also patterns within the CNDH of omissions in the exercise of its capacities. In cases presented against the PGR, the CNDH seems to have diminished or avoided the use of its full capacities of investigation López Ugalde 2010: 24-26).

⁹⁷ There have been accusations in the press by journalists and scholars of personal alliances between the CNDH's ombudsman, the PGR and the President in different cases of high political profile. See http://www.contralinea.com.mx/archivo/2007/septiembre2/htm/CNDH_Poder_Inescrutable.htm (Last accessed May 18th 2014), and Human Rights Watch (2008).

predicting it. But Jodi Finkel does not accept that critique (2005) and argued that the strategy responded actually to a careful “insurance policy” for the executive. President Zedillo, well aware of the crisis of presidentialism, orchestrated in the new federalism a new system of checks and balances with the “new” tools for constitutional control - not checks and balances as understood by the Rule of Law- but checks and balances of personalised politics to ensure that the institutional establishment of the PRI would survive after the moderated effort of judicial reform. To some extent, this could be inferred from the relation between the President and the candidates for Ministers of the Supreme Court, and the great discretionary power that the President kept over the process of adjudication.

The reform generated scepticism because of its incapacity to deliver the promises of transformation that it brought about, not because of the personalised politics and the tremendous trust placed in the new expert tutors to deliver the progressive rhythm of judicialization (see Ansolabehere 2007; Fix Fierro 1995). But the reform did succeed in producing a more powerful Court. What kind of power was generated, and how much did that power resonate with the hopes and democratic expectations of human rights defenders and the general public? From 1994, the only mandate of the Supreme Court was constitutional interpretation, which in a democratization project meant that the constitutional court was put at the centre of the Mexican political life⁹⁸. Once institutional requirements for judicial independence were promoted and settled, the democratic promise for an effective delivery of justice was materialised with the investment in the independent leadership of expert tutors; but above all, a peaceful transition was ensured at the end of presidentialism, and the Supreme Court gained its legitimacy as a neutral servant of the “law” and the supreme norm, perhaps as the only neutral institution in the whole legal system.

From different angles of analysis, the reform was considered a democratic milestone: because perhaps of the strong social consensus on the unconformity with the systems of

⁹⁸ The only two tasks that remain in the SCJN apart from the constitutional interpretation are to settle the jurisdiction of the different tribunals in Mexico, and the resolution of contradictory sentences emanating from the *Tribunales Colegiados de Circuito*.

law enforcement and administration that preceded it, or of the exhausted credibility of the PRI's presidentialism. The reform was embraced as an optimistic step forward in political development, particularly for legal scholars, and for those activists and members of civil society to whom it was meaningful more because of their own historical situation than the actual reforms it promoted. It accommodated citizens' hopes for effective accountability, but an accountability that is yet to come, because it neither repaired, nor met, the failures of corruption and inefficacy in the system left behind by the previous regime. In the next section I present those cases that implicated the Court with the hope that its renovated authority would address cases of political impunity, a list of cases that resulted in the self-restraint of the Court that could not deliver the political expectations it created. I have tried to argue so far that the inauguration of the Court was a project to redistribute authority at the horizontal level. The original reform of Zedillo did not preview the extent to which citizens would use the Court. Therefore, in the inauguration of judicialization there was not provisions to design a system of counterweight for the Supreme Court or the new authorities who had access to the Court (see Ansolabehere 2007, 2010); the success of the reform depended –again– on the political will of those with authority over it (Carpizo 1995: 807-808). The reform did not repair the personalistic politics of the PRI, it only distributed its authority among institutions with the hope that the Supreme Court would mediate between them.

III. 2001, THE CONSTITUTION AND THE INDIGENOUS PEOPLE

If the 1994 reform ensured the peaceful transition to the post-PRI politics with the establishment of the Court, a reform by the way moderated by the last president of the PRI himself, the reform of 2001 was planned to resolve the heaviest burden of the political crisis that was postponed with the reform of 1994: a new project for the nation. It was going to be the first constitutional reform promoted from within civil society, and that meant not only the ability to imagine real representation in the constituent process, but also a show of political will from the new executive to break the PRI establishment of

the state and all outworn structures of governance in the country. The 2001 reform, I claim, was a lost opportunity of constituent power not only reasserted from below, but *outside* the logics and legal regimes of the state (Speed 2005: 43).

The 2001 constitutional reform was going to be the “reform of indigenous rights”. It promised to radically redefine the project of the liberal state, and at the same time to alleviate the neoliberal harshness of the NAFTA and the economic crisis; and not through the reinforcement of the power of the state in order deal with the economic harshness through new creative means, but through an alternative power structure based on alternative logics of rule (Speed 2005: 42). The reform became possibly the most publically debated and questioned in the history of Mexican constitutionalism, but again, not because of what it resolved, but rather because of its historical context and the political questions it raised (and later postponed); at the centre of those, the question about the very nature of the federal pact as perceived by Mexican citizens.

The reform promised to resolve the political turmoil awakened with the Zapatistas’ uprising of 1994, the historical systematic exclusion of indigenous people from the national project of modern liberal democracy, the formal end of the PRI’s presidentialism with the new commitment towards the rule of law, and to resolve also the general sense of disenchantment (postponed in 1994) with the government, empowering at the same time the new agenda of civil society in the pursuit of justice, accountability and recognition. In short, this reform could have become Mexico’s most ambitious constitutional reform ever. It was not expected to modify the juridical order, but to radically transform it, using a different frame of interpretation for human rights and of the place they occupy in social life as the basis for a juridical order that would for the first time recognise *new subjects of rights*: not through the codification of inclusive citizenship of the pedagogical objects of democracy, nor a simple extension to indigenous people of the simple liberal state of legality, but through the embrace of those who had been historically excluded from the history of the state and whose recognition would have meant a full radical redefinition of the concept of citizenship.

The project of the reform was derived from the *Acuerdos de San Andrés* of 1996. The *accords* were an effort to open a dialogue and conciliate a peace process between the EZLN, the *ad hoc* governmental *Comisión de Concordia y Pacificación (COCOPA)*⁹⁹, and the CONAI (the National Intermediation Committee - *Comisión Nacional de Intermediación*)¹⁰⁰. The main outcome of the dialogue was president Zedillo converting the accords into a formal proposal for constitutional reform “on indigenous rights and culture”. The COCOPA drafted the bill, the EZLN accepted it, but when Zedillo sent the proposal to the congress two years later, he argued that it threatened fragmentation of the nation and fundamentalism¹⁰¹, and substantial aspects were missing from the accords. Vicente Fox promised in his presidential campaign to bring a “solution” and capitalize the conflict with the EZLN because of its electoral potential (de la Peña 2006: 291).

The original COCOPA bill was modelled largely on the ILO Convention 169, and the concrete mechanisms for autonomy and the rights for self-determination printed there. The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted in 1989 (and coming into force on 5 September 1991), is typically the modern, non-paternalistic, non-assimilative referent in legal efforts for indigenous peoples attempts to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions. Within this framework the Convention lays down a series of provisions banning discrimination against indigenous peoples, but more importantly, establishing a series of obligations for the state to adopt special measures to safeguard peoples’ institutions, property, labour, cultures and environment (Art. 4(1) and (2)). The

⁹⁹ The Commission for Peace and Reconciliation was an entity formed by legislators from the two federal houses and the local Congress representing all major political parties, mediating the government’s interest for the peace negotiations with the EZLN. It was formed in 1995, and gradually disintegrated after the 2001 reform.

¹⁰⁰ The CONAI was a group formed of intellectuals, artists and citizens led by Bishop of the Diocese of San Cristóbal de las Casas, Chiapas, Samuel Ruiz. It was in San Cristóbal de las Casas where the uprising initiated publicly, and Samuel Ruiz became an important mediator favouring the indigenous against the government.

¹⁰¹ Zedillo was not alone. Among intellectuals from the left, there was resistance to the proposal to officially recognize the plurinational identity, rejecting the perceived customary gender hierarchies and the normative structures of indigenous peoples, and mainly the “naivety” of their conception of autonomy. Warnings were given about the disruption of the municipal basis of the state and also about the unbreakable nature of the principle of individuality in human rights (see De la Peña 2006: 290-291).

importance of the reference, above all provisions, is the non-interventionist place attributed to the state in the recognition of autonomy and self-governance of indigenous peoples. Earlier in the thesis I have mentioned some other experiences of litigation promoted by indigenous groups, where the effort of litigation confirms their knowledge of who they really are (Miyazaki 2004: 53), even when projects are invested in pursuing change through the very same legal regimes that underpin them. The Zapatista project had a more ambitious project in mind. It was not only the alleviation of material needs that kept indigenous peoples outside of the structure of the state, but the transformation of the violence endowed in the normative power of the state by involving the entire social body in the redefinition and restoring of the current state of affairs, breaking the logic of the neoliberal rule of the state (Speed and Reyes 2002: 73).

In 2001, the Zapatistas organised a triumphal march to Mexico City: the “March for Dignity” led by 24 Zapatistas (and hundreds of supporters) delegated to observe the constitutional reform in the Congress. The march gained unprecedented support throughout the country (and internationally) from varied sectors of society, with backing from religious institutions, coverage from mainstream media, and welcoming committees on the way to the city organized by different political actors, all expressing their affinity with the revolt against historical forms of governance, or simply showing solidarity with the indigenous cause. Once they arrived in the capital, factions of the PRI and the PAN in the Senate openly refused to invite the Zapatistas’ committee into the Congress because the mere physical presence of the March would impose an exception in the constituent procedure, a non-regulated authorization of legal interlocutors. The PAN leader Diego Fernández de Cevallos pronounced his absolute disagreement with allowing the Zapatistas a platform because they would use it, he argued, to orchestrate an attack on the nation’s institutional coherence and legitimacy, with a reform proposal that lacked any formal political project. He announced in advance that the Senate would not accept the initiative¹⁰²; nevertheless, he was later commissioned to draft the reform proposal for discussion in the senate.

¹⁰² Vid. http://www.sipaz.org/documentos/marchaldf/marchaldf_esp.htm Last accessed Feb 10th 2012; http://www.iis.unam.mx/obsdem/crono_mar_zap.pdf Last accessed Feb 10th 2012.

The reform was modified and the core of the demands of the EZLN were rejected, namely: the claim for autonomy and self-determination agreed by the COCOPA in San Andrés, the recognition of indigenous peoples as “new” subjects of *public* rights, the capacity for self-administration of natural resources, and the claim for a legal faculty of association that ended up confined to the municipal level (Espinoza Saucedo et al. 2001, 2002; Haar 2005; Hernández Navarro 1998; Rábago Dorbecker 2010). Nevertheless, president Fox rushed to congratulate the senate and the civil mobilisation after the reform was enacted, and celebrated the “gigantic step” towards peace in Chiapas¹⁰³.

The political claim of indigenous rights was enclosed in the new article two of the Constitution, reducing the discussion on autonomy to a condemnation of all forms of negative discrimination, resolving the discussion of exclusion as an ethnic and racial restoration of the assumed cultural homogeneity of the nation, and including a definition for the term *pueblo* [people] following ILO Convention 169. That was the only substantive result from the Convention, which effectively dismissed the non-interventionist project for a new relation between indigenous and the state. The reform actually left untouched the dissenting meanings attributed to hegemonic legal practices that were spelt out in the San Andrés Accords, and their call for the recognition of plurinationalism in the Constitution.

In legal scholarship (and mainstream media) the reform was celebrated because it pushed for the “update” of the principle of formal de jure equality. The language of individual rights, limiting indigenous jurisdiction presented originally as a claim for collective rights, denying indigenous peoples territory and natural resource rights, and limiting indigenous people pursuit of autonomy, replaced the discussion of the forms of power with which the authority and the rule of the state are reproduced (Speed 2005: 37, 39). The new Constitution contains as a summary the way the reform resolved the political crisis and the questions about the state raised by the Zapatistas with a minimal package of cultural

¹⁰³ The reform was finally published in the *Diario Oficial de la Federación* on August 14th 2001. For a chronology of the agreements, according to organized civil society, visit <http://www.cedoz.org/site/content.php?doc=368>, last accessed January 17th, 2012.

rights, and an equally vigorous rejection of other forms of appropriating human rights language. Since the reform, the new paragraph two of the Constitution reads:

“The Mexican Nation is *one and indivisible*. The nation has a multicultural composition based originally upon its indigenous peoples [*pueblos*], who are those inhabiting the country even before the conquest took place, and who have lived according to their own social, economic and political institutions, or at least part of them... The consciousness of their indigenous identity has to be a fundamental criterion to determine to whom the dispositions for indigenous people are applicable ... The right to self determination of indigenous people shall be granted within a general framework of autonomy according to the Constitution and in a way which preserves the national unity.”

In the previous chapter, I have recognised as the leading narratives of neoconstitutionalism in Latin America those that acknowledged the *de facto* plural order, in constitutions that enabled the transition of the political location of their citizens from the state of permanent illegality to the state of rights. In the substantive changes of the 2001 reform that transition did not happen, and the political location of indigenous people, defined by themselves in the claim of autonomy and self-determination, was entirely dismissed from constitutional recognition. In the transplant of the definition of *pueblo*, indigenous communities were acknowledged as “entities of public interests”, but not entities of public rights (*entidades de derecho público*) as had been phrased in San Andrés, and the power of attributing meaning to that definition was entirely left to the legislative authorities at the local states’ level; this meant that the legal personhood (or juridical capacity) of the indigenous communities was only codified through individual attributions, the latter guarded by the state constitutions and federal law, reducing the political claim of autonomy to a cultural feature and not a fundamental question about rights.

Finally, the political authority of indigenous people was forced to be submitted to the frames of municipalities and states: while the changes forced state authorities to consult indigenous people on legislation and public policy that affected them directly, and suggested ethno-linguistic and physical settlement criteria to be taken into account (as if

these were not already a given in democratic principle¹⁰⁴), they did not recognise any authority generated within indigenous communities, which means that all indigenous affairs had to pass through state assemblies who have the capacity to delay or deny rights recognition (new article 115 on the right of association).

The question that the indigenous mobilization raised about the power of the Mexican state was dismissed. That question was perhaps the very core of the political agenda of the Zapatista uprising as a condition to challenge the authority of all rule and decision making processes, where the power of the state becomes an interdependent element of all attempts to challenge the different exclusion that indigenous people suffer. A new culture of rights is born instead with the new Constitution that does not acknowledge the Zapatista narrative, replacing it with a model that would recognize the distinct identities and experiences of the movement participants as fragmented, with no considerations about the structure of the state, leaving a discursive void that was filled by identity-focused, rights-based conceptualization of struggle (Speed 2005: 36). New social movements were taken on board in the project of the state, movements who would profit from the new language of non-discrimination in the Constitution.

The limited notion of the multicultural composition of the state imposed a resolution for the indigenous mobilisation based on the assumption of the inherent desirability of the new relation between neoliberalism, human rights and multiculturalism (Speed 2005). The Mexican state diverted its responsibility to manage social inequalities by “privatizing” responsibility for indigenous inequalities to the civil society, and it was within civil society –particularly those sectors of the population drawn into the state project– where the conflict was rapidly depoliticized and evaded, presenting the implementation of a holistic and coherent alternative political project as an *impossibility*, replacing it instead with projects to manage the seemingly unending inequality of indigenous peoples caused by their own *usos y costumbres*, the customs and habits of

¹⁰⁴ The specific language, however, comes from article 6 of the Convention 169 of the International Labour Organization, the Indigenous and Tribal Peoples Convention, that declares that governments should consult peoples affected, establish means for free participation, and establish means for the full development of peoples.

indigenous peoples enunciated in the ethnocentric agreement that dismisses the indigenous political project.

In a restricted legal imaginary, the Mexican *multicultural Constitution* accommodated the “juridical customs” of its indigenous peoples. Being the sources of indigenous legislation fundamentally different from the one acknowledged in Kelsen’s pure theory of law, indigenous juridical customs are assimilated as those based on a cosmovision grounded on ancestral principles rooted in the natural order, principles whose application –and on this relies the main argument for the legitimate dismissal of indigenous rights– seems not to require the inclusion of indigenous norms in positive rules because those are regulated by “the common consciousness” of the people, who are aware of the principles that dictate their conducts and will only require as a general expression communitarian frames for the resolution of problems (Cuevas Gayoso 3004: 29).

The language of customs was particularly fruitful to bring sexual rights narratives on board with the new values in the Constitution, simplifying the indigenous rights question to a question of a culture that has to be regulated. *Usos y costumbres* soon became used as fundamentally different from human rights, shelving the capacity of indigenous movements to generate specific knowledge about the state that other movements could profit from. The urban Mexican feminist movement had struggled already for decades to integrate the agenda of indigenous women reproducing theoretical political premises of false consciousness, to justify the intervention of NGO and development workers in indigenous communities, based on ideas of an indigenous culture fundamentally patriarchal with family structures that are intrinsically violent for women and object of democratization. There were important feminist responses to the reform, by way of both intervention and analysis, prioritising the discussion of indigenous women and the patriarchal features of indigenous cultures but with no critical engagement with the core of the Zapatista intervention (see Álvarez de Lara 2002; for a critical analysis see Hernández Castillo 2001: 212-214). For the LGT agenda, the reform represented the establishment of a new culture of discrimination, but in every mention of the reform this was because the “reform on indigenous rights” although the question of the state was

never assimilated as part of the language of LGT rights as it was dismissed at the time, appropriating the new values of equality in the Constitution as a common goal for all subjects victims of possible discrimination, erasing all epistemic distance that separates the political positions of indigenous people from groups in the urban sphere organized around their identities and practices.

There is no need to clarify that the reform did not change the material conditions of exclusion of the indigenous population. For the indigenous movement and its supporters, there was a general sense of disappointment and discouragement for further social mobilisation around constitutional reform. The negotiation in the Congress practically ignored the promise made to respect the input of the indigenous representatives. Social groups throughout the country lobbied their local representatives against the ratification of the reform, and presented as a last legal resource approximately 339 *controversias constitucionales* against the reform¹⁰⁵, coming from the municipalities with the largest indigenous populations in the country (mainly municipalities from the states of Chiapas, Oaxaca, Hidalgo and Guerrero)¹⁰⁶. The *controversias* claimed that indigenous people were not consulted on the reform, violating international treaties (ILO Convention 169, the American Convention of Human Rights) but also the constitutional procedure, including the prescriptions of the new art. 115. The substantial agreements of the San Andrés Accords were not considered in the debate, the voices of the Zapatistas who spoke in the Congress influenced the media and the public opinion but not the Congress, and definitely not the constitution. The Supreme Court rejected playing a role in the *controversias* through a jurisprudential claim, on the grounds that constitutional amendments were an exclusive competence of the Congress and the cases were beyond the Court's competences. The Zapatistas then declared the dialogue with the government finished¹⁰⁷.

¹⁰⁵ Called in the Zapatistas' and activists' communications the "Fernández de Ceballos-Bartlet-Ortega Law" after the leaders of the PAN, PRI and PRD. For the chronicles and indigenous responses to the reform see <http://ceacatl.laneta.apc.org/Controv0.htm>. Last accessed May 3rd 2014.

¹⁰⁶ Controversia constitucional 82/2001. For the news report of the litigants see <http://www.cedoz.org/site/content.php?doc=413&cat=6> Last accessed January 5th 2014.

¹⁰⁷ The EZLN formally issued a declaration announcing the end of the dialogue with the government and rejecting the constitutional reform, declaring that it ignored the national and international claim for

IV. A NEW CULTURE OF RIGHTS

As soon as he took office, Fox, with his business-honed expertise in managerial delegation, targeted the promotion of new institutes in charge of distributing budgets for social programmes as an application of the constitutional reform, recruiting activists as the new social capital of democracy (outside of the partisan system). It is important to remark the role these institutions played in legitimizing the new frames of interpretation of rights that the Mexican government authorised from this point. For example, the president rushed an initiative in the Congress to inaugurate the *Ley del Instituto Nacional de las Mujeres* [the National Women's Institute]¹⁰⁸, known as *Inmujeres*, an institution that was originally crucial for the establishment of social consensus that validated the dismissal of the original constitutional project of indigenous rights: Roberto Ortiz, then coordinator of legal research at *Inmujeres*, recognised that “a Democratic state (...) cannot commit itself to cover all forms of social organization or expression of personal autonomy, if those are sustained by racism, xenophobia and gender discrimination, etc.”¹⁰⁹. Indigenous women, in his statement, had to be incorporated into the models of development that were already covered by the clauses on economic discrimination inferred from the new art 1 in the constitution.

The new culture of rights operates through minimal agendas that hope to make the most of constitutional language. That is how the PRD managed to include in the Constitution a reference to the debate on sexual diversity in the Congress as a note of the progressive politics of the constitutional reform. Deputy Hortensia Aragón¹¹⁰ presented to the Congress a proposal to reform article 1 to condemn discrimination on the basis of sexual

recognition of indigenous rights and culture. <http://www.cedoz.org/site/content.php?doc=368> Last accessed February 10th 2012.

¹⁰⁸ Published on the Official Gazette on January 12th 2001.

¹⁰⁹ My translation. Available in http://www.eclac.cl/mujer/reuniones/Bolivia/Roberto_Ortiz.pdf Last accessed May 15th 2014. For the legal arguments that claim the reasonability of the dismissal of the indigenous reform see Álvarez de Lara 2002.

¹¹⁰ Her proposal is available in http://www.diputados.gob.mx/sia/coord/refconst_lviii/html/049.htm Last accessed Feb 10th 2012. Hortensia Aragón is a former feminist activist who joined the PRD in the mid 1990's, founding and coordinating the National Coordination of Women in the Party. She is currently the Secretary General of the Executive Committee of the party.

orientation. Article 1 defines the hermeneutic criteria for human rights in the constitutional text; it covers the list of suspicious categories of groups who suffer discrimination. Aragón requested the addition of sexual orientation (including all non-normative sexualities) to the list; the proposal was soon sabotaged by parliamentary representatives of the PAN, but in the spirit of the minimal platform, the Congress negotiated to leave the word “preferences” in the final draft. The ambiguity of the phrasing remained until 2007 when a less well-known reform clarified that the text meant to say “sexual preferences”. The new article 1 of 2001 reads:

“All types of discrimination whether for ethnic origin, national origin, gender, age, different capacities, social condition, health condition, religion, opinions, *preferences*, or civil state or any other which attacks human dignity and has as an objective to destroy the rights and liberties of the people are forbidden.” (My italics)

With institutional gender mainstreaming and language of sexuality in the Constitution, a new optimistic prospect opened with the promotion of non-discrimination clauses that would be recognised as the main human rights contribution within the reform. Paragraph 1 required for its regulation secondary law; Vicente Fox’s strategy was to make the process as participatory as possible. A group of activists was gathered from feminist movements, people with disabilities, people working on sexual diversity, etc. in the new *Comisión Ciudadana de Estudios contra la Discriminación* [Citizens’ Commission for Studies against Discrimination]. The Commission started producing research on discrimination in Mexico, with similar formats of the *Facultad de Investigación* of the Court, and drafted the first proposal for the *Ley Federal para Prevenir y Eliminar la Discriminación* [Federal Law to Prevent and Eliminate Discrimination]. President Fox presented the Law to the Congress and it was finally approved in 2003.

The Law anticipated measures to be taken by public authorities to ensure a life free from discrimination for every person: it incorporated a hermeneutic canon to resolve interpretation of principles of equality and non discrimination imported from instruments of international law and examples from other constitutions. In the drafting of the Law, the *Comisión* comprehensively studied comparative constitutional law, and even transcribed

paragraphs from international instruments of rights, revealing the transnational dimension of their legal imaginative commitment towards the progressive and optimistic narratives of human rights dialogues (cfr. Rincón Gallardo 2001: 276-278), but compromising the political space to resist their attachment towards the new Constitution). The Law also designated a special budget from federal resources to promote equal opportunities transversally (art 3), and converted the citizens' commission into the *Consejo Nacional para Prevenir la Discriminación* CONAPRED [National Council Board to Prevent Discrimination], a new decentralised institution spearheading the promotion of a culture on non discrimination, entitled to resolve complaints (through conciliation) and to receive claims against federal authorities (to be diverted to the legal authorities).

In general terms, the 2001 reform was promoted politically as a constitutional moment because it did represent a breakthrough in Mexican political life, inasmuch as it “consecrated” human rights in the Mexican constitution and consolidated the terms for the new culture of rights for the whole of the juridical system in the country. Because of its historical situation, the reform authorised the constituent legitimacy of human rights claims for those citizens that matched the political narrative of recognition that was manageable, and politically profitable, for Fox and the new government, who in turn started authorising new actors, interlocutors and institutions to articulate the democratization in the following years. Democratization then retreated from the Zapatista claims. The sources of new constitutionalism in sexual rights historically coincided with the fragmentation and disempowerment of the radical social claims of redistribution that were the political core of the *Acuerdos de San Andrés* that had in its time galvanised such powerful demonstrations of solidarity.

I have said in chapter one that the most intense promises in a specified historical timeframe give meanings and identities to those who take part in them, and also produce strong relations of attachment. When the announcement of a promise turns into a constitutional moment, the attachments to the Constitution -and to the authority that facilitated the reform- can grow so strongly that critique against the technologies of authorisation upon which the reform relies can be cancelled or postponed. What passed in

the Mexican ephemerides as the “indigenous reform”, as a myth of re-foundation of the state in democracy, was only a governmental strategy that proved the insularity of the constitution, a strategy legitimized by the authorisation of new professional actors of democracy. The direct beneficiaries of the constitutional reform were the activists in social movements who were well versed in the transnational dialogues of human rights, whose new institutional attachments compromised their critical response against the reform. As an opportunity for a true rights revolution based on the recognition of the political position of all Mexicans, especially those who had been not only excluded but also violently diverted from the project of the liberal state, the reform failed.

For a critical optimist, the expectations raised with a promise for human rights in the constitution were discouraged. Politically, the reform gained so much visibility that the idea of promoting another one, and a new promise of a re-foundation of the principles of the nation, lost its recently renewed credibility. However, there was a new participatory culture after 2001 that made sense of the social progress in Mexico, at least institutionally speaking or according to transnational standards of rights accountability. For the 2001 process, the Supreme Court appeared only as the last resource for the “recently empowered” municipalities that presented the *controversias constitucionales*, but a non-response from the Court only diverted the authority for political decisions back to the Congress; the Court took no stand on human rights. But soon after the Court was put again at the centre of political life with the assumption that it had to do so.

The reform of 1994 set up the institutional basis for judicial independence and authorised the SCJN to resolve *the main political conflicts* in the country. The Zapatistas’ uprising that preceded the reform of 2001 was never recognised as one of those conflicts, and their rights claims were politically kept away from the constitution and the new culture of rights. Vicente Fox’s government capitalized on the Zapatista crisis, but the political decisions that were taken about it were delegated to the legislative for resolution, and that is how the *Acuerdos de San Andrés* were depoliticised, reducing the political crisis to cultural terms of identity. The “indigenous reform” gained its historical legitimacy

because of the political will to expand notions of human rights, towards the language of non-discrimination and inclusion, but with no indigenous involvement.

This new reform left the judiciary untouched, both politically and institutionally. In a sense, the 2001 reform worked as a symbolic (but ineffective) solution to the political situation, but it did set up basic structures for the new human rights language through the institutional organization of civil society. Civil society, more aware of international instruments of human rights and actively participating in international dialogues, had a different perception of what law, and the constitution, could do for it.

V. TOWARDS A MORE TRANSPARENT COURT. THE 2001 REFORM

The transformation of the judiciary was in fact a priority for the recently elected president Fox. Since the constitutional channel was focused on resolving the political unrest, and to conciliate the citizenship with the promise of a new project of nationhood coming from the PAN, the legislative became a safer and, compared to the mechanism of executive initiatives, less controversial channel to contain judicial development. Following the 2000 election, for the first time no political party had a majority in the Congress, so all controversial discussion now had to pass through strict negotiations between the parties, and the confrontational agendas of the parties diluted commitments to progressive transformation. The new culture of rights in the country became divided: the executive and the legislative embraced a commitment towards transparency to repair the perceived corruption and lack of transparency of the PRI administration, while the judiciary was left with the promotion of human rights in the new constitutionalist culture.

Old and new governmental institutions, and decentralised organisms, had to detach themselves from the image of insularity and corruption of the PRI. Prime amongst them was the Supreme Court, which had in fact a specific need to build its own judicial independence (in the eyes of the citizenry) without the protection of the PRI and mediating the stability of the new rule of law of the PAN. In 2002, president Fox

promoted in the Senate the *Ley de Transparencia y Acceso a la Información Pública* [Law of Transparency and access to Public Information]¹¹¹ that dictates that all public institutions –including the Judicial Power of the Federation– are obliged to make available all the information about their internal functioning, the faculties of their organs and dependencies, the approved wages of all public servants, and their general budgets. Since then, the Supreme Court makes all its sentences public, broadcasts some of the Court’s sessions on television in the *Canal Judicial* [Judicial Channel], and uploads videos and transcriptions of most of its sessions and discussions.

For activists, there were more institutional spaces open in which their national networks grew closer, their expertise on international human rights dialogues developed more confidently, the strategies to use law as a means to satisfy political claims were circulated, but also the scrutiny of governmental institutions and the claim for transparency and accountability became heavily politicized. The Supreme Court gradually “appeared” to activist as a new resource for political processes: for those well versed in legal technicalities that had convenient alliances with political parties and municipalities to access the Court, presenting cases became a crucial strategic decision in political action for the observance of the legality, or constitutionality, of the exercise of the other branches.

But for most other activists with no legal expertise, who had by then greater options of institutional instances accepting cases, filing recommendations, or just giving publicity to political processes and human rights violations (the CNDH itself, the *Comisión Ciudadana de Estudios contra la Discriminación*, for example), the Supreme Court became recognised as a last, most powerful and most effective, resource of governmental intervention, since it was the only one among those institutional spaces whose decisions were enforceable. With that, the Court received unprecedented attention, it became the object of hopes for progressive transformation and governmental accountability; but we can also argue, unprepared for such a level of attention to and exposure of its internal procedures, it became the object of new political scrutiny.

¹¹¹ Published in the Gazette on June 11th 2003.

V. 1. Using the Court: The Facultad de Investigación

The commitment of the Court towards the general project of democratization was clear. It had to provide institutional stability in the redefinition of the democratic relations of opposition in the legislative, and it soon activated the image of public access to the citizenry (via the public perception, not actual rules of standing). But now, with activists exploiting all possibilities to access the court, its reputation was threatened in a political scandal in 2006 where the Court was pressurised to make use of its fourth tool of constitutional control: its *facultad de investigación* or faculty of inquiry, that did not sit well with its strategy of transparency, its credibility, and its commitment to defend human rights.

The *facultad de investigación* was the second channel, after the writ of *amparo*, for the Court's intervention in defence of the violation of individual guarantees. As with the *acciones* and *controversias*, the *facultad* was previously in the constitution (since 1917 in art. 97), but never regulated, and never used until 1946. An inquiry was opened that year against federal soldiers who attacked and repressed a protest in the city of León, Guanajuato. The incident happened when a group of students protested against an electoral fraud, and the repression killed more than fifty people. In that first case, the Court declared the violation of guarantees of the citizens and informed the correspondent authorities, delegating to them the responsibility for further actions (Morales Ramírez 2007: 133-137).

The *facultad* has only been used five times since: in the Aguas Blancas case in 1996, the case of Lydia Cacho in 2006, Atenco in 2006, Oaxaca in 2006, and the ABC Nursery case in 2007. Each of these cases refers to violent exercises of violations or omissions that resulted in explicit forms of exclusion of groups who have been historically excluded from equal access to the law. However, in none of these *investigaciones* did the Court

address the weakness of the system, nor the core problems of impunity that each case uncovered¹¹².

Article 97 of the Constitution was modified in 1994 to present the *facultad*, as follows:

“The Supreme Court of Justice of the Nation shall appoint one or more of its members, or a District Judge or Circuit Magistrate, or designate one or more special commissioners, when deemed advisable, or if the federal Executive, or one of the chambers of the Congress, or a governor of a state so requests, solely to investigate any act or acts which may constitute a violation of any individual guarantee. The Court can also request the *Consejo de la Judicatura Federal* to investigate the conduct of any federal judge or magistrate.”

Let us now try to imagine the political context in Mexico in the mid 1990s, the promises offered by the constitutional reform of 94, the upheaval of claims of indigenous people and campesinos rights after the Zapatista uprising, and the image of the government and its army at the time. This context stimulated the revival of the *facultad* and the involvement of the Court. In 1995, seventeen campesinos were murdered and twenty were wounded by the state’s police in Aguas Blancas, Guerrero. Originally, the CNDH formulated a recommendation to the state of Guerrero requesting further inquiry. The NGO *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, AC* presented a petition to open an inquiry in the SCJN, which was rejected because it did not have constitutional capacity, and the CNDH had already finalized its own investigation. However, two ministers in the Court insisted on accepting the petition since the violation of guarantees could not be accepted as an *amparo* as the CNDH concluded, and they should comply with the Court’s overriding moral mandate. Finally it was president Zedillo who presented the file, resulting in confirmation that there had been a grave violation of rights (3/1996). However, there was in the specific regulation for the *facultades de investigación* no explicit indication of what to do with the findings. The court simply informed the competent authorities (Morales Ramírez 2007:138-143; Morineau 1997).

¹¹² See the report of the Comité de Liberación 25 de Noviembre AC/Asociación de Abogados Democráticos, ANAD (2009) for a general overview of the strategic usage of the *facultad*.

In January 1998, after the massacre of an entire indigenous community (49 people killed and 17 injured) in Acteal, Chiapas, that was attributed to the low intensity war in the zone, the Court was again asked by civil organisations to intervene and issue an enquiry. Once again, the CNDH concluded its investigation and issued its recommendation, besides, the government had already published information about judicial prosecutions that resolved the case as a dispute or act of revenge between communities¹¹³. I am not trying to make assumptions about the formalities of the response of the Court in the Acteal case, I am only trying to represent the political position in which the Supreme Court was placed during those days of transformation, and the Court's image in the eye of the public opinion.

The next intervention of *investigación* of the Court was Lydia Cacho's case in 2006, which the Court originally declined to accept on the grounds that it did follow the pattern of previous cases that addressed the violation of the rights of a group, since there was no clear indication about the type of cases that were eligible for *investigaciones*. In this list of interventions, the Cacho case was the only one in which the Court did not recognize the violation of individual guarantees. This is going to be a crucial case in the presentation of the abortion case study: because of the lack of recognition of the violation, the abortion case came as an informal compensation, as I will argue in chapter 5.

The Court opened an inquiry requested by the Congress to investigate the illegal arrest, threats and torture of the feminist journalist accused of defamation and malicious slander after publishing a book that uncovered a network of pederasty implicating powerful businessmen. Cacho was arrested in the state of Quintana Roo, in the south of the Republic, and (illegally) taken on a 20-hour journey to the state of Puebla in the centre of the country. She claimed she was tortured during the transfer, and later on, the media got hold of videos that demonstrated the threats and humiliations she suffered in Puebla. She was released on bail seven days later.

¹¹³ The SCJN, however, accepted five *amparos* in 2008 protecting the right to due process of the defendant.

Two months later, a telephone conversation was made public between the governor of Puebla, Mario Marín, and the businessman Kamel Nacif, who was among those accused by Cacho of involvement in the network. In the recording, the governor promises the arrest of the journalist and a special punishment for her as a personal favour to Nacif¹¹⁴. The SCJN accepted the case and delegated the inquiry to a special commission. In the inquiry it was discovered that the van used to take Lydia Cacho to Puebla was owned by Nacif, and that the people involved had no legal authority for their action, and that there were serious inconsistencies in the actions of the judge who first authorised her arrest¹¹⁵. However, the commission later declared that there were some irregularities in the process, but the individual guarantees of Cacho were not violated. The Court declared itself incapable of pronouncing on the case, citing illegally gathered evidence; it did not invoke existing provisions of exception (available when rights and fundamental freedoms are endangered). Therefore, the conduct of the police who arrested the journalist, and the governor who orchestrated it, were not condemned. No responsibility could be attributed to either Marín or Nacif (vid. Ibarra Palafox 2009).

The same year, another inquiry (3/2006) investigated cases of torture in Texcoco and San Salvador Atenco, in the state of Mexico: after days of civil unrest and campesino mobilization, several people were arrested. Several women were sexually abused by the police in prison. The CNDH documented cases of sexual assault, and the Committee of the CEDAW recommended that the Mexican government intervene. The inquiry resulted, again, in the recognition of a violation of guarantees. This time however, there was a concurring vote published by Minister José Ramón Cossío Díaz, questioning the procedure and the usage of the criteria of “gravity” that justified the intervention of the Supreme Court in the use of its *facultad*¹¹⁶. Cossío Díaz claimed that every violation of rights is serious, in a sociological way, but that that was not sufficient justification for the involvement of the Court, which should be reserved for the cases that imply a

¹¹⁴ The recording is available on http://www.youtube.com/watch?v=PuSQ_Ai8CH4 Last accessed 27th February 2012.

¹¹⁵ *Facultad de Investigación 2/2006*.

¹¹⁶ Voto Concurrente formulated by the Minister José Ramón Cossío Díaz, available in http://www.scjn.gob.mx/PLENO/Solicitudes%20de%20Investigacin/15_2_1.pdf Last accessed February 10th 2012.

transcendent impact on the community. The Court related the gravity of this case to the inequality and social decomposition of the community in which the violations of rights had happened. However, as the concurrent vote insisted, the Court could only address the inadequate use of force, and therefore the decisions it was issuing, and the expectations it was raising, were passing citizens' expectations because of the political position in which the Court was placed, and not because of its actual capacities of constitutional control.

Once again, and in the same year, the *facultad de investigación* was requested to investigate a violent repression by the police. The inquiry 1/2007, requested this time by the Chamber of Deputies, investigated and confirmed the violation of individual guarantees after the violent confrontation (resulting in one protestor being killed) and the illegal imprisonment of leaders of the *Asamblea Popular de los Pueblos de Oaxaca* (Popular Assembly of the Peoples of Oaxaca) who participated in a general protest by a teachers' union. The inquiry declared that the governor of the state of Oaxaca, together with the director of Public Security, the director of Ministerial Security, the director of the Police, and seven police officers were responsible for the abuses. But the inquiry's "revelation of the truth" had only political resonance and no judicial efficacy. *Facultades de investigación* kept being subject to political pressure, and in the absence of any regulation that could enable them to resolve litigations, the Court could not respond to the now constant requests that it take responsibility for judging particular actions.

Yet another inquiry was opened two years later. The ABC inquiry (1/2009) investigated the accidental burning of a nursery that operated under a subrogated scheme of property, in which forty-nine children died. The inquiry concluded with the recognition of irregularities in the scheme of nurseries and the consequent bypassing of children's rights¹¹⁷. The ABC case united a new social movement, the *Movimiento Ciudadano por la Justicia Cinco de Junio* [Citizens' Movement for Justice June Fifth], a citizens' initiative focused on following up the judicial outcomes of the judicial process. After the

¹¹⁷ Preliminary report available in http://www2.scjn.gob.mx/fi1-2009/Documentos/Informes/Informe_Preliminar_Comision_ABC.pdf Last accessed February 12th 2012.

investigación concluded, the movement raised a lot of attention in the media denouncing the level of corruption and impunity around the case: the defendant, the owner, and legal representative of the nursery, obtained in an *amparo* diminished capacity, because in the regime of property no one had a liability or obligation to prevent the accident. The *investigación*, again, resulted in a verbal recognition of rights violations¹¹⁸. The *Movimiento* emphasized that the owner was related to the wife of the president Felipe Calderón, but that discussion was unrelated to the technicalities of the case.

The ambiguity of the *facultad de investigación* lies in the fact that the more it was requested, the more evasive became its decisions, and the more political reactions the Court provoked. The cases listed were some of the most public political scandals of the period. The *facultades* were used because they were the most accessible methods to hand for calling the Court to take a stand. Compared to the other tools of constitutional control, the Congress and the Executive could more easily meet the requirements to present them, and litigants had more political resources to pressure them to do so. The *facultades* gained popularity even though they led only to recommendations for further inquiries (Ibarra Palafox 2009), none of them being followed by prosecution. The judiciary thus absorbed a political sense of urgency of political claims driven by citizens who felt entitled to demand the Court's attention, despite its lack of capacity to take action.

Let us remember that the results obtained by the *facultades* do not correspond to the possible results obtained through any judicial or administrative sanction or disciplinary procedures; the aim of the *facultades* is not to attribute criminal, administrative or civil responsibility. According to their constitutional mandate, in the art 97(II) and with no regulating statute, their task is to study an event and determine if there had been a human rights violation on it, and the authorities that could have been involved, without issuing any specific statement on the different responsibilities that a public officer might have incurred. It is important to remark that in all the files of *facultades* in the Supreme Court (the León case, the Aguas Blancas, the Lydia Cacho case, and the Atenco and the Oaxaca

¹¹⁸ Vid. <http://www.movimiento5dejunio.org/abc/category/pronunciamentos/> Last accessed March 4th 2012.

cases), it has been the executive in the states that was involved in human rights violation. A proper disciplinary procedure would have challenged the structure of the state and the federal order as a whole, with the Supreme Court serving as an institution capable of regulating the abuses of authority of the executive (not only the legislative as the *acciones de inconstitucionalidad* allow), leaving the Court in a deeply political position in charge of a task of accountability that no other institution was fulfilling (see Morales Ramirez 2007: 120). The *facultad*, nevertheless, still represented a rich political intervention for those involved in the presentation of cases in the Court, even though it left cases “half way through, in the mere exposure of political responsibility, which at the time represents the best one can do in terms of justice accountability”¹¹⁹. If it was not closing conflicts with effective judicial sanctions, at least it was informing the identity of the movements and legitimizing the human rights claims that were making sense in the identity of the groups who were mobilized.

From the four instances of constitutional control that I have visited here, two of them refer to the control of horizontal relations that moderate the exercises of the legislative, the *acciones de inconstitucionalidad* and *controversias constitucionales*; only through *amparo* can a citizen directly appeal to the Court, and it was only with the *facultad de investigación* that the Court could indirectly target specific authorities of rights violations (instead of challenge their jurisdiction), even if it was only on the nominative disclosure of human rights violation. The *facultades* became increasingly attractive to the citizenry, because social groups had no other means to publicly confront governors and challenge them on political grounds, albeit with no possibility of judicial or administrative sanctions, or any form of reparation. But soon after receiving the request for the Oaxaca case, the Court requested that article 97 of the Constitution be reformed, effectively moderating the *facultades de investigación*. The original proposal for reform aimed to regulate the recognition of violations of rights, but in order to avoid any impression of criminal procedures there was an explicit omission of information about the perpetrators

¹¹⁹ Interview with Marina, summer 2012, Mexico City.

of such acts¹²⁰. The *facultad* was erased from the Constitution in the reform of 2011, when the Court transferred it to the CNDH, who already had a similar faculty. The *facultad* as such was finished.

CONCLUSION (THE DEMOCRATIC OBJECTION)

When we reached the judicial interventions on abortion and same sex marriage of 2008 and 2009, the development of the Mexican judicialization seemed to have discouraged a critical optimism, the production of an account of the political and historical praxis of social claims and social transformation, particularly sensitive in identifying, and producing, language that anticipates “the new world to come of vindicated justice” (Freire 1992: 60-61). Still, we hold on to the conviction that the authorisation of new social actors in democracy, and judicialization itself, are meaningful for activists, scholars and everybody to whom constitutional language makes sense, because they can reinvigorate hope for material, social and political change, and the possibilities to raise expectations about the SCJN’s role in the promotion or facilitation of the *inéditos viáveis* of sustained commitment towards the human rights of citizens. In critical optimism we hope that the court could recognise the different political positions of different people in the country, a country that is *de facto* plurinational, whose legal system is organised in a strict hierarchical and exclusionary arrangement, and whose record of governmental institutions presents a path of abuse of power, violence and impunity, that targets different people with different intensities. That, however, has discouraged neither human rights activists and citizens who continue to see in the Court a possibility of intervention that Mexico did not have before, nor legal theorists who affirm that something good will come with judicialization.

¹²⁰ The CMDPH lobbied to prevent this reform, accusing the Court of supporting the impunity of the cases of Atenco, Oaxaca and Lydia Cacho. <http://www.cimacnoticias.com.mx/site/07081010-Preocupa-que-SCJN-a.26925.0.html> and http://e-consulta.com/portal/index.php?option=com_content&view=article&id=1201:sesion-scjn-sobre-facultad-de-investigacion-oaxaca-va&catid=18:hoy Last accessed Feb 11th 2012.

In this chapter I have attempted to recreate the way in which the promise of judicialization has been politically distributed across constitutional reforms in Mexico. The reforms of 1994 and 2001 that settled the conditions for our case studies both offered new language of rights that promised to improve the legal relations citizens establish with the constitution, holding out the hope of fixing, improving, or bringing something new to legal culture. However, the dynamic of constitutional reform became a political habit in the country, not actually repairing structural problems in the system and political crises, but postponing them with the hope of further regulation, or the promise of the next reform. In the judiciary, these promises rapidly exceeded the democratic mandate of the Court.

Unsurprisingly the Mexican Court became overloaded in this journey: with the executive investing in it his hope for the stability of the new federal system; with citizenry (and authorised institutions) demanding the intervention of an activist court willing to trespass its limited mandate and take political decisions on human rights cases; and with the new culture of transparency that left the Court under unprecedented public scrutiny.

The public assumption about the Court “repairing” the political life of the Country does not create agreement about what this process actually means. While the Court might be repairing trust and confidence in governmental institutions, the expectations about the power of precedents, and the *actual* juridical implications is in general overestimated by activists. In this chapter I have been highlighting the political determinants of the contemporary history of judicialization; those notes will be crucial to contextualise the processes of abortion and same sex marriage in the next two chapters. I have intentionally avoided the “*democratic objection*”, the sound critique that affirms that the judiciary is not an appropriate axis on which to accommodate the hope of altering the democratic order through redistribution of power and authority, because judges have no place in the politics of human rights (see Fiss 2000; Prieto 2003; Lara, Mejía and Pou 2007). The judiciary in this objection needs independence, and not politics, the process of legal decision-making is an exclusive attribute of the citizens’ representatives, whose

democratic elections entitle them to act. Any other premise is supposed to mislead an analysis of the Supreme Court, and endanger the coherence of the democratic order.

Against that argument, there is a claim that affirms that the Court is deliberately shielding itself with dogmatism and excessive formalism, and there are sufficient political reasons to support this claim¹²¹. The democratic objection that supports formalism effectively aspires to resolve the dilemma of judicial activism with the clarification of the principles of deliberative democracy: highlighting the distances between those who have the *final say* in constitutional control (the judiciary or the legislative in different interventions), those who are authorised within the citizenry to participate in that deliberation, and those who are represented and whose interventions are therefore already considered within the democratic model (see Álvarez Ugarte 2012; Gil Dominguez 2008). But the opposite position insists that the judiciary cannot be conceived without considering the political motivations that have driven the constitutional moments, and values the outcomes of constitutional moments according to the political crises they have in the practice postponed.

The constitutional reforms of 1994 and 2001, presented as historical events in the Mexican ephemerides, expose a version of new constitutionalism as the engine of contemporary human rights debates that left the Court as the foreseeable recipient of political conflict, thus destabilising the theoretical foundations of constitutionalism and of the Rule of Law itself. The new status and location of the constitutional court force us to adopt personal positions and assume consequences over our understandings of judicialization. We might be able to avoid the democratic objection and still *normatively* justify rights claims celebrating the Court's capacities for administration but testing its actions according to the way they benefit alternative visions of justice and social transformation; we can demonstrate the coherence of the political claims by reclaiming the premises of democracy both in relation to law and under its auspice in an interactive relation. We can produce theoretical readings of judicialization and legal reform in democracy relocating the tests and the political questions posed to judicialization not in

¹²¹ See the open debate between Christian Courtis, Ana Laura Magaloni and Arturo Zaldívar, promoting judicial activism, and Roberto Lara, Raúl Mejía y Francisca Pou arguing against it, a debate compiled in the chapters 6 and 8 of the edited work of Rodolfo Vázquez (2007). See also Gargarella 2006.

that to which it promises to respond, but focused on the main political ills they came to remedy and the emphasis on the crises that were cancelled or postponed, and vindicate critical optimism.

PART 3
CASE STUDIES

Chapter 5

AN ABORTION IS SOLELY FOR WOMEN TO DECIDE! (AND JUDGES!)

“Bravo! Let’s celebrate. From August 28th [2008] there is no question about it (at least in the Federal District): women’s capacity to decide over the interruption of an unwanted or non planned pregnancy will no longer drive them to the threat of criminal prosecution. Bravo to the Ministers who belong to our highest court of justice. The women in the DF, and the women from other states that exercise their rights in the DF, are grateful to you (...) the celebration of the Court's judgment should become a national holiday. We should buy champagne and toast in the Zócalo each August 28th (...) Bravo, since August 28th women do not risk their lives in clandestine abortions anymore (...). Not only to the SCJN but to the ALDF too. Let’s celebrate because the legislature approved a law that is saving women’s lives...”

Alma Beltrán y Puga; Legal Coordinator in *Grupo de Información en Reproducción Elegida A.C. (GIRE)*¹²²

What changed in Mexican history and its rights' culture with the legal reform of abortion and the Supreme Court’s subsequent upholding of the law, how are Mexican politics different and how it influenced the peculiar development of Mexican judicialization? What is the best way to acknowledge the reform in 2008, the lawful relations that were authorized by it, the political positions acknowledged, and the discursive shifts in human rights inspired by the new values of democratization? In this chapter I aim to present an analysis of the reform and the *acción de inconstitucionalidad* against the abortion reform of 2008, avoiding the temptation to succumb to an uncritical attachment to the Mexican legal system and the Supreme Court of Justice, claiming that the process a) postponed important moments of tension at a political juncture of crisis of legitimacy by upholding the law, but that it did so through the strengthened authority of the legislative, with the

¹²² See <http://eljuegodelacorte.nexos.com.mx/?p=1378> Last accessed August 15th 2013

Court making no commitments towards the protection of women's rights that would ensure further interpretation favouring the right to choose, and b) underestimated the effects that the disjointed decision that resolved the case in Mexico City would have on women's rights in the rest of the country, since by supporting the authority of the legislative the decision indirectly promoted a wave of retrogressive legislative reforms in the states that the Court did not subsequently stop, favouring the federal order over a progressive interpretation of women's constitutional rights.

The Latin American and Caribbean states hold the most restrictive abortion laws in the world¹²³. In the context of the institutional instability of the process of democratization those restrictions appear as diagnoses of the structural inequalities that define the relation between the state and women, with the state defining terms of control over women's bodies, narrowing discursive frames available to advocate for women's rights to their reproductive capacities (Vid. Craske and Molyneux 2002, Dagnino 1998, Vargas 1996). The imposition of the power of the state over women's bodies became at the same time the axis of women's mobilization, and the eventual entry point for women's movements into institutional politics. In the 1980s, the intense institutional adjustment of democratic shifts stimulated the coming together of feminist and women's movements at the national level within new left cadres and with transnational networks of solidarity. The early production of language of accountability in the transnational scenario gave content to the critique that linked gender oppression, subordination, exclusion and exploitation, with the economic and political oppression of the patriarchal state.

In the 1970's women's mobilization was part of the broader social mobilization united against the dictatorship, and differences of class, age, and gender were transcended in favour of solid opposition to the state. "It was this unity that accounted for the strength

¹²³ Latin America is home to five of the seven countries in the world in which abortion is banned in all instances, even when the life of the woman is at risk: Chile, Nicaragua, El Salvador, Honduras, and the Dominican Republic (Leaving outside only Vatican City and Malta) Only in two countries has abortion been decriminalized at the national level: even while writing this chapter Uruguay became the second, after Cuba (<http://www.estadao.com.br/noticias/internacional,uruguai-e-o-primeiro-pais-sul-americano-a-descriminalizar-o-aborto,946863,0.htm> last accessed Oct 17th 2012. The reference does not pretend to draw generalizations for the Latin American region, but to replicate the arguments that frame the local dialogues as legal cultures.

and ultimate success of the opposition movement” (Molyneux 1985: 228) Since the 1980s, the movement had stressed a dialogue about women as new political subjects, as a response to the internal fractures with other social movements, but also encouraged by transnational development agendas embraced by feminists as the promotion of individual potentialities for a free and fair society with a democratic vocation (Lamas 2008b). Like many other social movements, part of the feminist movement “professionalized” and adapted its organizational forms to the channels of intervention of democratic institutional politics, stressing new fractures in the identity of the movement, but gaining institutional spaces that started influencing public policies and legal reforms (Alvarez 2009; Vargas 2001).

Throughout the decades, the decriminalization of abortion remained the perennial pending agenda of the shifting relations between women and the state in democracy. The promotion of equality policies and institutional participation of women, organized under the ideology of secular and liberal democratization, never resolved the fundamental claim of reproductive rights, slowly subjugating the oppositional nature of reproductive rights to the strengthening of the state (see for example Molyneux 1985: 244). But during the last four decades the debates on abortion did transform traditional stereotypes and conventions about women citizenship and women in politics; if they did not destabilize legal systems, they did challenge their coherence with the confrontation of patriarchal cultural patterns of gender roles, reproduction, and family in modern law. Constitutional courts (finally in the last decade) are slowly joining in with judicial reviews of abortion statutes all over Latin-America; in some cases this courts have been required by women’s rights advocates to intervene guaranteeing the right to choose against criminalization abortion (that is the case in Colombia); but in other places it has been not been women’s rights activists but groups or actors seeking repeal of the legal provisions decriminalizing abortion (the case in Mexico). The role that courts play in abortion, supporting the criminalization of decriminalization, is mostly determined by who has access to the court, and how that capacity is used to protect women’s rights, or to confront other instances of political authority.

Courts have been forced to make choices that they are largely unprepared to address, between restricted or broad applications of women's rights, between different judicial settings to accommodate women's rights appropriately in the judiciary (women's rights versus the rights of the unborn as a constitutional priority), and ultimately, they have to justify the conceptions of human rights they will be bound to (negative rights or positive rights as their main mandate). Constitutional courts had to define their own roles in the new constitutionalism, to assimilate the new political power that was given to them (either by turning passive and reinforcing the power that kept the structure of the state unquestioned or by becoming activists courts with the capacity to transform human rights culture), and to control the meanings associated to their decisions (to transform the historical experiences of rights lived by women, or to maintain the status quo of institutional relations?).

Attempting to recreate the critical optimism of Freire described in chapter 2, anticipating a good future through the critical analysis of political praxis that contemplates the possibility of a pattern of judicialization to be followed in the judicial review of criminal abortion laws inclined towards the recognition of women's right to choose¹²⁴, I present the judicial response to abortion in Mexico as one where the Court did not commit to give juridical content to women's right to choose, but to the *rule of democratic procedures* understood by a strict reading of the federal structure of the State: the distribution of political power between the three branches of the government, (which disbars the judiciary from intervention in political controversies because it has not been democratically elected), ultimately determining the Court's passivity towards social movements' human rights agendas¹²⁵. The Court's performance removed the original women's rights claim to bodily autonomy from the judicial process and converted the

¹²⁴ In Spanish the right is formulated as "*derecho a decidir*" (right to decide). The English formulation of *right to choose* could suggest (at least to Spanish speakers) the right to *choose from* fixed (and feasible) choices in the exercise of rights, as opposed to the *right to take decisions* in an empowering enunciation that includes the unedited and untested feasibilities, and a different projection towards law (see the discussion in chapter 1). I use the term 'right to choose' as it can be more familiar to Anglo-Saxon readers (because of its reference in international human rights instruments). This does not replace the debates that the literal translation in Spanish demands (right to choose = *derecho a escoger/elegir/decidir*).

¹²⁵ For the distinction between judicial responses focused on the 'content of policies' and responses committed towards the 'rules of democratic procedures' see Curtis 2008.

process of the *acción de inconstitucionalidad* into something else, the reinforcement of the capacities of the legislative across the federal state. The SCJN could have resolved the case by giving juridical content to the right to choose, informing all further regulation where legislative instances would have had to follow their interpretation, moderating therefore the uneven conservative forces that routinely prevent women's rights by imposing criminal control over their reproductive choices.

But the case in Mexico is still celebrated as a progressive opening to social movement's claims; the greatest stimulus for that was a fiction of a receptive court, a court that opened to civil society even if it did so with no juridical consequences, favouring the Court with symbolic recognition that had no material consequences for women's rights. For the first time in its history, the Supreme Court organized exceptional public hearings where citizens came to present arguments for and against the decriminalization of abortion; however, most of these arguments were not legal in nature. Citizens were invited, but came with different ideas about the Court; their arguments were not organised and were not assimilated as fundamental components of the Ministers' decision-making. The hearings were organized in a way that produced a symbolic rather than a juridical effect; the Court demonstrated its interest in *listening* and *learning*, but not a structural willingness to assimilate the interventions of those invited to participate. The judicial process of the decriminalization of abortion of Mexico City did not resolve the controversy raised over women's rights, leaving their realization to the exclusive discretion of legislative organs, reinforcing the path of judicialization only shared among elite interpolators, with strong echoes of the old presidentialist state apparatus.

This premise does not lead me to contest the final outcome of the process: the decriminalisation of abortion in Mexico City, and the judicial recognition of the reform was always the desirable and desired end of the process; perhaps the problem lies in the means that achieved this end. Women in the City who decide to access the service to terminate their pregnancies can now do so freely, and the reform made health services available to them (Bravo!). The process did not come about in the "best way possible", but it still became a hopeful object of inspiration to imagine new lawful and political

relations. The chapter is then motivated by critical evaluation of the self-restrained performance of the Court that contradicted the new culture of rights to which it had been forced to respond, and the ambitions generated through the promises of judicialization that imagined a Supreme Court open to the citizenry, with the capacity to compensate for the lack of progressive development of the legislature elsewhere in the country, willing to moderate that lack by providing enforceable content for the rights recognized in the Constitution.

Feminists have always been aware of the limits of legal reform. The conditions of attachment of this case do not challenge feminist politics but instead contribute with an incredible pedagogical potential to teach us about the Mexican state, judicialization in the country, and the limits of its promises. We can remember Virginia Vargas' statement about the Latin American feminist movement:

“from the initial enthusiasm to build democracy we moved to a much less seductive reality (...) because some of [the frames of action] were isolated from other multiple strategies of questioning and transforming the structures of power that generate other multiple forms of exclusion and subordination” (2003:42).

Latin American feminists have learned to use legal systems “in ‘subversive’ ways, to ‘provoke’ debate in both activist and policy circles about ‘bodily and sexual rights’ as core dimensions of democratic citizenship” (Alvarez 2009: 181). In that sense, the setting up of the happy judicialization of sexual rights is not a feminist process, and it is not a subversive strategy of feminist activists, it is only accidentally part of the trajectory of the struggle for women's rights. The image of the subject attached to the law that has been evoked in the introduction is a theoretical position that authorizes here a concession, a solution to explain how the continuum of the failed delivery of good governance encounters a promising new culture of rights: without a better Court interceding for women's rights, we still need the political relevance of a “newly acquired right to abort [that still remains to be] mediated by women's historical relationship to state services...”, that confronts hopeful ideas of human rights with the tradition of Mexican political culture of “...clientelism, authoritarianism, and assistentialism” in which the new service

of legal termination of pregnancy is being delivered (Amuchástegui 2013), and the new lawful relations with the Court are imagined.

The judicial process of the *Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007* (AI 146-2007 y 147/2007) was initiated by the president of the National Commission of Human Rights (CNDH) and the General Attorney (PGR), teamed up to challenge the legal reform of the Legislative Assembly of the Federal District (ALDF). As discussed in chapter 4, social movements have never had the capacity to present *acciones de inconstitucionalidad* to the Court; therefore, from the beginning the case reaffirmed the exclusive access of expert tutors in the Court¹²⁶, actors who in this case happened to be against the reform; as I infer later in the chapter, the exclusive authorization of these specific expert tutors is related also with the way they protected the interests of the conservative president. The Court rejected the *acciones* and confirmed the legal reform, but its decision was soon followed by a conservative wave of harsh restrictions of women's reproductive rights in the country that the Supreme Court *did not prevent*; in a strict formalist analysis of AI 146-2007 and 147/2007, the Court only set up precedents that determined that it *could have not prevented* the subsequent cases. After uncovering, in the process, the legal gaps that enabled the reform in Mexico City, different legislatures in the states promoted reforms in their own constitutions including explicit language to guarantee the right to life from the moment of conception, reforms supported by the Supreme Court which had already favoured the authority of legislative assemblies to interpret women's rights to choose themselves and determine the content of women's rights in the states' jurisdictions.

In the resolution of the process, human rights were only addressed as a discussion of horizontal accountability in the effort towards the new federalism: the promotion of *fair* relations across a network of relatively autonomous powers embodied in the legislative. The discussion of horizontal accountability is imported here from the Latin American dialogues promoted by Guillermo O'Donnell, who distinguishes it from vertical

¹²⁶ Let us remember that according to the art. 105 in the Constitution, the mechanisms created to increase access to the court's jurisdiction are for the exclusive benefit of federal and local agencies (see chapter 4).

accountability (the claim to make elected officials answerable to the ballot box); horizontal accountability is “the existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions to impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful”. (1999b: 38)

Horizontal accountability as a priority for democratization postponed judicial responsibilities over the recognition of women’s right to choose as imagined in the feminist political tradition, and the right to choose as stated in article 4 in the Constitution¹²⁷. I identified the discourses preceding the Cairo conference of 1994 as the feminist tradition which spoke of the right to choose as a basic enabling conditions for women’s empowerment that ambitioned robust concepts of citizenship, a new citizenship that was an intrinsic provision for the overall transformation of social, cultural and economic systems in which subordination is entrenched (Facio 1995; Molyneux 2002; Petcheksy 1986).

The happy judicialization in abortion produced neither new lawful relations nor new robust notions of citizenship such as could have been ambitioned as an interpretation of progressive democratization. In fact, a careful reading might suggest instead that it discouraged the development of judicialization altogether, to the extent that it demobilized activists from pursuing abortion politics in both the legislative and the judiciary by narrowing the constitutional language available to frame further campaigns. Activists never had (non-mediated) access to the Court, they were deprived of the tools to confront the conservative wave that followed the process of Mexico City.

The discussion in the chapter takes place in the following order: in the first section I will try to summarize the political context in which sexual rights claims emerged to demand a response from legal and judicial authorities. In the second section, I will attempt to

¹²⁷ “El varón y la mujer son iguales ante la ley. Esta protegerá la organización y el desarrollo de la familia ... toda persona tiene derecho a decidir de manera libre, responsable e informada sobre el número y el espaciamiento de sus hijos” (All people, men and women, are equal under the law. And law will protect the organization and development of the family ... All individuals have the right to choose freely, responsibly, and informed the number and spacing of their children).

outline the political background of the *acción*. I will suggest that the political precedents (contextualized in chapter three with the electoral confrontations of the PRD) explain a) the sudden centrality of the abortion law reform in Mexican politics, and as a convenient strategy for the happy judicialization, and b) to some extent the inconsistency of the decision, both in procedural terms and regarding its desired political coherence. The third section is a close reading of the *acción* where I emphasize the disorder of the process. This disorder ultimately limited the potential for this case to contribute to a progressive transformation of the judicialization of politics: expansive lawful relations, where other groups and subjects of rights could imagine themselves replicating the success of human rights campaigns, profiting from the legal knowledge that could have emerged from the abortion cases with attractive tools for action left behind in shared solidarity towards broader human rights campaigns. But the case suggests instead the regressive impact of the progress in the capital compared to the recoil elsewhere.

I. AS IF THAT IS WHAT THE COURT DOES.

In chapter 2 I used specific language to talk about judicialization in Latin America first as an optimistic project that aimed to expand the interpretative frameworks of rights with promises to redistribute political power and authority between legal and non-legal actors. But the institutional instability in Mexico, inherited by the monopoly of authority of the PRI (that included original plans for the new democratic constitutional court as a sort of insurance policy for the President, as I suggest in chapter 3) limited the capacity of the Mexican Supreme Court of Justice to fulfil those promises. The empowerment of the Court as constitutional tribunal with the adjustments that started in the constitutional reform of 1994, have mainly targeted the stabilisation of horizontal relations of accountability (between the Court and other branches of the representative government), and the setting up of basic conditions that would restore the rule of law in the new federalism, or the federalism that has never been fully achieved in the democratization process (see chapter 4 for Ernesto Zedillo's reform).

The judiciary contributed to the project of the federal state by temporarily resolving political crises that triggered the constitutional moments in the country (those historical moments that attracted extraordinary publicity to the Court and constitutional reforms), resolved with images of rights accountability, even if those did not share democratic authority or much political power with citizens (as opposed to with expert tutors). Nevertheless some social movements developed a strong attachment to the Court, as if the investment of their own hopes into legal reform had to pass through the legitimation of the Court's new authority. Sometimes this occurred not even because of the institutional adjustments secured by the Court, but through single cases that were seen as if they representative of a wider, inspiring transformation. This is what happened in the abortion case.

In this attachment, social movements stand convinced that the Court should abide by the interpretations of human rights that have circulated within local and transnational activism, and celebrate legal events as if they are coherent and responsive to those conceptions. Judicialization is evaluated as if the Court “*can, or ought to, provide certain and demandable juridical content to the juridical notions of sexual rights, or/and densify the rights debate through its decisions, in order to update in ultimate instance the coercive nature of law*” (Morales Aché 2008: 175, my italics). And when the Court delivers a decision that matches the juridical outcome as imagined and desired by the movement, the process fabricates a general image of the legal system built on the aspiration of a legal system taking political decisions, demonstrating itself to be capable of transgressing the borders of legal reasonability to defend expansive notions of human rights (Corrêa 2008: 35), even when it is from the formalist learning that the process emanates.

From a legal perspective, transgressing the borders of law is an enterprise that goes against democratic precepts. The Brazilian activist and scholar Sonia Corrêa has brought to light the paradox that is behind this transgression: the language of sexual rights is largely external to legal frames, it is in principle related to political claims, it is first affiliated to political expressions (and ethical impulses as I argue in the introduction) and not legal prescriptions. In an attempt to hold open the space in between the politics and

the law lies the linguistic distinction between “*ley*” (as the written legislation or rules) and “*derecho*” (as Law, with a capital L, as a given order within a legal system), rooted in postmodern scholarship. First made by Jacques Derrida, the distinction allows us to recognize the different investment that is made in questions of justice and in questions of authority: the questions of *droit* (*derecho*/Law) are different from the questions of *loi* (*ley*/legislation). The distinction is juridico-ethico-political, and is made to enable an instrumental attachment to the law that remains sceptical towards the power of the [L]aw, and does not demand sacrificing one’s critical optimism: it facilitates a utilitarian separation of the *droit/derecho*/Law as a force that always “authorises” itself, and of the *loi/ley*/legislation (Derrida 1980/1990: 924).

The distinction is crucial if we aim to separate the result of the decision of the Court (how it supported the rule of the ALDF) and the process by which the Court failed to commit itself to protecting women’s reproductive rights (how it transformed the Law, the legal system). The *celebration claims as its object the law*, and thus dismisses a critical relation with *the legal system*. In Latin America, the language of rights used to reunite the collective interests in emancipation of those who embarked on political action and resistance, including resistance against the sources of authority of the Law, the authoritarian states, where the Law was conceived in general terms as a source of oppression and exclusion (Esquirol 2008, López Medina 2004; Novoa Monreal 2006). Rights evolved as creative tools of collaborative networks resisting the social fragmentation authorised by the neoliberal structures of governance (Santos and Rodríguez Garavito 2005). But only recently, and after efforts to modernise the federal structure of the state as a democratic priority, have human rights been interpreted as legal conditions that have to be authorized (or granted) by governmental authority. We witness here a merging of Law-and-law as a condition to authorize all aspirations for justice, where the achievements of one legitimize the power of the other, and one law of the ALDF speaks for the whole Assembly, and one decision of the SCJN inspires gratitude towards the whole of the Court, and the Law in general.

But in the Mexican democratic arrangement, to provide enforceable juridical content to sexual rights (or any other human rights claim) *is not* the SCJN's mandate, therefore the attachment has to be broken. The opposite, if not discredited by the democratic objection, can be explained by a “mystified” version of the Court, fetishised or surrealistic, an idea that makes of the Court an attractive object of study in full awareness that it is perceived in a way that does not reflect its reality (Lemaitre Ripoll 2009, Rodríguez Garavito 2012). But we do need those versions to create hypothetical desires about the court. We have resources to relocate the study of judicialization within transgressive understandings of the law, the visions for alternative usages of law that actively oppose the formalist tradition of law as the only possibility to estimate change (Andrade 1988) and reject the rationalist paradigms that merged the Law and the law under an totalizing project of 'the rule of law' (Barreto 2013; De Carvalho 1992). As argued in chapter 2, transgressive visions are especially important in the Latin American context, because only non-formalist spaces have been able to assimilate the shifting legitimacy of the institutions at the same time as the crises of the political regimes, and the different meanings attributed to law in pluralist cultures (Falcão 1984). Their dismissal is also the underestimation of the law that is spoken in the streets by people who still hold on to its emancipatory potential (Faundez 2005, Goldtsein 2007).

Contemporary literature on Mexican judicialization has distinguished in its analyses the positions of judges of the Supreme Court as “Legalist vs. Interpretativist”. In the first approach, the Supreme Court is understood as if it is ruled by the *natural* restrictions of constitutional rights, defending theoretical frames that prevent the failure that is predicted when the objectives and goals to implement desired policies are settled in non juridical arguments, with incomplete visions of the normative prescriptions of the Court (see Aguiló 2013: 82; Lara, Mejía y Pou 2007; Poder Judicial de la Federación/Suprema Corte de Justicia de la Nación 2006: 69-70; Pou Giménez 2010). The second one acknowledges the way individual judges assume the political, social and economic consequences of their decisions (Ansolabehere 2008; Sánchez, Magaloni and Magar 2009).

There is the another tendency in the literature and analyses of the Court that goes beyond the legalistic convictions of its Ministers, highlighting with its historical contextualisation the limited trajectories of judicial independence (Domingo 2005), and acknowledging the Mexican judiciary's passivity in developing appropriate policies or claiming political independence through their human rights decisions (see Ansolabehere 2007; Courtis 2008), insisting that the fundamental rights cases that the SCJN has accepted are marginal, and therefore should not inspire conclusions about the Court's development. But in the main, the theoretical dialogues tend not to pay enough attention to the different political positions of actors in relation to the Court, to the fact that the vast majority of civil society has little power to intervene in the Court or negotiate the juridical content of their own rights, a reflection of a legal culture focused on "institutional fundamentalism" that has normalized exclusion to the point where it stopped being a theoretical concern of constitutionalism. This is how Pedro Salazar Ugarte paraphrases Amartya Sen to create a portrait of the relation between poverty and constitutionalism in Mexico, describing the tendency to focus all deliberation and social action towards the redesign of political institutions (or a theoretical debate about assumptions for the redesigning) without properly taking into account the social context. The consequence of this, Salazar Ugarte argues, is the lack of ideological and political positioning within claims for social justice, poverty and inequality in national politics (Salazar Ugarte 2011: 302).

Under this frame the Mexican Court is represented as an institution that is willingly adapting itself into democratization, accepting with discretion the challenge of having capacities to implement tasks which are not strictly juridical, but prioritizing nevertheless the upholding of the status quo of the different institutions of the federal state without destabilizing their political arrangements (cfr. Ansolabehere 2007: 197, 220). The Court applied restrictive criteria to human rights cases, and also repeated a formalistic interpretation in their resolutions: ruling always *in relation to* fundamental rights, avoiding substantive interpretations and clear enforceable jurisprudence, a tradition labelled as "deciding without solving", of resolving cases without ever touching the substantive questions they pose to human rights (Courtis 2007; Magaloni 2007; Magaloni and Negrete 2000; Magaloni and Zaldívar 2007).

With no political counterweights, and with no established solid criteria to define how it should resolve the affairs of its competence, the Court did not fully engage with the political coming to being of the democratization process. The links between judicialization and the end of Mexican presidentialism, the scandals that have fast tracked its development, and all the points of tension outlined in the previous chapter, have to be restored in the analysis to understand the Court's decisions, its position towards the shifting political context, and its role vis a vis the new meanings attributed to human rights, in both legal and non legal spheres. In short, the Court has postponed the clear demarcation between its jurisdictional function and its political role (Ansolabehere 2010, Domingo 2000; Magaloni 2003). It is the choice of the observer of judicialization to restore those connections, or to celebrate the legalistic (but passive) processes of learning of the Mexican Supreme Court.

“You cannot expect from the Court more than what it has to offer”, I was told repeatedly during various interviews with legal activists and scholars who specialize in Mexican judicialization. But my theoretical (and ethical) dilemma is that I do want a responsive Court, I want to unfold an analysis that departs from what the Court did, passes through what it did not do, but is interested in describing how the Court should have articulated its decision. In other words, I wish to recognise the gaps between the normative objectives of the *derecho/droit/Law* and the social realities of the *ley/loi/law* that are determined by it, because in between the two there is a notion of human rights that authorises only expert tutors to “speak the law”, and only certain questions, even though they claim entitlement over questions of accountability and justiciability (César Rodríguez Garavito, in Jaramillo Sierra and Alfonso Sierra 2008: 16). I am therefore suggesting reading the decision of the SCJN *as if* it is (or ought to be) responsive to women's reproductive rights, *as if* that is intrinsic to its political role and fundamental task, against the democratic objection that prevents all harm to legal reasoning made by illegal challenges.

Drucilla Cornell returns in her work to the Kantian “as if” in a way that proves useful here to promote the value of this hypothetical aspiration. The expression stands for a fictional position of general consent (deposited within the general will) towards law and the political system that is not the classical contractual assumption, the founding explanation of political power in which modern Western societies recognize themselves. The assumption of contractualism explains, with the idea of an implicit or explicit agreement, the irreversibility of the dynamics of civil society, the conditions that make thinkable *all that it is* in politics and law, and also tests the rightfulness of the law that all citizens *could have* agreed under the assumption of their consensual membership in the contract (which determines in turn the representations of membership in political identity that distinguish between those who are part of the contract –and agree with the rightfulness of the law-, and those who are excluded from it) (Santos 2009:13). In Cornell’s work, the agreement of the *as if* is determined instead by imaginative political discussions, it creates (rather than represents) rights demands that are capable of testing the reasonability of the assumption of the contract, but producing its own tests to determine the rightfulness of the law (1995: 12-17).

The main task of reclaiming an original hypothetical *as if*, to study the Court’ decision as if it could have been better, is then determining the conditions in which we could make alternative agreements reclaiming the general will to legitimize the Law in different terms. This is what the Brazilian movement of the alternative usages of law did in the 1980s: to educate ourselves for a new general will in which to understand the law (and the Law) shaped by 1) the rejection of the irreversibility and unavoidability of the economic and liberal set up of the Law; 2) a priority given to the political positions of those in situation of disadvantage in relation to, and with hierarchical distance from, the Law; and 3) the unanimous critique of legal positivism, a strategy to study the normative prescriptions of the law but always aware of the political commandments that organize them (de Carvalho 1992: 89, see also de la Torre Rangel 2006 [1984]; Wolkmer 2003).

The legal termination of pregnancy (LTP) - as the reform to abortion law was framed by the Mexican feminist groups involved - becomes the object of the general will, and the

test for the rightfulness of the Law, but because of the desire for the enforceability of the right to choose, and not because of the authority of the ALDF. With the call for the *as if* and for active imagination in the analysis of the Mexican process, the framing of abortion and the LTP in the right to choose will test this discursive suspension against basic premises of legal formalism. The right to choose surpasses the belief systems that are flexible for strategic manipulation and the spatial temporal resonance of legal reforms, and builds instead on a moral conviction about the capacity of women, and citizens in general, to negotiate the definition and delivery of their own rights. In the politically translated version of the *right to have rights* there is an indispensable requirement of access to the basic conditions of participation. What was tantamount to meaningful change in Anglo-Saxon scholarship in judicialization (Scheingold 1974), in Latin America represents a still new, ambiguous and unedited circumstance of democratic exchanges that were being settled at the same time as the case study developed. There were no closed rules of engagement with the judiciary for social movements before the case of abortion came to the Court, which gives an enormous potential to our *as if*: the authority of the Court was not yet formally fixed on the predicaments of the coherent constitutional order. Judicialization, and the new constitutionalism, were still promises to explore, and a forum in which to invest sexual rights expectations.

1.1 The Legal Interruption of Pregnancies

The reasonable and desirable claim for LTP, the unconditional recognition of the autonomy of women who claim the right to decide over their bodies, has been historically the founding core of sexual rights and of feminist and women's movements in Latin America, but also the most contested one. In the last forty years, feminist activists and women's movements have been producing and renewing discursive frames in which the ethical commitments towards women's right to choose have projected different instrumental usages of law. In the framing processes they have shifted interpretations and attributions in order to strategically renew (or replace) the social constructions that lie beneath the dominant belief systems through alternative mobilizing systems in collective

action (for the discussion of collective action in these terms see Tarrow 1998: 106). In their legal version frames are articulated as projects of flexible symbols open to manipulation and routine reconstruction, in order to offer adequate responses to the different interests, agendas and contexts of opportunity that they encounter (including partisan alliances and electoral opportunities). These symbols, it is important to remark, suggest juridical content for rights enunciation in law, but they never enclose the full meaning of the desired claims, since this meaning often occurs outside legal institutions (McCann 1991: 228,230). The LTP, therefore, is not the fulfilment of the right to choose but a mere condition for its possibility.

Abortion and the LTP have been the most contested narratives in sexual rights because they embody the apparently irreconcilable debate between moral commitments towards an indivisible notion of the right to life (from the moment of conception) and women's right to choose, two opposing visions that are irredeemably pitted against one another as "conceptually incommensurable", inasmuch as they rest on rival premises with no common ground for possible dialogue in between (Alasdair MacIntyre, quoted in Shapiro 2007: xiii; vid. Woliver 1996). Yet, diverse discursive frames have found resonance for recognition in different legal cultures, appealing to different belief systems and horizons of expectation, as if abortion and LTP represent different "types of legal problems" for different political communities (Olson 1995: 190; Bacchi 1999: 46). The right to choose has been framed in law and public policy, for example, as the right of citizens to privacy and autonomy, as the state's duty to protect its citizens, or as the constitutional commitment towards the right to dignity, where the choice of frame responds to the best way to mobilize strategically the claim of autonomy into a political engagement with a spatial-temporal dimension (see Ferree 2003, Ortiz Ortega 2010: 185).

The frame of the right to choose is sufficiently flexible in law and public policy to cover the necessary enabling conditions to make abortion or LTP concrete and universally available; still, despite its variations it can remain rooted in the "feminist morality of abortion" that Rosalind Petchesky (1986) defined as the inscription of narratives of self-determination in terms of the right to control one's body and the moral necessity of

autonomy. Politically, that project has been translated in the claim that every person should enjoy the “right to have rights” (see Corrêa and Petchesky 2003; Craske and Molyneux 2002; Dagnino 1998; Miller 2000; Petchesky 2000; Vargas 2002: 204) which covers the enabling conditions for the enjoyment of other spheres of rights, but also the capacity to advocate for those conditions oneself, in a conception of politics that keeps a certain distance from the exclusive constraints of the government-controlled political spaces.

The LTP is desired as a legal expression of the right to choose, suitable to undermine the androcentric premises of legal positivism conceived on the basis of the individual and detached male subject of rights, inasmuch as it demands the protection of the sphere in which the individual makes autonomous choices that connect her/him with others (Facio 2000: 31, 32). As a legal expression it can produce conditions of possibility to expand women’s practices of citizenship on the path to the transformation of social, cultural and economic systems. The immediate enabling conditions of the right to chose refer to, but are not exhausted by, an urgent call to decriminalize abortion and implement public health reforms: with a powerful call to alleviate rates of maternal morbidity and mortality related to induced abortions that particularly affect poor women (Coates 2011, Dries-Daffner, García and Yam 2006), and compensate the uneven effects that the criminal system imposes on women, particularly poor women or those in locations of intersectional vulnerability by reason of their geographical location, ethnic identity, age, language, etc.

The relation between women in situations of poverty and criminal law precedes the reflections on abortion: all regulation of abortion under a frame of criminality (as opposed to a frame of health and human rights) is used not only to protect life from the moment of conception, but to punish deviant practices of women, and to maintain the definition attributed by a legislative body of deviant practices in relation to a pregnancy. In some legal cultures legal uncertainty exposes women to the arbitrary exercise of power (Cook and Dickens 2003; Cook 2010) and the reinforcement of the stigmatization of women in relation to class, ethnicity, work and many other factors. Latin American

feminists have observed the sweeping increase of the number of women in prison in the last decade, an almost doubling of the number of women inmates in Latin America (accused mainly of misdemeanours and drug crimes)¹²⁸. But it has also been remarked how the profiling of women is being shaped in criminal systems: from a selective exclusion of women in criminal law and narratives of punishability (apart from abortion, infanticide and passionate crimes) (see Zafaroni 1993) to a closed and vicious cycle of poverty, gender and public policy, where “certain types of women” are not only inclined to certain crimes, but certain narratives of crime make much more visible the “transgression of women” in social relations being more juridified than ever.

In the case of abortion, this visibility has provoked health practitioners (often subject to criminalization themselves) frequently to denounce to criminal authorities whenever a miscarriage is suspected to be the consequence of an induced abortion (see Casas Becerra 1997). This situation targets both poor and indigenous women who are already vulnerable to unsafe practices of illegal abortion, and health practitioners who have to find their way around uncertain liability within the bureaucracies of their public health care systems (McNaughton, Mitchell, and Blandón 2004). With the combination of both claims, the decriminalization and the public health approach, feminists aim to resolve a promise of permissive legislation on sexuality that will automatically be followed by better healthcare systems for women, including reproductive and sexual health, and will exempt health personal from criminal responsibilities (vid. Grimes et al 2006, Khan et al 2006; Madrazo 2009b; Sedgh et al 2007). In that scenario women will have full autonomous capacity to negotiate their own means to pursue their own happiness using all legal and political resources available, and an accessible and effective healthcare system.

In Mexico, different frames for addressing abortion and LTP have been formulated according to the different “stages” of democratization in the country. In the seventies (the “new wave of Mexican feminism”) feminist and women’s movements organized publicly within the *Coalición de Mujeres Feministas* [Coalition of Feminist Women] that

¹²⁸ See the report of Open Society Justice Initiative in <https://app.box.com/s/39m9gi43p9ecrjicz7m1> . Last accessed Sept 15th 2014.

campaigned for ‘*voluntary maternity*’ and freedom of sexual choice (including an anti-rape debate), and against violence against women. That platform aimed to resonate as a democratic aspiration of women and as a problem for both social justice and public health. They targeted mobilisation around sex education and access to contraceptives, defending abortion only as a last resource for women. They also drafted the first “bill on voluntary maternity” and presented it to the Congress for its promotion. The bill was not even brought up to discussion on the floor (Lamas 1997, 2009)¹²⁹.

In the following decade, social movements invested their political resources in the strengthening of political opposition against the PRI¹³⁰, and started negotiating alliances and support within partisan structures. Only in 1977 the Federal Law for Political Organizations and Electoral Processes was published, marking a turning point for new leftist parties and alliance building for identity based and sexual politics movements (de la Dehesa 2010: 69). The feminist movement spread its connections across the small political parties of the left, and started to adapt its lobbying strategies in line with the parties’ agendas. During the same decade, the conservative pro-life groups also strengthened their anti-abortion mobilizations against the new feminist frames, defending the right to life from the moment of conception as a non-negotiable principle that ought to dictate the morality of all laws and regulation on reproduction.

It was only in the nineties when the “feminist reasoning was transformed into civil society arguments” (Carlos Monsiváis, quoted in Lamas 1997: 60) and the oppositional question of ‘for or against abortion’ was replaced by the question of ‘who is entitled to make decisions regarding the termination of a pregnancy?’ sustained in the defence of *the right to choose* and of a full sense of its legitimate entitlement. The local democratic

¹²⁹ This decade represents a major urban development in Mexico City and the expansion of the middle classes, where the new wave of feminism flourished. The predominant political practices were codified in unions and campesinos’ movements, articulated to give a direct response to the corporative profile of the state. The emerging movements (including the students’ movement) were clandestine organisations inspired by ideologies of collective actions against the authoritarian state. The bill on voluntary maternity had little chance to resonate, even with the larger leftists constituencies (Somuano, 2010).

¹³⁰ In the 1988 presidential elections, the candidate of the PRD, Cuauhtémoc Cárdenas, gained unprecedented attention as the challenger to the candidate of the PRI. The elections, however, were classified as an electoral fiasco with the failure of the computer system (see previous chapter).

development, together with the recognition of reproductive rights language across UN conferences, enabled the grounding of human rights language as the most appropriate discursive resource for mobilization. Sexual and reproductive rights were defined as inalienable human rights, not only overcoming the impossible conciliation of opposing conceptions of life and pregnancy, but also utilizing the rights claims to address the broader conservative economic and political agendas in the now democratic institutions (vid. Vargas 2001; Plácido 2007; Corrêa 2006; Corrêa et al. 2008: 152; Lamas 1997, 2009).

As a discursive strategy, the rights framework proved in the 1990s its potential to both translate social claims into norms for which governments are (supposed to be) accountable, but also to legitimize the relations that the government establishes with its citizenry in order to justify its authority. Political parties accepted into their ranks professional activists coming from social movements, offering them an institutional platform to voice their rights claims (see Alvarado and Davis 2004), and social movements started to turn to institutions and to the new allies that occupied the positions that have come to define the relation between activism and partisan politics¹³¹.

II. THE ‘HAPPY’ (BUT DISORDERED) JUDICIALIZATION

The *Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007* occurred at the epicenter of Mexico's judicialization process. The case was a breakthrough for human rights culture and occupied a central place in the political life of the time. It took the role of the constitutional moment but on a much smaller scale, inasmuch as it had the capacity to generate new identities (women whose rights are “recognized” by the Court), and to shape new relations between citizens and the Court. It created a new identity for the

¹³¹ In chapter 3 there is a deeper engagement on this issue. The representation of activists in political parties is problematic when we start unfolding the requisites of professionalization (that ultimately alter their human rights rhetoric), that ultimately disabled the double militancy due to work constraints, and the eventual separation of the new politicians from activism. Politicians working as liaisons with social movements occupied similar positions of negotiation, and sometimes with more effective results in the institutionalization of rights language (the clearest example is perhaps the same sex marriage debate presented in the next chapter).

subject of rights who is now recognized in the Court, reciprocated to the Court as a legitimate guarantor of constitutional rights. However, the mould for that relation does not hold a simple meaning.

Once it was established as a constitutional court with the new political opening of democratization, and with the set up (and shifts) of the different tools for judicial review in constitutional reform, the Court started to receive rights cases gradually, moderating them with frames of interpretation that would limit the amount of cases admitted, and the restrictive criteria to avoid the establishment of precedents. The advance of rights cases in the Court does not suggest a substantive development of interpretation of constitutional rights; instead it suggests different phases of indirect engagement of the process of judicialization with the political development of democracy after the PRI regime. This does not mean that the Court submitted its authority to the service of the new partisan politics, but the formalist prescription that limited the performance of the Court still suggests that the Court has been a passive witness of democratic transformation.

In chapter 4 I used Jodi Finkel's argument where she claims that the inauguration of judicialization with the constitutional reform of 1994 was planned as an "insurance policy" of the PRI who had seen its legitimate capacity to keep the monopoly of Mexican policies slowly fading away (2005). The last president of the PRI, Ernesto Zedillo Ponce de León, paved the way in this period for the end of presidentialism in an attempt to reconcile his party's style of governance with the very basic conditions of the rule of law that had been postponed for seventy-eight years, among those judicial independence and constitutional control. Now, the frames of interpretation of human rights might still suggest the continuation of that policy. The Court developed criteria in limited rights discussion, and organized in different temporal cycles: freedom of association marked the first "phase of human rights cases" in the Court. From 1994 with the reform, and up to 2000, the Court received more petitions related to electoral rules than to any other category; for the established political parties in the opposition the new package of constitutional review enabled the first real option for a competitive electoral playing field understood as the fundamental right of association.

It was first an *amparo* suit that questioned the constitutionality of the exclusive authority of the president to designate the leadership in Mexico City, that eventually evolved to the legal reform that enabled the first democratic election in Mexico City in 1997 (see chapter 3). Later on, the PAN and the PRD used *controversias constitucionales* to challenge the constitutionality of the methods of proportional regulation and public financing established in different electoral codes in the states that were clear instruments of the PRI to grant its hegemony in the state legislatures¹³².

Apart from the interpretation of the rights of association as the protection of competing political parties, the Court undertook cases that involved unions and other forms of political association, thus disarming the support structure of syndicalism and corporatist culture of the hegemonic ruling party with power and authority over unions, business associations and civil society organizations, based on the existence of a single trade union or business association for each area of economic activity (Ansolabehere 2010: 97, see also Zepeda Martínez and López de Lara 2013). The most recurrent issue in Courts decisions was the recognition of the freedom *to not join* an association¹³³. In Karina Ansolabehere's analyses of the theses produced by the Court in the immediate period before the Law, and the period after, she suggests that there is a tendency towards the promotion of an interpretative framework that favours individuals' rights of association (to join or not to join), but a proclivity to restrict the formation of new associations (2010: 98). The political consequences of this framework, following the same line of Jodi Finkel's claim, are inferred to be the basis of a new political culture of fragmented political power, the source of efficacy for the new democratic authorities that never managed to fully detach from the authoritarian profile of the PRI regime (see Ríos Figueroa 2007).

¹³² For a through development of the 1996-2000 period see the work of Jodi Finkel, 2003.

¹³³ See for example Suprema Corte de Justicia, Tesis P. LIII/99.

The second phase of rights cases refers to freedom of expression. It coincides with the first *sexenio*¹³⁴ of the PAN in presidency, and it is related to the approval of the Law of Transparency and access to Public Information of 2003, not just because of the new public profile of the Court (now forced to make available all information about its internal functioning, to publish definitive decision, to broadcast most of its sessions), but because of a series of theses published soon after, with criteria that cut across the circulation of political ideas, the circulation of public information of the three branches of the governments, and the prohibition of prior censorship as basic grounds for the new democratic government, contrasting with the secrecy of the PRI (see Ansolabehere 2010).

The assimilation of freedom of expression as a rights debate in the Court was mainly centred in the circulation of information within the institutional structure, with few cases in the Court that restricted its content on behalf of “public interest”, or the national symbols that cannot be offended by any individual dissident, moderating the limit of the freedom of expression in tune only with the democratic precepts previewed by governmental institutions. Miguel Carbonell documents the *amparo en revisión* 2676/2003 that upheld the criminal prosecution against a poet who published in a small circulation magazine offensive language against the national symbols (the Federal Criminal Code protects the flag, the national emblem, the Constitution and other patriotic symbols from any outrageous insult). For Carbonell, this case is an emblematic lesson of the profile of constitutional jurisdiction: the Mexican Court is becoming a counterweight of the political branches, but it is leaving unprotected individual dissidents, authorizing only an accommodating version of human rights where these lose all their counter-majoritarian character (2007b: 144)

Indigenous rights cases represent a third phase of rights cases in the Court. These were a direct reaction to the constitutional reform of 2001, that I described in chapter 4 as a missed opportunity to reshape the identity of the nation and its plural order with a

¹³⁴ Sexenio is the 6 years' term limit for a President in Mexico.

revolutionary and truly participatory process¹³⁵. The Court never considered indigenous rights before 2001; cases involving indigenous peoples were only received as agrarian issues. In 2001 both indigenous rights discussions and judicial review had achieved great political and social visibility, but counterintuitively, their encounter in the Court was resolved with strict interpretation limited by restricted parameters and “formalities”. I have mentioned in chapter 4 the massive application of *controversias constitucionales* (presented by the recently empowered municipalities) to overturn the 2001 reform; for the cases that were accepted, all *criterios* or theses produced restricted the possible interpretation of the nominal recognition of indigenous culture in the Constitution, stressing the primacy of state law in the regulation of the territorial order, the restricted endorsement of their autonomy and cultural difference in access to justice (See Ansolabehere 2010).

In terms of its interpretation of indigenous rights, the mediation of political conflict by the Court resumed in the subordination of the civic unrest of the period (not only of the Zapatistas, but also of the civil society and municipal authorities that supported the movement) to the liberal logic of the state, the assimilation of the claim of pluralism within the formalist method of interpretation of the Court that recognizes rights while restricting their exercise (see Sierra 2005: 290). The passage of indigenous rights through the Court’s jurisprudence can be seen as a political lesson of that which the Court does not do: it does not mediate political conflict in ways that are not already authorised by the state.

The abortion case represented historically the possibility to open a new phase with a different frame of rights interpretation in the Court. Abortion, in principle, was not a discussion of civil and political rights, and was not a direct consequence of the institutional readjustments of political authority led by the new presidents in democracy. The Court had to face the challenge to give a response to a claim (women’s right to choose) that a social movement had been articulating for decades in a non institutional

¹³⁵ With the project of the San Andrés agreements as the original source for a new constitutional project, originating in the outcome of the Zapatista uprising in 1994.

political forum, and to define parameters of interpretation for social movement's rights language that have not been accommodated in the Court which so far has been adapting to the democratic shift with formalist interpretations of rights.

However, the challenge represented at the discursive level, as I am presenting it now, was not as transformative in practice as it might seem. The discussion of abortion (and women's rights) did not arrive at the Court as an evolving phase of comprehensive development of the Court's agenda to promote human rights, nor did it set up a new practice of judicialization that would recognize the capacities of the feminist and women's movements to access the Court. In coherence with its restrictive trajectory, the Court only authorized those who, from their position of institutional power, promoted the conservative view shared by the executive in the abortion debate. In this new phase, as in the previous one, there was no room for dissenting understandings of human rights.

II.1 Abortion in the Court

There have been three different interventions of the Court related to abortion with *acciones de inconstitucionalidad*: 1) in 2000 against the *Ley Robles* that extended the statutory defence regime (or regime of exceptions) in Mexico City; 2) the *Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007* against the law that decriminalized abortion in Mexico City in the first twelve weeks of pregnancy; and 3) the joint resolution of the *Acción de Inconstitucionalidad 11/2009*, and the *Acción de Inconstitucionalidad 62/2009*, both challenging constitutional reforms in the states of Baja California and San Luis Potosí that included explicit mention of the "right to life from the moment of conception". All these *acciones* were rejected by the Court, but whereas the first two confirmed the progressive legal reform reaffirming the LTP, the joint resolution confirmed the legality of the reforms in Baja California and San Luis Potosí that settled a legal lock, a limit against LTP, not only preventing any further development of the decriminalization of abortion, but also undoing the progress that had been made by the feminist frames that defended the rights to choose.

This chapter pays more attention to the second intervention of 2007 because it was the one located at the heart of the most intense period of judicialization in Mexico, measured in terms of the transgressive ambition of the human rights cases the Court accepted. If the 1994-2000 *sexenio* represented the setting up of the insurance policy of the PRI articulated in freedom of association, the 2000-2006 presidential period, coming at the end of the uninterrupted PRI presidency, required closure of the basic settlement of the new institutional guidelines of transparency, accountability, and freedom of expression which gave content to the governmental agenda of human rights. During the *Foxista* years (under Vicente Fox's presidency) constitutional control became more dynamic (or gave the impression of being more dynamic), the Court adjusted to the new culture of transparency broadcasting its discussions publicizing the delivery of sentences in the media, as legal and political experts gradually started to monitor judicial cases and make them accessible to civil society.

The image of the Court was more public than ever; I have argued that this was the period of “appearance” of the Court in political life. The following period of great intensity represents the overloading of the Supreme Court with citizens increasingly demanding its intervention. The most obvious evidence was given with the usage of the *facultades de investigación*, but there was an unprecedented circulation of sexual rights in politics due to a few “successful” *amparo* cases¹³⁶. The second *acción* had a major role in the way the Court coped with this unprecedented visibility, the following two were only an exercise of the Court where it moderated its intervention, discouraging the visions of activists whose perception of its main role in abortion debates was to recognize the women's rights to choose.

a) The precedent

¹³⁶ As I have presented in the introduction, these successful cases are the collection that inspired some to celebrate the “sexual revolution of the Court” (Madrado y Vela 2011) with *recursos de amparo* in 2007 dealing (indirectly) with HIV issues, in 2008 with a case of civil recognition of gender identity, and after the list of abortion cases the initiation of same sex marriage interventions in 2010, that are presented in the next chapter.

We are in the year 2000 in the *sexenio* of Vicente Fox. The first phase of judicialization has just passed, where president Zedillo had carefully crafted the precedents for the new federal order overlapping with the Court issuing decisions in relation to the freedom of association giving new solid structure to competitive political parties and unions, and a liberal makeup to all other forms of political association. Some feminists and women's groups had signed short-term alliances with the PAN after the once hopeful project of Cuauhtémoc Cárdenas in the PRD to reunite left movements was run-down after two presidential elections. However, while the authority of the PRD decreased in the country, it increased proportionally in Mexico City, with Cárdenas as the main instance of political opposition from the left.

On the side of the electoral scandals there was a national mobilisation of feminist and women's movements calling attention to the abuse of authorities against a girl who had an LTP denied in a case of negligence of the medical and judicial authorities. In 1999 a thirteen year old girl was sexually assaulted, and as a result she became pregnant. The Public Ministry in the state of Baja California (governed by the PAN) authorised a legal abortion. However, the Attorney General took the girl and her mother to see a priest who threatened them with excommunication. Later on in the hospital, the medical authorities exposed her to prolife activists and managed to postpone the intervention until the three statutory months were over. The girl eventually gave birth, and a large campaign was initiated against the negligence and impunity of the authorities involved¹³⁷.

Together with Baja California against the rights to choose, there was an important reaction against the feminist voices in the state of Guanajuato, Vicente Fox's native state (of which he had been the governor in the immediate period before the elections). Just a

¹³⁷ The campaign eventually involved the Procurator of Human Rights of the State and the CNDH issuing reports against the authorities involved. The state of Baja California responded granting a welfare fund for the girl and her baby, later cancelled by the subsequent administration, with the new state governor justifying that there were no "instructions left" for him about the continuity of the programme. In 2002 an international group of feminist litigants presented a complaint to the Inter-American Court of Human Rights that was resolved only in 2005 with an amicable agreement between the federal government, the state of Baja California, and the organizations involved in the litigation process. The agreement emphasizes the non discriminatory treatment for women who request the LTP. The agreement did not have direct consequences for further legislative reforms. But according to the feminist litigants, it implies the Inter-American court recognizing the "right to abort" (see Lamas 2009; Ubaldi Garcete 2006).

month after the elections the Legislative Assembly of the State approved a reform to the Criminal Code that would criminalize women who underwent abortions in the case of rape, and would strike off medical personnel who assist them. After its presentation in the Assembly there were only ten days before the bill had to have the approval of the Governor. The governor commissioned a poll in the state (not a legal referendum), but civil society promptly produced parallel documents and achieved the veto of the Governor (Lamas 2009).

Fox's election rushed through the reform in Guanajuato, but also in Mexico City. There were no immediate progressive legal developments to the campaign anywhere in the country, and the centre of attention turned to Mexico City. When Cárdenas lost the national election there was an urgent need to reinforce the grassroots support for the party and the capital was the ideal place. With the evident response of the PAN to the national debate on abortion the PRD became the ideal recipient to promote the reform and confront the new government. The interim head of government Rosario Robles managed to secure alliances with the feminist and women's movement by promoting the extension of the statutory defence regime in the ALDF.

Robles was already visible as the first woman occupying the Head of Government office (although she was only the second person in the office, as Mexico City had only held elections since 1997, and was in the office only in an interim position). In the earlier chapter I have presented more details of the political context of her government (and the short term alliance with the feminist movement interrupted by a corruption scandal). At this point it is important to emphasise only the basic facts: with the majority of the PRD in the ALDF, and the national political context, there were very few resistances to the "Robles act"¹³⁸. The feminist activists involved in the drafting of the proposal had to take the opportunity to advance the legislation as far, and fast, as possible, before the next presidential election determined the rhythm and content of the Legislative agenda. Their draft was framed around the high rates of maternal morbidity and mortality caused by

¹³⁸ The representatives in the Assembly of the PRI and the Worker's Party PT were from the beginning supporters of the bill. Only the PAN and the Green Party refused their support.

unsafe abortions, and grounded on the basis of the right of women to decide over their bodies and lives (that does not have *prima facie* constitutional reference). They achieved in the reform of the Criminal Code the reduction of the punishment for the crime of abortion, the elimination of the mention of “honour” as an extenuating factor for abortion cases, the revision of the statutory defence, and extended the exceptions for criminal persecution for induced abortions in the cases of foetal deformations, non-consensual artificial insemination, and danger for the mother’s life¹³⁹. In the Code of Criminal Procedures the role of the *Ministerio Público* [Official Prosecutor] was made explicit, and the protocol of action for rape cases was specified¹⁴⁰.

Less than a month after the reform the blocs in the Senate of the PAN and the *Partido Verde Ecologista de México* PVEM [Ecologist Green Party of Mexico]¹⁴¹ presented the *acción de inconstitucionalidad 10/2000* against the reform to the Supreme Court. The *acción* claimed that the new Criminal Code violated the constitutional principles of the right to life on the grounds that life is protected from the moment of conception in Mexican legislation, as interpreted directly from art 14¹⁴² and art 22.¹⁴³ The right to life from the moment of conception, furthermore, was argued to emanate from international law with the Convention on the Rights of the Child (and its mention of the right to life of all children), and the International Covenant on Civil and Political Rights and its article

¹³⁹ Reform of the Criminal Code for the Federal District of its article 334 fraction III, and article 131 bis Code for Criminal Procedures; published in the Official Gazette of Mexico City on August 24th 2000.

¹⁴⁰ “The procedure required that the authorisation emanating from the Official Prosecutor should be released during the criminal investigation or Preliminary Inquiry [formal name given in Mexico to the inquiries conducted by the Official Prosecutor prior to bringing a case before a criminal court] and within twenty-four hours of the woman’s formal request. Pursuant to this reform, public health-care facilities were expected to provide abortion services in cases when the practice was not against the law” (Ortega Ortiz 2005).

¹⁴¹ The PVEM is a small party that has managed to keep its registry in the different elections through different alliances with bigger parties. In the 2000 they were allied with the PAN. Therefore, this *acción* can be suggested as an immediate consequence of the electoral relation.

¹⁴² “No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act”.

¹⁴³ Specified the exceptions in which death penalty was considered. It was interpreted in the *acción* as the general protection of the fundamental right to life of all human beings and all manifestations of human life with independent biological processes. The article used to impose the death penalty “for betraying the country during international war, parricide, murder that is committed against a defenceless person, with premeditation or treacherously, arson, kidnapping, banditry, piracy and grave military offences.” But it was out of circulation until a reform in 2005 that abolished the death penalty altogether, removing the only reference in the Constitution to the concept of “life”.

6,1 (Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life).

International law then still enjoyed an ambiguous status in the constitutional order. Article 133 provides as follows:

“This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it, that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States.”

This means that the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights could have supported the claim for art 14 and 22 in the Constitution. Article 133, however, does not preview clarification in the case of conflicts of interpretation, international law still enjoys the same hierarchical status as constitutional precepts. However, because the *acción* did not yet raise a controversial argument on the hierarchical order of the constitution in relation to international law, the discussion did not yet take place. It was in the next *acción* where the debate became relevant. The discussion was postponed until then.

They also argued that the reform to the Codes of Procedures cannot modify the mandate of the *Ministerio Público*, because that had to be regulated exclusively by the appropriate legislation of judicial attribution¹⁴⁴. Feminist activists mobilized against the *acción* for over a year, but the case had a very low and discrete profile; they strategically targeted private meetings with the Court’s Ministers to discuss practical arguments in support of the law, and sought very little publicity for the case, thus avoiding a moral polarization that could have radicalized the public and influenced the legal arguments, discouraging a confident public debate that could create a precedent in society about Courts discussing abortion (Ubaldi 2006: 216). A more ambitious public campaign could have worked against the case: most political efforts in the year 2000 were focused on the electoral shift

¹⁴⁴ The *Ley Orgánica de la Procuraduría General de Justicia del Distrito Federal* [Organic Law of the General Justice Attorney of the Federal District].

of President Fox. The feminists who were following up the campaign were well aware that the discreet publicity gained by the case avoided the impossible positions that always divide public opinion about abortion. They were also aware that the political programme for the Court was still ambiguous, Fox's plans for the judiciary were still unknown, which meant that a low profile for the Court would be most beneficial to ensure its positive response: the Court was not going to engage with the case if it had to respond to public opinion at each stage. The feminists perceived that here were many more chances to succeed with the *acción* if the Court was left alone to deliberate, trusting their capacity to achieve a fair legal decision, aware that publicity would invite powerful actors supporting the *acción* that would have diverted its successful conclusion¹⁴⁵. Besides, and more importantly, by 2000 the Court did not yet enjoy a central role in the political life of the country, it was more possible to maintain a low profile when the judiciary and the Supreme Court were not yet under civil scrutiny. Let us remember that it was under Fox and his programme to promote rights as a matter of horizontal accountability that civil society starting looking up at the Court. There was no point in calling for attention to a process that was going to have legal consequences, but was not going to attract the right political attention.

The main debate within the Court concentrated on the clarification of the difference between the act of exculpation and acquittal. They resolved that the reform only addressed the exculpations or decriminalisation in extraordinary and exceptional circumstances, with rigorous mechanisms of control that would ensure that decriminalisation would never imply removal of criminal responsibility in abortion cases, that is, it did not alter the illegal nature of the practice (see Pou Jiménez 2009: 140). There were important debates in the process that were not definitive conditions of the resolution but granted an essential role to the constitutional article 4 for the discussions of abortion in the coming years. Article 4 states that "Every person has a right to decide in a free, mature and informed way, the number and spacing of their children [and] every person has a right to receive medical treatment when deemed as necessary. The law shall not only define the guiding criteria regulating the access to health services but also

¹⁴⁵ Interview Carolina, Summer 2010. Mexico City.

establish concurrent activities to be carried out by the federation and the states in organizing public health”. In similar terms it highlighted the importance of Art. 123 that regulates workers’ rights, including the rights of pregnant women to access health services, that was used (and was repeated again in the following *acción*) as an indication of the Court’s will to protect life from the moment of conception¹⁴⁶.

But those discussions did not have a defining role in the decision, and the relation between them was never clarified. There are ambiguous readings of the judgment because it simultaneously declared that life and the “product of conception” enjoy a strong and clear protection in the juridical order (vid. Ortega Ortiz 2005, GIRE 2009) but the reform is still constitutional. There was not a definite debate on the right to life from the moment of conception, or the position of the Court towards it. The case should be read therefore as a decision on decriminalisation of certain exceptions of abortion that discussed women’s rights along the way, but avoided discussions on the rights of the foetus or their possible legal personhood. It manifested the *presence of the debates* in the Court without committing towards precedents of offering reasons to believe that the decision would protect any further projects to expand statutory defences. The confirmation of the legal reform of the Robles Act postponed several discussions about its implementation. It is critical to remark that the mechanisms enabled by the Robles Act were resolved through the authorisation of the *Ministerio Público* (for the interpretation of the prosecutor of the evidence of rape) and medical practitioners (in the cases of abortion due to health risk, risk of death and foetal impairment, where he or she would determine the gravity, and the very concept of health) to take decisions over women’s bodies. The *acción* 10/200 confirmed that the practice of LTP depends on *the expansion of authorised actors to take decision over women’s bodies. It authorised actors, not women, nor rights.*

The sentence, as Francisca Pou Giménez argued, “rushed into a conclusion without explaining what it is that it authorizes”, making its *ratio* difficult to extract (Pou Jiménez 2009: 141-142). It separated the different constitutional discussions (right to life from

¹⁴⁶ AI 10/2000: p. 100.

criminalization), and there was no justification for why the acquittal excuse does not operate in the statutory defence regime, nor did it develop the new legal classification of the product of conception. It only pointed out that there is a constitutional niche for its recognition, but without extracting any juridical consequences from it. That recognition was detrimental for the process that followed until the next *acción*.

b) The decriminalization of LTP

After the constitutionality of the 2000 law was confirmed by the SCJN, the feminist and women's movements working on reproductive rights and abortion in the city were focused on filling the gaps left by the conditions of authorisation of the law, and the language that did not clarify the relations of responsibility in the text of the Robles law. Feminist groups were working on the interpretation of the ambiguous procedures for LTP facilitating the process for women who could adapt to the new statutory defence regime and make the law “realistically accessible for all women”, through information campaigns and the training of workers in the justice and health sectors about its implementation¹⁴⁷. At the time there were few spaces available to negotiate the expansion of the law. The only legal attempt made to protect medical practitioners after the reform was a new clause for “conscientious objection” in the reform of the Law on Health from the Federal District in 2004¹⁴⁸.

Rosario Robles left the party in 2003 and quit her capacities for political negotiation in partisan politics for a few years. The PRD of Andres Manuel López Obrador soon established its priorities in the coming elections and the political consensus within the ALDF, and he was not willing to take any risk with the moral polarisation that would come with the open promotion of abortion within the electorate, or with the Local Assembly. For the PRD and the forces of the left, the dismissal of the specific human rights claims were justified with the emphasis of the defensive strategy “from the federal

¹⁴⁷ Interview with Josefina M., feminist activist, Mexico City in the summer of 2010.

¹⁴⁸ Published in the Official Gazette of the Federal District on January 27th 2004. It reforms article 16 Bis 7 to grant the conscious objection to health practitioners whenever there is no immediate health risk for the woman, forcing them to refer the patients to non-objectors WHAT?? practitioners.

harassment” against the authorities of Mexico City, a narrative that concluded with the process of the *complot* against López Obrador (where he claimed the entitlement to disobey a Supreme Court’s decision, as described in the last chapter)¹⁴⁹. The leftist politics of Mexico City of López Obrador determined a style of politics that were dismissive of abortion politics, the government was just “not interested” in promoting them despite the social pressure of a feminist mobilisation that never diversified its agenda beyond abortion (Macdonald and Mills 2010: 193; see also Lamas 1997; Lamas and Bissell 2000). The political will of the PRD government was overestimated in the 2000 reform and the historical juncture that made the reform possible.

The next federal elections came and reshaped the loyalties and priorities of the party and the feminist movement. In July 2006 Felipe Calderón Hinojosa (from the PAN) was declared winner in the narrowest margin ever in a Mexican election (according to official data the difference was only 0,65%) against Andrés Manuel López Obrador. The elections were followed by months of mobilisation lead by López Obrador: the *voto x voto* campaign, contesting the final results, and the stressing of the deficiencies of the electoral and judicial system in Mexico (vid. Cárdenas Gracia 2007).

The initiative to expand the law on LTP was formulated in this political context in the ALDF, in November 2006. The initiative did not come from the women’s movement: they were investing their politics in making the previous reform “realistically possible” when this call took them by surprise. The proposal came (unexpectedly) from the representatives of the PRI, not from the PRD. The original PRI proposal was to relocate the discussion of abortion from the logics of exceptions (interpreted as *excuses* or *concessions* towards rights or “grants of clemency from the state” in 2000) to a stronger pronouncement of freedom and women’s rights with the full decriminalization of LTP in the first 12 weeks (Ortega Ortiz 2005). The initiative was soon joined by the deputies from *Alternativa Socialdemócrata y Campesina*¹⁵⁰, who presented a second proposal that

¹⁴⁹ . See <http://www.jornada.unam.mx/2006/12/05/index.php?section=capital&article=042n1cap> Last accessed June 15th 2014.

¹⁵⁰ [Social Democratic and Campesina Alternative] The same party that promoted the civil partnership law in 2006 presented in the next chapter.

also promoted decriminalisation, but formulated it in the same logic of exclusions and exceptions as the previous law. And only after the two initiatives were publicised did the NGO GIRE, one of the leading feminist organizations within the pro-choice mobilisation, attempt to join the debate by pushing for the inclusion of a new clause for exception in the previous law granting the LTP when “the life project of a woman” is endangered. The PRD supported the initiatives only later, when the legislative session started, but claimed a leading role in the public discussions facilitating open discussion forums.

Mexico City was going to become, once more, the most progressive city in the country towards the decriminalisation of abortion¹⁵¹, and a victory for women’s rights for the whole of the Latin American region (only Cuba and Puerto Rico had similar legal regimes). Organizations in the feminist movement were confronted with the dilemma of whether to participate in the advocacy or keep their distance from the parties’ competition to appropriate the abortion agenda. They foresaw important political risks that could have undermined their own rights frame and expectations towards the new government with hasty legal reforms, potentially both sabotaging what was already gained in the Robles reform, and also prematurely subverting the movement’s radical commitment to the right to choose (Interview with Susana in Mexico City, Summer 2010). The internal debates finally concluded with a campaign of support for the PRI reform coordinated by a network of women’s and feminist NGOs. Some of those activists were already important references in the political arena because of their public work against the criminalization of abortion in the previous process. But the debate achieved such a high degree of publicity that the appetite of the media, legal experts, and general public for information prompted new spokespersons from the movement, and established the need for young feminists to contribute to the new dialogue¹⁵².

In April 2007 the Mexican Official Gazette of the Federation (*Diario Oficial de la Federación*) published the decree that reformed the Criminal Code for Mexico City, and the Law on Health, decriminalizing the interruption of pregnancies in the first twelve

¹⁵¹ Soon with Morelos WHAT?, who replicated the reform soon after.

¹⁵² The works of the campaign can be followed in www.tupuedessalvartuvida.org Last accessed Oct 24th 2011.

weeks of gestation as the PRI project proposed. The reform included a new definition for pregnancy: while pregnancy was previously recognised with the fertilization of the ovum in the General Law on Health, in the reform it was recognised in the Criminal Code as the legal termination of pregnancy after the 12th week of gestation (art. 144). In addition the new rules and procedures for health practitioners in the city guaranteed free access to services (and counselling before and after the intervention) for women who decided freely to access the service (art 16 bis 8 Law on Health); it reduced the period of imprisonment for abortions that happen after the 12 weeks and do not correspond with any legal exception¹⁵³; it also protected women who were forced to abort inaugurating the clause of “forced abortion” to emphasise the issue of consent (article 146 Criminal Code). Its main achievement, nevertheless, was to effectively relocate the legal framing of LTP outside criminal law.

Other political processes were instigating more for the success of the reform than the reasonability of the claim for the rights to choose, and that is made obvious with the accidental contribution of the feminist movement in the process. In the federal election the PRI had just lost the presidency for the second time and had no significant political authority in Mexico City; by taking the lead in the reform the party was trying to profit from the alliances the PRD had left unsecured in the city¹⁵⁴. On the other hand, the PAN was perceived to be expanding its institutional power during its second time in the presidency¹⁵⁵ discouraging the promise of competitive democracy that came in the 2000 election. The process of this new reform, Alberto explains in an interview¹⁵⁶, was a direct confrontation to the political leadership of the PAN and its conservative agenda:

“If Mexico City took that decision, that was more of a political than a legal decision, it was only because the leftist ALDF wanted to confront the ruling conservative party... just to confront it! To establish *political markers of difference!*” (My italics).

¹⁵³ It passed from 1 to 3 years of imprisonment to 3 to 6 months of imprisonment, or from 100 to 300 days of community work (article 145 of the Criminal Code of the Federal District).

¹⁵⁴ Interview Alejandra R., Mexico City, summer 2012.

¹⁵⁵ And the accusation of electoral fraud promoted by Andres Manuel López Obrador.

¹⁵⁶ Alberto P. is a former LGBT activist and currently an academic. Interview in the 2012 summer in Mexico City.

The reform as a political marker of difference can be interpreted in various ways in this context: first, as a political message from the leadership of Mexico City, and all parties involved, to embody oppositional politics against the PAN, sending a message about the kind of progressive agendas they wanted to promote in the city (supported as a fictional encounter with and commitment towards social movements); second, as the strategy of the PRD, now with Marcelo Ebrard in the City, to reconcile itself with the social movements that were distancing themselves from with Andres Manuel López Obrador's personal usage of the party platform. In one way or another, the political marker of difference becomes, as Jon Binnie has claimed, a marker of a political community's level of sophistication and development, or a high indicator of a nation's success in developing (2004: 68)¹⁵⁷, both values that are highly profitable in electoral terms. The reading of the reform as a political marker, therefore, can be applied but with a narrow meaning of who the political community is and whom it is representing: Alberto expanded:

“This was a change orchestrated at the top of the decision making hierarchies in the city and not a participative process, it was a *political decision* that managed to transform (*not in the best way possible*) the health system (...) but that is the product of the political national electoral context of 2006, of a tense relation of the capital city (with a more progressive population) with the rest of the Country (presumably more conservative). After a contested electoral process, the ruling party in Mexico City decided to send a political message, even if *it was not convinced by it*. I know this is a negative evaluation of the process, but this view is confirmed by the fact that for the rest of the country a reform like the one in Mexico City is not even a possibility, and it will not be in the immediate future!”

The legal reform did not come about in the “best way possible”. But the progressive transformation of the law became such a beautiful and hopeful object of inspiration for new lawful relations that it facilitated the postponement of two important critiques: the first about the way partisan politics absorbed the participation process that is supposed to sustain it, and the second about the general conditions in which the figure of the subject

¹⁵⁷ For Jon Binnie the markers not only come promoted by law, they need to respond to wider markers in the cultural resonance of consciousness (2004: 114, 77).

of rights occurs in the city with the law. The feminists who supported the parties' campaign to promote the law managed to locate the debate in the public arena quite successfully; they found new allies within the media and the general public who were following every move of the campaign. At that time, Mexico was living under the new political culture (installed by former president Fox) that had associated human rights with institutional transparency, and the media that had taken responsibility for monitoring legal debates, had on a large scale taken the side of the feminists. The feminists managed to ensure the public support for the reform that the ALDF needed in order to legitimize it, and later capitalise on it in political terms. And with the terms that framed the reform, abortion shifted from the language of criminality, to that of human rights related to health services, but the health sector was not fully capable of absorbing the legal symbols the reform promised.

III. THE DISORDERED PROCESS

After the reform on LTP was published, and as predicted by the feminists and the litigants in the ALDF, the *acción* was presented in the Court. The parliamentary group of the PAN failed this time to lobby to mobilize the minimum percentage of the Assembly. Therefore, Eduardo Medina Mora, the Attorney General (*Procurador General de la República*, henceforth PGR) presented the *acción*; and José Luis Soberanes Fernández, president of the National Commission of Human Rights (CNDH)¹⁵⁸ its *acumulada* [its accumulated, or addition]. Both documents were looked on as controversial moves: as explained in the previous chapter, the PGR office depends directly on the executive, and the involvement of the Attorney General was seen as the mediated intervention of President Felipe Calderón Hinojosa in Mexico City¹⁵⁹. A negative resolution from the

¹⁵⁸ *Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007* (Appeal of Unconstitutionality 146/2007 and its corollary 147/2007). Available in Spanish in http://www.inb.unam.mx/bioetica/lecturas/iab_abortomexico_08.pdf last accessed July 19th 2011.

¹⁵⁹ In the report of the ALDF presented to the Supreme Court they remarked that the PGR did not respond to the reforms of statutory defense or extension of criminal exceptions elsewhere in the Country (AI 146/2007 y A 147/2007: 118). The role of the PGR years later also undermined the legitimate institutional

Court would have been interpreted as a direct confrontation of president Calderón. On the other hand, while the CNDH had already created an image of independence in relation to the executive, Soberanes Fernández submitted his appeal without prior consultation with his Advisory Committee [*Consejo Consultivo*]¹⁶⁰ raising concerns about his political motives, not only for his position against women's rights, but because of the challenge to the authority of the government of the Federal District for which he exceed his attributions¹⁶¹, particularly after the public statements of support of the feminist claim from the Human Rights Commission in the City¹⁶².

The Court's acceptance of the case was the object of further controversy that originally had little to do with the content of the law, or with ideological positions towards women's rights. As I have suggested, the case arrived at the Court at the epicentre, or one of the most intense moments of judicialization: the *facultad de investigación* had been used three times in two years, and the lack of delivery on its investigations, compared to the political expectations citizens had of them and their political connotations, meant that the legitimacy of the Court was at stake. The process could have not afforded the discrete passage through political life that the previous *acción* of 2000 enjoyed. For the feminist movement it was particularly the Lydia Cacho case that had damaged the reputation of the Court, and its declaration that no human rights had been violated there despite the public evidence that confirmed the opposite. The academic Marina P. explained in an interview¹⁶³ "You cannot study abortion without Lydia Cacho".

intervention. With the support of the incoming presidents, Eduardo Medina Mora became a Minister of the Supreme Court of Justice himself, despite the outcry of the civil society, who WHO OR WHICH had no space to intervene in the process of judicial authorization, still indirectly left to the President to moderate.

¹⁶⁰ The approval of the Committee was not mandatory; however, the Constitution demands that the president of the Commission may not act on his own adjudication (Art 105, clause II, inciso g). Some members of the Committee publicized statements in the media against the action and the content of the appeal (vid. <http://ciencias.jornada.com.mx/ciencias/foros/despenalizacion-del-aborto/controversia-en-la-cndh> last accessed June 9th, 2011), and one of them, Juliana González, participated later in the public hearings in representation of the section of the Committee against Soberanes Fernández's move.

¹⁶¹ In the report of the ALDF to the Supreme Court they requested the invalidation of his *acción* on these grounds. AI y A 147/2007: 77.

¹⁶² See <http://www.proceso.com.mx/?p=208387> last accessed June 15th 2014.

¹⁶³ Interview in Mexico City on the summer 2012.

The basic facts of the Lydia Cacho case in 2007 were presented in the previous chapter. The Court issued an inquiry to investigate the case of the journalist Lydia Cacho after she was arrested and allegedly tortured, and rejected the evidence that incriminated a state governor over the irregular arrest. There was public outcry at the self-restrained decision of the Court. Furthermore, at the same time as the abortion case the court had to respond to *amparos* against the reform of the law that regulates the Institute for Social Security and Services for State Workers, to an *acción de inconstitucionalidad* against a reform on electoral regulation, and *amparos* that were claiming the protection of national and transnational enterprises against the taxation regulation. All of these other reforms had the potential to generate a lot of publicity. But they did not achieve the same level of public attention as the *acción* against the abortion reform had. Marina P. expanded:

“[Abortion] was a case in which the Court could not win in any possible way. Accepting the case was an issue that was going to compromise the Court on its very basis. And yet it could not reject it. The Court was coming out from the Lydia Cacho case (...) that was such a shock for its legitimacy that they even had to hire external advisors to clean up its image. That started the campaign *The Court protects your rights [La Corte cuida tus derechos]* where the Court redefines its public image as rights guarantor, not only constitutional tribunal”.¹⁶⁴

It was an initiative of the president of the Court at the time, Guillermo I. Ortiz Mayagoitia, to request expert advice and to launch a media campaign to ensure that the abortion discussion would help to clean up the image of the Court, to avoid the same level of repudiation that it had faced in the last year with the Cacho case and to develop a different relation with the citizenry¹⁶⁵. From that project arose the initiative to promote public hearings in the Court for the first time in the history of the SCJN in the abortion case, where citizens (for and against the *acción*) were convened to stand up in and inform its debate. The public hearings, presented with more detail later on in the unfolding of the events of the case, demonstrated in the public imaginary the willingness of the Court to open itself to citizens’ intervention, although in an improvised and poorly structured

¹⁶⁴ Ibid.

¹⁶⁵ <http://www.jornada.unam.mx/2008/01/02/index.php?section=politica&article=010n1pol> Last accessed February 15th 2014.

procedure, because so far the Court had not delivered what it promised in the previous exercises of constitutional control in basic terms of right protection.

The abortion case became pivotal to the judicialization process, and its resolution to confirm the constitutionality of the law reinvigorated the legitimacy of the Court. For the most part however, the case disrupted the lawful relations of Mexican judicialization understood in formalist terms. The Court was at the same time stimulating the expectations of the citizenry (in order to clean up its image with new perceptions of rights accountability), committing to the expert tutors who were authorized to present the *acción* (strengthening the trajectory of judicialization prescribed in the new constitutional order), and finding at the same time its own place within the democratic transformation, although not adapting as fast as was politically required.

III. 1. The acción and its acumulada

The *acción* of the PGR and the *acumulada* of Soberanes Fernández presented four arguments as agreed invalidating criteria¹⁶⁶: 1) that the legal reform infringed the right to life of the conceived person; 2) that the reform violated the rights of the father, his right to decide over his reproductive life; 3) that in the reform the competent legal authorities trespass their capacities; and 4) that the reform endangered the principles of legality and juridical certainty.

The *acción y su acumulada* both relied on the fiction of the essential content of the right to life from the moment of conception. But there is no concrete expression of this right in the Constitution; the decision in 2000 inferred that there is but without extending the argument to its justification. The essential content of the right was still to be logically inferred –the PGR and the president of the CNDH claimed- in the interpretation of:

¹⁶⁶ I have selected only these four as central points in the *acción* for the purpose of the narrative of this chapter; they correspond with the different analysis published after the process as the key discussions (vid. GIRE 2009; Madrazo and Vela 2011; Ortega Ortiz 2010; Pou Jiménez 2009; Sotelo Gutiérrez 2010).

a) article 1 in the constitution that establishes the principle of non-discrimination: the reform discriminates on the basis of age without objective or reasonable criteria, since neither did it consider cases of underage women, nor cases of (unborn) human beings in the first twelve weeks of their life (after conception)¹⁶⁷;

b) article 30 that provides a definition of juridical personhood and states the reference to the acquisition of attributed of personhood¹⁶⁸. Article 30, however, defines juridical personhood in terms of nationality or naturalisation; there is no explicit reference to conception, nor juridical development of the notion of legal personhood.

c) from the government's responsibility towards the full protection of life that is inferred from the constitutional reform of articles 14 and 22 of 2005, (a reform that actually responded to problems of arbitrary abuses of power prohibiting the death penalty)¹⁶⁹. Article 22 was deeply embedded in the historical notion of nationalism of the old formulation of the death penalty as a provision against any betrayal of the nation. Soberanes Fernández used the article to declare that any opposing interpretation of the right to life that emanated directly from art. 22 would be against the “humanitarian spirit of the nation”.

d) from the Pact of San Jose, the American Convention of Human Rights that states in its article 4 “Every person has the right to have his life respected. This right shall be protected by law and, in general, *from the moment of conception*. No one shall be arbitrarily deprived of his life” (My italics). This mention was not considered in the previous *acción*, and became crucial here because of the way it opened the question of

¹⁶⁷ AI 146/2007 *y su acumulada* 147/2007, p. 12. Article 1 reads: “Every person in the Mexican United States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided (...) rights shall not be limited based on discrimination because of ethnic origin or nationality, gender, age, different abilities, social condition, health, religion, opinions, preferences, civil status or for any other cause which is against human dignity and has as its purpose the annulment or diminishment of rights and freedoms of the individual” (My translation).

¹⁶⁸ For the presentation of arguments of Soberanes see. AI 146/2007 *y su acumulada* 147/2007, p. 5.

¹⁶⁹ Since December 2005 Article 14 omitted the possibility to deprive citizens from their life in any situation, and article 22 included the death penalty in the list of forbidden punishments.

hierarchy or rules to the voice of international law and its status in relation to the Constitution.

The president of the CNDH insisted that the reform on LTP violated the rights of the father protected by article 4 in the Constitution that reads: “All people, men and women, are equal under the law. This article also grants all people protection to their health, a right to housing, and rights for children. Everyone has a right to an appropriated ecosystem for their development and welfare”. Soberanes claimed that it was inadmissible to recognise the rights of only one parent over the product of a pregnancy (under the light, again, of article 1 that protected citizens from all forms of discrimination, in this case Soberanes advocates for the recognition of discrimination against men). With this argument he was advocating for the discursive replacement of *reproductive rights* with *procreative rights*, arguing that the woman’s procreative rights can only be exercised before conception, because then her autonomy is cancelled, she loses rights and only gains responsibilities. The moment of conception, then, generates responsibilities for the mother, for the father, and for the state in equal measure¹⁷⁰.

The only valid distinction in the Constitution between men’s and women’s rights, Medina Mora expanded, is based on the comprehensive list of rights for women already enunciated in article 123¹⁷¹ that covers the right to medical and obstetric attention, the right to maternity leave, and in its paragraph V, the right to not perform any intensive physical labour that could represent a significant risk for a woman’s health *in relation* to the gestation.

These first two arguments were the main ideological component of the *acción*. The main arguments coincided with the discussions that *appeared* -but were *not resolved*- in the *acción* of 2000. Except for the premises of article 22 with the 2005 reform that abolished

¹⁷⁰ AI 146/2007 *y su acumulada* 147/2007, p. 11. This debate was highlighted in the media by the president of the CNDH himself, it was in fact the main argument he debated with audiences that would not engage on the technical elements of his *acumulada*.

¹⁷¹ Article 123 is recognised symbolically as being the guardian of workers rights. In the Court it was used to recognise the rights of the working pregnant woman, with no reference to the product of conception. The article, once again, was already mentioned in the *acción* of 2000.

death penalty, the clauses to invalidate the law were almost a replica of the arguments of the previous decision. The clear exception was the article 4 in the Constitution, of the right to choose, and the intervention of article 4 of the Pact of San Jose. The discussions about the confrontation of the right to choose and the right to life from the moment of conception were deliberately left out of the 2000 discussion when abortion was diverted towards a frame of criminalisation vs. exception. If Soberanes' proposal had resonated in the Court, the "right of procreation" would have replaced the right to choose and annulled the debates of feminist and women's movements on autonomy on behalf of a simplistic, mechanic, and essentialist understanding of sexuality. And in the version of the PGR, women's reproductive rights would already have been satisfied by virtue of their positions as workers. If the decision was not going to be resolved in terms of rights (like the 2000 decision) there were other technical arguments that represented the meat of the discussion in the Court.

As mentioned earlier, the status of international law was unclear because the Constitution, in its article 133, grants the same authority to international law and the Constitution, with no hierarchical distinction. In that sense Art 4 of the Pact of San Jose could have initiated a complicated debate of hierarchical dimensions. However, the Court already had a jurisprudencial thesis that emanated from *amparo* 1475/98 (addressing the right to belong to a union) that resolved that the Constitution is confined to be the supreme law of the nation, and international law has only a secondary place in hierarchical order. In any case, Mexico had published a reservation on art 4 of the Pact of San Jose with which the confrontation was easily avoided. The article reads: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life", the Mexican delegation in the negotiation of the Pact stated that the expression "in general" does not generate an obligation to adopt the expression "from the moment of conception", leaving the definition to the states. Even with a different hierarchical relation, the Pact of San Jose would not have had binding force for the legal interpretation of the right to life because of the Mexican reservation.

Both appeals denounced the ALDF for altering the definition of pregnancy in the General Law on Health without having authority to do so, because this law is a federal law and outside the jurisdiction of the Legislative Assembly of the City. Article 73, section XVI, in the Constitution, recognizes the National Congress's exclusive authority to legislate on public health, and article 44 of the Government Ordinance of Mexico City ties the local legislative to the general guidelines established in the General Law on Health. As a consequence, the practice of abortion (beyond the statutory defence regime already recognized as compatible with the national Law on Health in 2000) should be interpreted under the old definition of pregnancy¹⁷², and local healthcare should not be authorised to provide the service unless an authorised expert in the *Ministerio Público* and healthcare services has approved the intervention.

For the *acción*, the exercise of statutory interpretation in the legislative process (*libre configuración del legislador*) must be limited for both the legislature and the judiciary according to the essential (and assumed to be absolute) content of the right to life. The reform of the ALDF therefore violated the *legal and judicial certainty* of the democratic order. The reform entailed an inexact application of criminal law when it stopped treating abortion as a crime because it did not provide the necessary clear definitions of health risk that would have justified the expansion of the regime of exceptions, it did not present compelling scientific justification for the twelve weeks period in which the practice of abortion was decriminalised, nor a distinction between gestation and pregnancy that would determine the later, and it did not properly address the definition of the consent of women who access the service.

Still expanding their arguments still referring to the reform as an exception in the realm of criminal law, the *acción* claimed that the legal and judicial uncertainty of the new law had to be resolved in order to protect the position of medical practitioners who were rendered vulnerable in disproportionate terms compared to the position of women who access a LTP.

¹⁷² Art 44 of the Criminal Code used to read before the reform that “abortion is the death of the product of conception at any stage during pregnancy”.

It is worth emphasizing at this point that Soberanes Fernández was not entitled, by statutory regulation, to question legislative competence. The CNDH (like the Human Rights Commission of the Federal District), can only present *acciones* when addressing laws from the federation, the states, and the Federal District that violate individual guarantees protected by the Constitution (art 105 in the Constitution, subsection G on Clause II); the president of the CNDH, therefore, was exceeding his attributions again.

This second block of invalidating criteria, the competence of the Assembly (3) and the violation of juridical certainty of the reform (4), could have only been sustained if the first block had succeeded. There is a counterintuitive relation between the two blocks: the appeal for a formalist resolution required as a premise an agreement over an ideological conviction towards the essential content of the right to life from the moment of conception, precedents of procreative rights in law, and an inclination to protect the rights of third parties involved in the LTP (the rights of the father, of the medical practitioner). Without these agreements the *acción* could have been initiated in a straightforward process of legal and judicial certainty, avoiding the repetitive, political and non legal argumentation that characterised the process and gave so much publicity to it (Pou Jiménez 2009: 144,145.). In that sense, the legal project of the CNDH and the PGR remained unclear throughout the whole process, from which we can infer that the use of constitutional tools for those with access to them was still predominantly political despite the trajectory of formalist interpretation of the Court of its own mandate.

III. 2. The Public hearings (audiencias públicas)

Taking Marina P.'s testimony as valid I represent this as “one of those cases in which the Court had no possible way to win”. Because of the political precedents, the expectations put on the Court, and the ambiguous nature of the request for the *acción* (in both ideological and technical terms) there was no way that the Court could not compromise

itself in one way or another, no matter what its decision might be¹⁷³. The motivations of the PGR and the president of the CNDH were presumably political, to intervene in a process where the legislative body of Mexico City was challenging the authority of the federal government, and the president was using the mediators in his favour in a process that was only demonstrating the lack of experience of the Court in dealing with human rights debates. The nature of the claims of the *acción* for the protection of fathers' rights and federal order did not present a compelling legal case that the Court could have resolved with satisfactory legal arguments. The process was going to bring a lot of attention to the Court anyway, and after the failure of the Lydia Cacho case, the Court was risking a big element of disclosure of its procedures and its capacity to engage with human rights cases.

This is how the *audiencias públicas* were introduced to the Supreme Court, as a logical consequence of the irreconcilability of this debate: the opposing ideological positions on abortion had to be expressed inside the Court by someone, and the ministers were not going to be the ones verbalising them, someone else had to do it in order to guarantee the legitimacy of the process. And it was the *audiencias* that offer to the public scrutiny an image of the Court open to the citizenry, for the activists and citizens who saw themselves included in the process, and for those who followed it as a women's rights case without engaging with the technical side of the constitutional formality that was postponing the discussion on women's rights.

I insist that this *acción* needs to be understood as non representative of the way the SCJN works, not only because of its tendency to avoid rights cases, but also because the extraordinary exception by which the Court opened itself to non juridical actors who were offered a share of authority in the enunciation of rights without the political mediation of expert tutors. Besides inaugurating the *public hearings* in Court, in the spirit of strengthening the "legislative culture of the Nation", it called –for only the third

¹⁷³ Marina P. is an academic. Interview Summer 2012, Mexico City.

time¹⁷⁴ - for experts' advice, as well as welcoming numerous *amicus curiae* coming from different parts of the country and international sources. While the input of *amicus* is not regulated, and therefore its efficacy or its reception not granted, their promotion prompted an important dialogue between expert litigants that happened parallel to the Court's process, but also the strategic exchange between networks of litigation and grassroots activists.

Ever since the Law of Transparency and Access to Public Information of 2002 (presented in the previous chapter) the Court was obliged to publish its sentences and broadcast some of its sessions on television and the internet. The hearings could have been a logical development of that opening to the public, as part of a proper judicial project of expansion of authorisation, but the historical evidence and the fact that they were never repeated only suggests that they were *ad hoc* political strategies suited to this case; the hearings were not even formally incorporated into this judicial process. The ambiguous agenda behind the opening of the Court was interpreted as an *episode* or *performance*, as the *mise-en-scène* of how the democratic political agenda might look (GIRE 2009: 30). Isabel S. argued in an interview¹⁷⁵,

“What we can see here is the fact that the Court is more open to citizens' examination (...) which happens in practically no other court in the world (...) the public hearings meant not only that selected citizens were called to Court, but were listened to” (...) “but to establish relations of causality or intentionality for an unprecedented event like this would not be assured (...) this was part of an ongoing involvement of the Court with fundamental rights, but also as part of many other things (...) we should not overestimate the impact that what was told in the hearings had on the decisions though, this was an instrument that allowed the Court to present itself as a non-intransigent court, open to listen, but just to listen”.

¹⁷⁴ In 2007 the Court received two other cases that later promoted for their resolution more open interventions authorised by the same ruling, the *Acuerdo Plenario 2/2008*. Experts were asked to present *amicus curiae* for the reform of the Federal Law on Telecommunications: that restricted the economic capacities of the major media enterprises for the regulation of tendering, better known as the “Ley Televisa” (Vid. Ferrer Mc-Gregor and Sánchez Gil 2009). It also called for experts' testimony and scientific intervention to declare the unconstitutionality of dismissals from the army of men living with HIV (Sotelo Gutierrez 2010). The *Acuerdo* regulated the faculty of the Court to request the intervention in matters considered of public relevance (to be determined by their discretion), but it does not specify the role these new resources can play, apart from the voluntary submission of information.

¹⁷⁵ Isabel S. is a legal scholar, the interview was held in Mexico City, summer 2012.

Following its agreement 2/2008 the full of the Court can call for the hearings whenever it is considered relevant, but always subject to the discretionary reception of the Ministers. For Karina Ansolabehere the adjustment is a step forward in the learning process of the Court, in a symbolic adjustment aimed at having the Court demonstrating itself to be less hermetic in relation to civil society, allowing itself to be nurtured by “other knowledges” (2009: 13), even if civil society had no guarantee that their knowledges had any predictable effect in the Court.

The hearings took place between April and June in 2008¹⁷⁶, the same year designated as the *Year of Judicial Transparency and Constitutional Justice for the Nation* by the SCJN. To the original invitation of the Court there were 181 replies, seven out of ten against the law on LTP. The responses of organisations and social movements were the most numerous, followed by political parties (most from the PAN), research groups from universities, feminist magazines, individuals (both legal professionals and others), and the Human Rights Commission of the Federal District (CDHDF). Interestingly, the majority of people who requested a hearing, both for and against the constitutionality, were men (as highlighted by GIRE 2009: 31), and most of them were non legal actors.

The participants were diverse, and so were the nature of their narratives, each one reflecting different expectations about what the Court wanted, or responding to imagined narratives about what the Court needed to hear. The sources of arguments varied from a) *non-legal arguments*, or pretensions to influence the decision with arguments sustained in philosophy, science or genetic facts about life; b) *arguments of politics*, that framed the case as a discussion on the structure of the state and its delivery of the rule of law, the role of the SCJN in the protection of women’s rights, the role of the CNDH and PGR towards women’s rights, c) *arguments of justice* that recalled the justifications of the ALDF in order to frame the criminalization of abortion as a general fault of the rule of

¹⁷⁶ All interventions were made public. They are available on video or stenographic versions in http://www.informa.scjn.gob.mx/audiencias_publicas.html last accessed on July, 28th, 2011. The sessions were divided between pro and anti the *acción*, and with no space in the hearing for the direct replica of opposing positions. Only the arguments supporting the constitutionality of the law are presented here in order to follow the narrative of this particular work.

law, and its discriminatory application of criminal law in the prosecution of abortion cases, and only the minority touched upon d) *arguments of law* to respond directly to the invalidating criteria; among those the rejection became relevant of the three previous sources of arguments for a debate that in the words of the PRD Deputy (and president of the ALDF) Víctor Hugo Círigo Vázquez ought to be exclusively juridical and constitutional, free from any other dogmatic (or over-theoretical) assumptions.

“We went to Court because the whole process was in part about a need for people to be *speaking* about LTP”.

Mariana R., a feminist activist told me in an interview¹⁷⁷,

“...we divided the work with the other people who participated: some of us used the rights frame in our speech, other people were supposed to use the cultural frame. At the end our strategy was to *articulate all possible risks*, to cover whatever it was that the Court was going to discuss afterwards and to make sure we would give them the arguments they needed”.

The process proved the predictions of activists to be inaccurate: all those interventions that did not directly address the invalidating criteria were not relevant in the final decision. The process enriched Mexico's democracy because of the way the actors that were selected to stand in Court felt about the process, but not because the Court actually needed them or was willing to make room for them in its proceedings. The lack of regulation, of previous experience of public hearings, and of guidance for participants led to the underuse of the hearings. While some of the language of the arguments was repeated in the individual votes, it was not part of *litis*, and did not determine the votes of the ministers. Karina Ansolabehere holds an opposing view, claiming that the *audiencias* represented an important learning for the Court and its conservative path towards rights agendas; she says:

“Even if the jurisdiction of the Court remains closed, there was a change; the Court became less impervious in front of the society. In a topic as disputed as abortion, the Court had chosen the exchange of arguments. The judicial decision neither started nor ended with the letter of the law, the judicial decision, at least formally, was nurtured by ‘other knowledges’” (2009: 15)

¹⁷⁷ Interviewed summer 2010 in Mexico City.

Moreover, the open call to participate in the new forum could not have been realistically representative due to the political rush that motivated it, the Court therefore *constructed* the profiles of ideal participants by selecting what the general public would consider to be representative (Sotelo Gutierrez 2010; Pou Giménez 2011: 243); and since the intervention did not require any legal expertise, the basic grounds of the legal reform were missing in most contributions. The final text of the decision only acknowledged the celebration of the hearings, and listed the name of participants (with no mention of the instances they represented) in four pages presented as *Comparecencias* (Appearances)¹⁷⁸. Nowhere in the final document do we find an open engagement where the Court recognizes the significant constructions of constitutional precepts as imagined by the hearing participants.

The evaluation of the public hearings goes to basic questions of judicial activism in the SCJN. In an interview with Eva¹⁷⁹, a legal activist, she rejected my critique of the hearings: “The Court has demonstrated a tremendous sign of progress just by listening to arguments we never dreamt of hearing in a Court before”, but the “listening” is not “integrating”. The revolutionary invitation to the Court is a promise of an activist court willing to change its procedures and take a side in a controversial human rights case, but the lack of resonance of women’s rights, discussed in the hearings and in the legislative process in the ALDF, discourages all possibilities for critical optimism.

III. 3. The sentence, the last word of the Court

Whenever the Court is presented a case, the President of the Court appoints one of the Ministers as an Instruction Minister, in charge of justifying the inadmissibility of the case, or when the case is received, to request reports to the parties involved, to facilitate and moderate the discussions within the Court, and to have the responsibility of delivering the case into a state of resolution. The Instruction Minister typically elaborates a draft for the final agreement to guide the rest of the Ministers (only in exceptional cases would a

¹⁷⁸ AI 146/2007 y su acumulada 147/2007: 123-128.

¹⁷⁹ Summer 2010 Mexico City.

Ministro Ponente be designated to take exclusive responsibility of the drafting of the project). This text has to be circulated to the entire the Court in anticipation of its meetings, and typically becomes a source of guidance for the debate and eventually for direct voting. Whenever the *proyecto de resolución* in the Court is approved by the Court's majority (that is at least 8 votes out of the 11 members) it is automatically recognized as the verdict or final decision. If two voting rounds have failed to achieve a majoritarian vote in two consecutive failures, the President of the Court appoints a new Instruction Minister in charge of drafting a new project, and if this fails the President of the Supreme Court herself or himself is in charge of the draft project.

Responding to the unexpected opening of the public hearings, the Supreme Court announced publicly that the project for resolution was not going to be drafted until the hearings were celebrated¹⁸⁰. After the hearings, the Instruction Minister Sergio Aguirre Anguiano drafted the project for resolution. Aguirre Anguiano's proposal was in agreement with the *acción*, and relied too much on the contradictions of the PGR and the president of the CNDH, and the ambiguous discussion around the absolute right to life from the moment of conception, that Aguirre Anguiano was himself defending. The document was rejected by the rest of the Ministers, but instead of appointing a new draft, relying on the capacity of the Full Court to address the issue and continue their task without the reference document required by judicial tradition.

In the last week of August 2008, six sessions were dedicated to the sessions of the full court. The final decision was approved but with a plurality of opinions: the Court achieved a qualified majority of eight votes against the *acción* to declare the constitutionality of the reform, but with a rather weak binding force since seven of those votes published concurring opinions preventing the eight votes needed to establish a binding precedent. The concurrent opinions are the written statements of the Ministers where they agree with the decision made by the majority of the Court, but state different

¹⁸⁰ <http://www.jornada.unam.mx/2008/04/01/index.php?section=sociedad&article=040n1soc> Last accessed Feb 14th 2015.

reasons as the basis for their decision, published as a dissent on the argumentation, not a dissent on the decision.

The Court appointed Minister José Ramón Cossío for the production of a new document. This time it was not a project for resolution, and it was commissioned after the decision was already taken. This new document aimed originally to compile both the decision and the individual votes (including the concurrent opinions). In Mexico this is known as the *engrose* of the sentence, whose main objective is to publish a public version of the final decision (omitting all information considered confidential), after authorisation by the Instruction Minister. The *engrose*, we have to clarify, was a controversial option. The choice for an *engrose* over a new project of resolution implies that the President of the Court acknowledged that the Ministers had already enough resources for a direct vote, and that the process of voting did not have to be publicised. The *engrose* delayed for more than four months the publication of the final decision, distancing it from the actual vote and blurring the public debate around the process: the sources of the vote disperse, and the theses that could emerge from them are only presented as isolated debates that represent only in fragmented details what it is that the Court decided (Pou Jimènez 2009: 146). It was in the *engrose*, with the publication of fragmented theses unfolded in an excessive level of literal detail, where all the gaps in the Ministers' debate were left unprotected, stimulating conservative actors to fill up the gaps that a Court which had never publicised a coherent position on women's rights left open, that only published an account of discussions that related in different terms to the case, with no effort to produce an objective clear outcome (Cfr Vázquez 2014: 148).

The *engrose* reports the way several claims of the *acción* were disqualified: the claim of conscientious objection¹⁸¹, the claim of discrimination on the basis of age¹⁸², the disproportional treatment of the different people participating in an abortion (that was aimed to protect practitioners)¹⁸³, and the claim of the rights of the father being

¹⁸¹ AI 146/2007 y su acumulada 147/2007, p. 74.

¹⁸² Ibid.

¹⁸³ 187, 199.

violated¹⁸⁴. These dismissals were made on the basis not of their content but of the faculty of the legislator to proclaim them¹⁸⁵. The main arguments that resolved the decision were unfolded across three main topics covering the invalidating criteria of the *acción* in the *engrose*: the substantive discussion on the normative concept of “life” in the Constitution; the resolution for problems of competence and authority raised by the *acción*; and finally the considerations about the juridical and legal certainty that was threatened by the *acción*:

1. On the underlying statement related to the normative concept of life in the Constitution:

The Court took no position on the ideological claim over the right to life from the moment of conception. It instead questioned the resonance of the concept in Constitutional language, because the ALDF reform would imply a violation of a fundamental principle if it transgressed constitutional structure.

a. There is no absolute content of the expression life in the Constitution. In the cases where criminal law has used the concept as the primary source of protection of individual rights it has had to establish *legal values* or *bienes jurídicos protegidos*. These are tools that determine instruments of protection but never constitute absolute rights. The consideration of a *bien jurídico protegido* does not automatically entail a pre-codified regulation of conduct that threatens them¹⁸⁶, but only the acknowledgement that appropriate measures ought to be taken for their protection¹⁸⁷.

As a consequence, the ALDF is authorized, but not obliged to regulate the LTP in one sense or another.

b. With the abolition of the death penalty in 2005¹⁸⁸ the Constitution stopped using all linguistic references to the term “life” as a superior legal value¹⁸⁹. It became a relative

¹⁸⁴ There is an interesting statement that determines that the right to be a mother or a father is not a right of collective exercise, and therefore the rights of the father are not to be confronted in the case of LTP. Ibid p. 187.

¹⁸⁵ 185.

¹⁸⁶ AI p. 75.

¹⁸⁷ P. 176.

¹⁸⁸ The prohibition of the death penalty of art 22 responded to the adjustments of national legislation to International Criminal Court stipulations, and Mexico’s obligations under the Rome Statute (and other

right open to the interpretation of the legislator, who is responsible for its harmonization with other rights.

c. There are crucial references in international law that protect the right to life as an absolute right. The American Convention on Human Rights, ratified by Mexico since 1981, recognizes in its article 4 the right to life from the moment of conception. However, when Mexico signed, it presented a reservation for art 4, holding the interpretation of the “personhood and conception as an exclusive faculty for state’s interpretation”¹⁹⁰.

d. The operation of balancing of rights that the LTP confronts (the rights of the woman against the rights of the unborn) was already exercised by the ALDF, and it does not correspond to the Court’s attribution. The interpretation of article 123 on workers’ rights should be read using that same logic.

e. One of the most important developments, compared to the previous *acción* against the Robles Law, was the consideration of criminal law. In the *engrose* the Court states that “criminal law should be the last resource among the state’s instruments, and used only to prevent the attack against the fundamental values and goods in society; in consequence, the intrusion of criminal law in society should be kept to the minimum”¹⁹¹. The Court replicated here the decision of the ALDF to name criminalization as an inefficient measure to regulate LTP.

The bounded concept of the right to life enabled the reform in the ALDF but it did not produce any legal assurance for further development of the decriminalization of abortion. Mexico’s reservation in the Pact of San Jose facilitated the decision of the Court without a commitment towards a statement that could favour the arguments for (or against) the

international human rights instruments). There is no reason to suggest the existence of a general and absolute right to life from the prohibition as Soberanes Fernández suggested.

¹⁸⁹ 157

¹⁹⁰ The reference to art. 4 of the American Convention has been crucial for the criminalisation of abortion elsewhere in the region. In Mexico the controversy was easy to resolve because of the reserve: the article reads “[the right to life] shall be protected by law, in general, from the moment of conception”. The word “general” for the Mexican delegation was read as a general guideline and not an obligation for the states.

¹⁹¹ 184.

LTP. The reservation was replicated by the Court on its format, resisting engaging with absolute values of rights. This was perhaps the key argument in the decision, however, it is empty of content in a human rights perspective: it disarmed the argument of those opposing the reform without favouring the supporters, but its failure to question the extent to which the right to life should guide (or not) all LTP discussions did not prevent the repetition of the same confrontation.

The separation of abortion from criminal law, however, represented a progressive achievement in feminist terms, perhaps the most progressive outcome of the reform. The shift from criminalization to human rights implies an authentic commitment of the legislative to protect vulnerable women from arbitrary exercises of authority, mainly from medical and judicial authorities. But read with the other responses to the criteria of invalidation, this shift does not extend to other states, and does not have the potential to introduce a doctrinal view on women's relation to law outside of the geographical boundaries of Mexico City.

2. In the report on the authority of the ALDF to promulgate the reform:

After a long exposition on the structure of the health system and the General Law on Health, the Court had to determine if the ALDF had authority to contradict the National Law on Health (and its concept of pregnancy), of superior hierarchy and of exclusive competence of the national Congress. The Court decided that it was the competence of the ALDF to determine directives on health and to regulate its concurrence in local services. The new definition of pregnancy in the Criminal Code did not alter the National Law on Health: the definition was not in the text of the Law but in a specific *reglamento* or regulation of the Law¹⁹². All *reglamentos*, even when they are applications of federal law, have inferior hierarchical value compared to the law from which they derive. They cannot overturn the autonomous authority of the states and municipalities over their own dispositions. And in the hypothetical case that the federal law had dictated a definition of

¹⁹² *Reglamento* of the General Law on Health, art 40. The definition produced in this ruling was articulated to be applied in research on health, is not a general definition and does not suggest general guidelines for the whole of the law. (AI 146/2007 and A 147/2007:143).

pregnancy, contrary to the ALDF's interpretation, the later has an "evaluative autonomy" faculty (*autonomía calificadora*) to determine its local relevance, explained as:

"...the capacity to establish the content of the different normative figures according to the nature of the legislation in question, even when those figures are previewed in dispositions with different content (...) the Legislative Assembly of the Federal District has legislative capacity to regulate the crime of abortion in the Criminal Code and to issue its own definition of pregnancy".¹⁹³

With no precedent contradicting it, the new definition of pregnancy is not perceived to be challenging any fundamental right. Every legislature is entitled to provide a definition of abortion, of pregnancy, and to determine the absolatory causes for sanctions and punishments. The solution of this invalidating criterion resulted in a positive outcome for the promoters of the reform, but it ultimately fragmented the notion of pregnancy with the possibilities of an expansive framework of interpretation of rights related to abortion. The legal definition in the ALDF does not affect criminal codes anywhere else in the country, enabling opposing conceptions to rule simultaneously in neighbouring states.

This clause is key to illustrate my claim: the Court did not resolve the case offering an interpretation of women's rights to choose in the *acción*: all legislative authorities have the capacity to legislate over abortion, to give the content they consider relevant as long as they do not challenge constitutional precepts of hierarchical authority. The Court's mandate is not to promote women's constitutional rights mediating between confronted interpretations that could endanger their right to choose, but to protect legislatures' capacity to legislate.

3. In an underlying statement the Court referred to the principles of legal and juridical certainty as the basic guideline for the decision: the *acción* claimed that the terms in which the reform was implemented did not correspond proportionally to the *legal value* of life, provoking a state of juridical insecurity to the detriment of the beneficiaries of the norm.

¹⁹³ (Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007: 148)

a. Having determined that life had no absolute value, there was no alteration to the principles of certainty and exact application of criminal law in the reform: the life in gestation is a *legal value*, but such also is women's freedom, and the legislator in the ALDF had already inclined towards the latter. As the two values do not present a disproportionate confrontation per se, the ALDF had the capacity to establish a hierarchy between them¹⁹⁴. The reform only contemplates circumstances and conditions under which those values would be protected, but never as absolutes.

In those terms, instead of violating principles of certainty the reform actually insisted on the exact application of the law. The reform indeed offers a clear definition for the offence of abortion, after the first 12 weeks of pregnancy, specifying the effect of judicial action and granting legal certainty to existing norms, one of the most critical gaps left by the previous regime of exceptions that had given excessive authority to judicial and medical personnel over women's decisions¹⁹⁵.

The fundamental *ratio decidendi* of the sentence, according to Francisca Pou Giménez (2009), was to limit the margin of manoeuvre of the democratic legislator, recognized in the Constitution as capable of criminalizing or decriminalizing conduct, but clarifying that “the very existence of a fundamental right does not imply an obligation to criminalize a conduct that affects it”¹⁹⁶. As Pou Giménez highlights, the *ratio* of the sentence is determined by what the Constitution *does not say about rights*, and what the Court itself does not do. Following its standard practice, the Court commits itself as minimally as it can to women's rights language, it remains ambiguous towards the responsibility of constitutional control as a guarantee of individual rights, transferring the task (or reconfirming it) to the legislative assembly's/assemblies, with “no intention of developing a systematic constitutional reading of a women's rights perspective” (Pou Giménez 2009: 150, my translation), nor to mediate the arbitrary exercise of criminalization that targets women. The *litis* did not question whether or not instances of

¹⁹⁴ P. 199

¹⁹⁵ P. 200

¹⁹⁶ *Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007*: 174.

criminalization across the states ought to address fundamental rights, only indicated that the legislature was authorized to criminalize specific conducts.

IV. THE LAST WORD

IV. 1. Who won the case?

“I could not relate to that question”, responded the scholar Isabel S, “it is not possible to even grasp it, politically, it escapes from my analysis (...) the decision is what it is, a product of this chaotic system of analysis, a system that does not force the Court to unify points of view”.

“I think it was women who won, if there has to be a winner! This was a bad judicial sentence with a minimal interpretation of the Court’s engagement with rights. The judicial response to abortion is a patchwork that resists all serious juridical analysis. Still, it feels as if it could not have taken us beyond where it took us; it is severely limited.”

According to Marina P., speaking in an interview¹⁹⁷:

“The winner might be the women’s movement in Mexico City, inasmuch as the law is still there; but this was definitely – and yet another – issue that was so politically controversial that the minimum engagement of the Court was going to be the most beneficial”.

Indeed, women in the city won because they can now access the service of LTP. The local media and the feminists have been celebrating since then the reform and its anniversaries as the contemporary political ephemerides of feminism in Mexico and the new culture of rights¹⁹⁸. But not enough attention has been paid to the relation of attachment that is claimed towards the Court with this decision, where the celebration of

¹⁹⁷ Academic, Interview in Mexico City in the summer of 2012.

¹⁹⁸ It became common practice to use the rates of abortions practiced in the public health system in the City as a sign of progress and of the exercise of autonomy in sexual and reproductive health. See for example <https://www.gire.org.mx/nuestros-temas/aborto/cifras> Last accessed June 15th 2014.

the final decision tends to renounce any critical unfolding of the process, of both the political implications of this process vis a vis other rights cases, and also of the implications it had for the evolution of judicialization.

As I said at the beginning of the chapter, this decision was a turning point for judicialization because of the level of attention it received: as a small replica of a constitutional moment that inspired a new rights culture and a new phase of judicial interpretation of rights frameworks: the celebration of this decision produced images of new *political identities* that were made available to citizens (new subjects whose rights are perceived to be part of the Court's agenda), and images of new *lawful relations* facilitated by the Court "that protects your rights"¹⁹⁹ orchestrating the basic principles of the new constitutional culture. Despite the fact that all other well publicized judicial cases of the time (mainly the Lydia Cacho case, but also the failed attempts to use the *facultad de investigación* and *controversias constitucionales* presented in the previous chapter) suggest the opposite. In the same way, the evolved phase of judicialization, that followed the path of interpretation of human rights as freedom of association in Zedillo's sexenio, or the freedom of expression of Vicente Fox's presidency, addressed human rights postponing political conflicts (like the outcry after the failure to respond to previous interventions of constitutional control) without enabling new conditions of possibility for women's rights development, turning back instead to the moderation of the basic conditions of democratic interaction between the three branches of the government, delegating politics (including human rights claims) to the legislative, and learn from human rights, but not produce guarantees for them.

IV. 2. One step forward, seventeen steps back

The publication of the sentence was followed by reforms in states' constitutions throughout the country. What the Court said in its decision, in practical terms, is that *it is legitimate to regulate the subject*, but not that *there is a constitutional mandate to protect*

¹⁹⁹ See supra 164.

women's constitutional right to choose when regulating on the subject. With its decision the Court gave enormous visibility to the path of advocacy that promoters in the ALDF followed, and in consequence to the ways to block and prevent any further reform towards decriminalisation. The right of the legislature to legislate on the subject does not diminish its constitutional value because the great majority of legislative bodies in the country would legislate against the decriminalization, taking the opposite direction from Mexico City.

Only in 2008 three states changed their constitutions to stipulate that the right to life must be protected from the moment of conception (Baja California, Morelos²⁰⁰ and Sonora). The states' constitutions were recognised in the *acción* as having the highest hierarchical position in legal interpretation (only inferior to the federal Constitution), and they had high political value for the new federalism of the state (explained in the previous chapter) that relies on the principle of local constitutionalism. The use of constitutional reform became the most effective way to set up *locks* for the local litigants that would favour the decriminalization of abortion. In 2009, new constitutional reforms followed in the states of Campeche, Chiapas, Colima, Durango, Guanajuato, Jalisco, Nayarit, Oaxaca, Puebla, Queretaro, Quintana Roo, San Luis Potosí and Yucatán. In 2010 Tamaulipas followed suit²⁰¹.

With the optimistic hope that constitutional reforms had expanded the possibilities to intervene in the Court and ensure the protection of human rights, two *acciones de inconstitucionalidad* were presented in 2009 (only two from all seventeen states) against the reforms. The first one in the state of Baja California presented by the *Procuraduría de*

²⁰⁰ As mentioned earlier, the state of Morelos followed the Federal District in 2000 and reformed its Criminal Code in the same regime of exceptions. The reform of 2008 was a retrograde step following the national tendency to block legal activism in abortion.

²⁰¹ Source GIRE (2011), *Reformas aprobadas a las constituciones estatales que protegen la vida desde la concepción/fecundación 2008-2011*, updated until March 14th 2011. Available in http://www.gire.org.mx/publica2/ReformasAbortoConstitucion_Marzo14_2011.pdf last accessed June 10th 2011. This information only includes the constitutional reforms that include the language of the “rights to life from the moment of conception” after the *acción* from Mexico City; neither does it reflect the progress of the regimes of exceptions in the states.

*los Derechos Humanos y Protección Ciudadana*²⁰² (the only one presented by an ombudsman); the second one presented by the PRD legislative fraction in the state of San Luis Potosí²⁰³, both states governed by the PAN. The Baja California Congress reformed its constitutional article 7 to declare that as a “fundamental norm [the Constitution of the state] guards the right to life, and declares that an individual is under the protection of the law from the moment of conception, and is reputed as born for all corresponding legal effects”. The ombudsman claimed the invalidation of the reform on the grounds that 1) it overruns the competence of the secondary legislator who has to sanction in criminal law the conduct of abortion in all its expressions (potentially including contraception and embryo manipulation for IVF treatments), encouraging nothing but legal uncertainties in the regulation of access to health services considered in the statutory defence regime²⁰⁴, and 2) does not justify the discrimination and violation of women’s rights made on behalf of the rights and personhood of the unborn²⁰⁵.

This time the Court engaged in a long discussion on the theoretical implications of personhood, humanity and zygote, concluding that the Federal Constitution does not recognize personhood in the zygote. The project of resolution suggested that the *acción de inconstitucionalidad* should be accepted, and the Court should invalidate the constitutional reform, arguing that the Congress of Baja California did not have the capacity to “introduce” new subjects of rights in its Constitution (with the recognition of life from the moment of conception) since that would violate the authority of the secondary legislator²⁰⁶. The project suggested the recognition of a hierarchical privilege to a woman’s dignity and rights as a normative axis to interpret article 1 of the Federal Constitution (and the principle of non-discrimination), determining the recognition of personhood of the embryo as a direct threat to her fundamental freedoms and rights²⁰⁷. It

²⁰² The Baja California Attorney for Human Rights and Citizens’ Protection office. The *Acción de Inconstitucionalidad 11/2009* was promoted by Francisco Javier Sánchez Corona who played the role of the state’s ombudsman (he later became a Deputy for the PRD in the local Assembly).

²⁰³ *Acción de Inconstitucionalidad 62/2009*.

²⁰⁴ In cases of pregnancy resulting from rape; or non-consensual artificial insemination.

²⁰⁵ AI 11/2009: 9, 15.

²⁰⁶ *Ibid*: 60, 61.

²⁰⁷ *Ibid*: 65, 91.

also suggests that the interpretation of the fundamental right to health should include unconditional recognition of sexual and reproductive freedom²⁰⁸.

In San Luis Potosí the Congress reformed its constitutional article 16 with similar linguistic expressions. The *acción* in that state, promoted by the PRD, challenged its constitutionality accusing the reform of procedural inconsistencies (it used the language of conception and fertilization indistinctly in different parts of the texts²⁰⁹), and of risking the federal order imposing a notion of personhood in the state that would contradict that of other states²¹⁰. The draft for both resolutions was commissioned by minister José Fernando Franco González Salas, to ensure that no invalidating criteria would be repeated.

The Full Court voted for both *acciones* in the same week, rejecting them both. This time, and having engaged in depth with language that could have resulted in major statements about women's rights, the Court resolved the cases once again in an ambiguous and unproductive fashion in the voting process: the constitutionality of both reforms was approved with a lack of a qualified majority. Only four of the eleven ministers voted against the appeals, constitutional reforms could not be invalidated, closing by constitutional mandate all possibilities for litigation in favour of a non restrictive abortion regulation.

THE LAST WORD

The debate on judicial activism in Mexico has articulated a heated discussion about who has the last word over legislative reform: the legislature, with legitimate authority gained by electoral means, or an active judiciary that can impose interpretations of rights but inevitably only by exceeding its democratic mandate? Well, here *the last word over LTP became a non word* that cannot be read as a non intervention of the Court: its decisions

²⁰⁸ Ibid: 78, 80.

²⁰⁹ AI 62/2009:17.

²¹⁰ Ibid: 19.

were determinant for the setting of a map of different regimes of exceptions and intolerance in the Mexican Republic and the restrictive trajectory of legal reform on abortion.

In the evaluation of Rodolfo Vázquez, with an *engrose* that published only a disjointed outcome of the process stating a literal and excessively formalistic agreement of the Ministers, the process left fundamental gaps in the argumentation in favour of women's rights, stimulating a conservative scenario with notorious fundamentalist features. Without doubt, the Court learnt about the democratic dialogues taking place in civil society, it put into evidence its good will towards the rights agenda, but did not ensure an interpretation with enough binding force to have prevented the actual outcome of the *acción*, it did not engage with the minimum necessary of scientific rationality about women's right to choose what has been already advocated by feminist in different frames (and in coherence with constitutional rights), it left untouched the *status quo* that supports the dynamics and forces that sustain a scenario that is announcing the now almost irreversible attacks of the legislative assemblies on women's rights (Vázquez 2014: 148). With no federal guarantee for the right to choose (Mills 2010: 419), conservative actors started re-criminalising women, even in scenarios that had already achieved extensive regimes of exception.

The national reactions of conservative actors led not only to 16 constitutional reforms in legislative assemblies, and the failed *acciones* in Baja California and San Luis Potosí, but it indirectly increased criminal prosecutions and the harassment of women from medical services throughout the country. After 2007, the cases of prosecution of women denounced by medical practitioners have increased from an average of 62.5 women per year to an average of 226.3 women per year following the *acción* and the publication of state reforms²¹¹. These numbers represent women searching for medical attention both in post-abortion conditions and spontaneous miscarriages, and in some cases, they correspond with new obligations on medical personnel to report cases to the police, interpreted from the new secondary regulation to guarantee the protection of life from the

²¹¹ <http://www.sinembargo.mx/14-07-2013/685459> Last accessed Feb 15th 2015.

moment of conception. The most publicized case was that of the arrest in 2010 of six indigenous women in the state of Guanajuato; they all requested medical attention after suffering spontaneous miscarriages. The women were denounced by medical workers, and afterwards accused of the crime of homicide in the case of kinship (*homicidio en grado de parentesco*)²¹². The prosecution in these cases was not even processed as an abortion (punished with three years of imprisonment), but as murder (punished with imprisonment, from 25 to 35 years), stressing the remnants that the debate in Mexico City left in the rest of the country²¹³. After the media reported that some of these women were forced to sign false declarations of induced abortion²¹⁴, four of them were put in isolation to avoid their contact with the media before the imminent visit of the United Nation's Assistant Secretary-General for Humanitarian Affairs²¹⁵

According to the pro-choice NGO GIRE, from 2007 to 2011, 679 women were reported to the legal authorities²¹⁶; the National Institute of Statistics reports that, from 2009 to 2012, 151 received formal accusations, (120 women and 31 men), among them 123 were processed, and 108 were found guilty (the largest majority being in the state of Baja California)²¹⁷. The number of cases increased almost 150% compared to the 1992-2007 period, immediately before the *acción*. In 2014, 157 women were still reported to be imprisoned for the crime of homicide in the case of kinship, 17 of them being indigenous women²¹⁸. There is a coincidence in most cases in the irregularity of judicial procedures, there is a common lack of evidence or investigation, which suggest a specific effect of the happy judicialization of sexual rights in Mexico City: the reinforcement of arbitrary abuse of authority against women (and sometimes their partners) that not only punishes

²¹² It can be also translated as 'homicide of a family member'. The criminal code in Guanajuato, in its article 156 punishes those "who deprive of his life to a direct ascendant or descendent by blood, brother, spouse, concubine..." See http://www.jornada.unam.mx/archivo_opinion/index.php/autor/front/45/25353 Last accessed Feb 14th 2015.

²¹³ The case triggered a national mobilization that resulted in seven of them being released after a legal reform that decreased the penalty.

²¹⁴ <http://mexico.cnn.com/nacional/2010/09/01/mujeres-presas-en-guanajuato-esperan-libertad-tras-la-reduccion-de-penas> Last accessed Feb 15th 2015.

²¹⁵ <http://www.jornada.unam.mx:8810/2010/08/04/sociedad/036n1soc> Last accessed Feb 15th 2015.

²¹⁶ <http://informe.gire.org.mx/caps/cap1.pdf> Last accessed Oct 11th 2014.

²¹⁷ <http://www.animalpolitico.com/2013/08/en-4-anos-fueron-condenados-87-mujeres-y-21-hombres-por-aborto/> Last accessed October 11th 2014.

²¹⁸ <http://www.jornada.unam.mx/2014/01/23/estados/027n2est> Last accessed Feb 15th 2015.

different practices of women related to their pregnancies, but sometimes punishes women even without sufficient evidence of abortion ever having been attempted. Only one case arrived in the Supreme Court via an *amparo* action, of an indigenous woman who was imprisoned after being denounced by her family to a tribunal of communitarian justice, accusing her of infidelity, with no evidence supporting the case. The woman was released in 2014, two years after being imprisoned, in an uncontroversial case of the Court of due process.

The symbolic power of the reform of Mexico City was counterproductive to the wave of moral rebuke implemented by actors with authority over women's choices, and stimulated by the excess of visibility of the legal means to do so. In Alejandro Madrazo's optimistic review of the reform of Mexico City, the ALDF indeed inaugurated the possibility of:

“consistent patterns emerging from this trajectory includ[ing] the gradual and constant exclusion of public morality from the language and thrust of the law; the emergence of the woman's consent as a determinant factor to be taken into account by the law; and, equally important, having sexual and reproductive health and rights be the centre of the law regulating abortion, both criminal and administrative. The result, and the transcending significance of the example of Mexico City's new law, is not only decriminalization of abortion during the first trimester, but also robust legislation enhancing family planning, respect for sexual and reproductive rights and, importantly, prevention of unwanted pregnancies” (2009b: 269)

But that is an evaluation that is contained in the law, and in the assumed agreement of the Court. There was no change to the clientelist political relations in Mexico, and the status quo of women in the law, particularly for those in situations of disenfranchisement. Apart from the harsh enactment of new laws for poor and indigenous women in the state, the legislation in Mexico City has not transformed situations of entitlement, nor supported empowering and subjective notions of citizenship, given that the state keeps promoting the reform as a concession with electoral capital (see Amuchástegui, 2013; Amuchástegui and Flores 2013). The Supreme Court did not transform the political relations that separate women in conditions of disenfranchisement from the full enjoyment of public services and rights, it only indirectly generated new geographical, class and ethnic

distances which fragmented citizens' experience of the law. The decision of the Court could have been better if only it had generated guarantees that protect women from the arbitrary exercise of power of legislative authorities, the police, and medical practitioners.

The political counter-effects that the case produced leave open a question: what is it that the Court does with its newly gained authority as constitutional tribunal, and how can we assimilate its understanding of human rights? I will go back to explore this question further in the next chapter, trying to articulate how this mystical version of the active court, only sustained by the few pertinent successful cases and their uncritical celebration, can authorize the demands towards the SCJN even if it is only by declaring through its resolutions what it does not do.

Chapter 6

JUDICIALIZATION AND THE RIGHT TO MARRY

“[T]here is nothing better than savouring a legislative triumph: to enrol oneself in history, to build from there new forms to relate to one other aspiring to equality and justice as values for democracy. [The same sex marriage reform] was not only a triumph for lesbians and homosexuals, but for society as a whole” (Lol Kin Castañeda 2011: 86).

Progressive legal reforms are like promises. In Mexico we celebrate them not because they are paramount to change themselves, but because they announce that something good always follows, if we believe in them. The legal reform on same sex marriage of 2010 was not the spontaneous consequence of an inclusive society embracing new rights for lesbian and gay citizens. Instead, it was a proclamation that a new legal culture is coming, announced by the recognition of the right to contract marriage in accordance with the constitutional precepts of equality, and promoted as a fundamental condition for the full exercise of citizenship.

The legal reform followed the structure of the promise that I presented in chapter one. For those invested in this promise - those who promoted it (activists), those for whose benefit it was promoted (lesbian and gay citizens), and those who authorised it (the legislative, and in the second instance the Mexican Supreme Court) – the reform grew a virtual attachment that bound them together. Same sex marriage merged their desire for change in one single project of development towards a better future, one that demanded an equal commitment (from each of the three) to recognise its legitimate validity and ensure its place in the history of Mexican politics. This attachment, ever since the law was enacted, proved to have huge potential for the reassurance of the identity of each party: activists, lesbian and gay citizens, the Legislative Assembly of the Federal District

(ALDF) and the Supreme Court. Like every other promise: it represented the triumph of the long fight of lesbian and gay activists against oppression and exclusion, it offered material references to the claims for recognition of lesbian and gay rights, and became a sign of an inclusive legal system, a democratic government, and a new Court committed towards the new culture of human rights.

From the beginning of this thesis I have been concerned with the way the promises revealed in judicial events announce a *change in history*: their celebration (often framed as the historical decisions of the Court) becomes a galvanizing image for social movements; they inspire powerful images of hope towards the Mexican democratisation. There is no question about this one thing, that same sex marriage was a positive reform and a sign of progressive development in the country, reflecting the aspirations of many citizens who perceived themselves as being excluded from constitutional premises of equality. But there is a question about the conditions that were settled for its *participation in history*, not determined by citizens or social movements. The celebration of Lol Kin Castañeda²¹⁹ that opened this chapter is an overstatement: was the recognition of same sex marriage really a triumph for all society? Did it open paths enabling other social movements to promote further rights agendas in the country, particularly in terms of new ways to relate to one another in untested expressions of human rights in the Mexican legal system?

The previous chapter portrayed a representation of the Supreme Court in the context of the *acción de inconstitucionalidad* of 2008 in between the conundrum of the celebration of the Court's support to the legal reform of abortion, and the postponement of crucial questions on the political unfolding of judicialization, of the scrutiny over the political junctures that determined the decisions of the Court. The images of hope inspired by the decision to support the reform of Mexico City were later discouraged with decisions in 2009 that confirmed the Court's primary commitment is towards the legislative bodies in the state and the reinforcement of their authority in the new federal system, rather than

²¹⁹ Castañeda was one of the leaders of the same sex marriage campaign that triumphed in the legal reform of 2000 and in Mexico City.

towards human rights. The Court was perceived by juridical experts as inconsistent in its decisions which almost disabled the political legitimacy it had won with the first intervention, with *amparos* historically failing to establish precedents for the expansion of strategic litigation (Magaloni 2011; Magaloni and Negrete 2001) and using constitutional review as a tool for the mending of norms, but not the establishment of juridical content for constitutional rights (Magaloni 2008: 272). I suggest in this chapter that the same sex marriage processes that started in 2010 *replaced* in the Court the abortion dialogues of the previous years - and before the political conundrums about its mandate towards the protection of human rights were resolved. The language of same sex marriage in the Court reignited the optimism for judicialization, with good decisions in support of same sex marriage that were being published at the same time as the backlash of women's rights kept advancing in the legislative.

The replacement of abortion debates with those of same sex marriage was not only an indication of lesbian and gay rights taking the lead as the modern and progressive version of sexual rights, but was also an indication of the adjustment of the format of constitutional control available to citizens: the *acciones de inconstitucionalidad* yielded the attention of human rights agendas back to *amparos*, not because of the strategic choices of litigants searching for more efficient channels to access the Court, but because these were the only channels left open for citizens to access the judiciary in the later stage of judicialization. The *acciones*, together with the *facultades de investigación*, were informing the way social movements perceived the Court as an alternative governmental institution capable of resolving cases that lower courts, and the judicial system in general, proved incapable of addressing.

In 2010, when it accepted the *acción de inconstitucionalidad 2/2010* against the legal reform of same sex marriage of Mexico City, the Court was more exposed than it had ever been before, and was placed in a compromised political position. Faithful to its tradition to always decide on formalistic grounds, and avoiding direct commitments to human rights language (Magaloni 2011; Magaloni and Negrete 2001), it was dealing with cases of constitutional control with neither the capacity to give judicial resolution, nor the

will to make political statements on them. The return to *amparos* helped the Court to restore its image as ‘guardian of rights’, with the same sex marriage debate contributing very publically to this. With the *facultades de investigación*, social movements lost a space in which they were articulating novel engagements with the judiciary, legal strategies of resistance that relied on their hope for a Court willing to guarantee the substantive enforcement of justice and accountability, issues that have been the main historical indication of the deficit of democratic development in Latin America (Jones 1998; Rodríguez Garavito 2011; Morris 2009; Méndez, O’Donnell and Pinheiro 1999; Sieder 2010).

This chapter explores the process of the same sex marriage debate from its evolution, initiated in 2010 with the *acción de inconstitucionalidad* against the legal reform of 2009 in Mexico City²²⁰ and expanded with different *amparos* throughout the country. The effects of judicial expansion have not yet concluded in the states. By July 2014 moderated versions of civil partnership had been regulated in the states of Quintana Roo, Colima and Jalisco, and *amparos* have been promoted in a National Campaign for Equal Marriage initiated by the granting of the right to marry to same sex couples in Oaxaca in reached at the end and *amparo colectivo*, suggesting that debates about collective rights and entitlements for lesbian and gay subjects are some way from their conclusion. With the experience of the abortion case, this chapter extends the premise that the Court organises its decisions only *in relation* to rights without resolving the fundamental debates that are triggered by such cases, and perhaps the format of *amparo* has contributed to that issue. These new cases did not generate jurisprudence, leaving no option for further development but instead simply the repetition of litigation with no enforceable disposition.

The *amparos*, perceived to be the most important contribution of Mexican constitutionalism to the region (Fix Zamudio 1981; Sánchez Mejorada 1946), are exceptional procedures with remedial effects, but can only affect individuals and only in

²²⁰ Decree that modifies the *Civil Code for the Federal District* and the *Code of Civil Procedures for the Federal District* published on the *Official Gazette of the Federal District* on December 29th 2009.

exceptional cases; they cannot generate declarations on specific laws, as opposed to the *acciones de inconstitucionalidad* that can challenge the constitutionality of a law (and consequently the authority of the legislative institution that promoted it). The most powerful result of *amparos* could be jurisprudence generated with five consequent and consistent decisions on the same subject²²¹, and that has not been the case in the evolution of same sex marriage. Even though there is an optimistic trajectory of new *amparos* resolved by the Court, the decisions have been taken with dispersed and fragmented criteria; there are few common principles linked with constitutional principles, and no solid production of precedents. The process, therefore, does not suggest new ways to relate to the Court but the narrowing of constitutional control in a way that is compatible with the liberal conception of human rights; they respond only to concerns for recognition of the individual subjects, limiting the spaces of public deliberation and excluding all non-authorized social moments from their collective conception.

The recognition of women's right to choose, that is behind the struggle for the legal reform on abortion, has been a crucial aspect of the political identity of the regional feminist and women's movements; there has been a consensus over its materialization in the decriminalisation of abortion since the early stages of democratization. It has represented a discursive autonomous space that still defends an independent feminist ideology, detached from the democratic governments (see Alvarez 2009; Molyneux 2000; Vargas 1999) to the point that abortion became *the main feminist claim of democratization* (Molyneux 1988: 115; Lamas 2007: 137), and the focal (or existential) point of motion for the interaction between women, the state and its laws (Facio 2000: 26-27), the axis of power of the state over women's bodies, and the power structure that symbolically distributes respectability between women according to their economic status, ethnicity, and all the hierarchical distances that separate their reproductive impositions. There is no equivalent intersection, no autonomous or independent frames in the contemporary dialogues of lesbian, gay and transsexual (henceforth LGT²²²) rights in the

²²¹ Article 192 of the Amparo Law.

²²² The reference in this chapter to narratives of LGT rights will not refer to the codes through which people define, or perform, their identities in line with their own sexual or affective relations. I take distance from the discursive formula that groups different communities of people as LGBTTTIQ (as it has been

region (Brown 2010: 89); LGT's agendas have been heavily conditioned by the episodic and superficial incorporation of LGT activism into the new institutions of democratization and partisan agendas (De la Dehesa 2010: 81-82). The claim for legal reform of same sex marriage has been gaining legal spaces despite the lack of resonance with other human rights claims, and despite its incapacity to rearrange the political positions and relations of all citizens (particularly those in situations of material constraints). Same sex marriage does not necessarily challenge the new conditions with which the state delivers human rights, as it has now been largely contested by feminist and queer critique²²³.

One of the most successful contemporary human rights agendas, promoted in the judiciary, is also one of the most contested ones, and perhaps the most ambiguous ones if we try to define its relevance in the transformation of the judiciary and the whole of the Mexican culture of rights. Its promotion coincided with a narrowing of possibilities of intervention by human rights social movements. The most successful intervention in sexual rights, therefore, is enabled through a perception of a subject of rights that is not suggesting new ways to relate to one another in political terms, but instead reforms the attachment to the judiciary's authority to recognise a citizen. This urges its critical re-evaluation both in terms of how it has been articulated but also in terms of the politics it postpones, that is the evaluation of the political performance of the Courts.

popularized in Mexico City). This 'alphabet soup', in attempting to include a wider spectrum of sexual expressions, inevitably 1) minimizes sexual diversity to immutable, homogenous, and mutually exclusive relations in the dialogues between sexuality and rights, 2) produces the epistemic erasures (Currah 2009; Yoshino 2000; Waites 2005) that render invisible the tensions between different needs, agendas, and multiple forms of identity shaped by various cultural contexts and spaces, 3) does not acknowledge the internal competition for resources and access to politics within movements (Budhiraja, Fried and Teixeira 2010; Pecheny 2004), and 4) presupposes uncritical homogenous positions made out of rights scarcity, violence and stigmatization as the affirmation of the spectrum of the sexual diversity (see Love 2007). I choose to use only LGT because there are only legal and judicial developments on lesbian, gay and transsexual rights. When appropriate I will use only LG trying to refer responsibly only to those identities that the law, or the judiciary, is related to in specific dialogues.

²²³ The edited collection of Ryan Conrad (2014) has reunited some of the main opponents in the United States against the way same sex marriage processes have overshadowed other debates on basic redistribution of rights, and has effectively postponed other pressing debates around race, economic justice, critiques of the criminal system, etc. (see also Mogul, Ritchie and Whitlock 2012) and the feminist critique against the patriarchal basis of the institution of marriage that has been long addressed (see Barker 2012; Whitehead 2011; Polikoff 2008; Ingraham 1999).

I will now unfold the argument discussing first the critique on same sex marriage, then introducing the *acción* and, briefly concluding by presenting the *amparos* that followed. I recognise the critique against same sex marriage is primarily conceived within Western parameters, with an idea of a universal standard of a subject of rights that is assumed to have the capacity to travel across transnational exchanges of gay and lesbian activists, but not necessarily in the political communities they socialise in. I will then move on to present a detailed consideration of the trajectory of same sex marriage debates in the Mexican legislative, and then give a detailed insight of the discussion of the *acción de inconstitucionalidad* against the reform of Mexico City of 2010.

I. THE TRANSNATIONAL LGT AGENDA AND THE SUBJECT OF RIGHTS

If the LGT movement has not been the main beneficiary of the transformations brought about in democratisation, at least it has been the group which has suffered perhaps the most radical shifts in its own political agendas -and ideological basis- and adapted more successfully to the turn to law of the last decades. There has been a boost of intensity (both in quantitative terms and the range of discussions) in the debates on sexual diversity and gender identity as hallmarks of liberal democracies (with or without legal or material consequences), an increasing level of articulation between activists both in the region and internationally, and a foster for different identities and claims covered by them in Latin America, “perhaps in a higher degree than anywhere else in the world” according to a Human Rights Watch report (2009:39). The report celebrates the way democratic openings have enabled the entry of lesbian, gay, transsexual and bisexual people in the cultural and political sphere, but also acknowledges a remarkable contrast between this new political sphere and the continuums of violence and the prevalence of hate crimes. In Brazil and Mexico, for example, some of the most progressive legal reforms and judicial decisions in the region coincide with the two countries experiencing the highest indices of hate crimes in the region according to NGO based reports internationally (see Parrini Roses and Brito Lemus 2012: 14; Taus 2014: 210; Villamil 2010). This contrast triggers a question about the way LGT rights are conceived in a democracy, and who might

benefit from them.

1. 1. The transnational sphere: having rights for the first time

The LGT movement has profited from the democratic opening of what Javier Corrales (2010) recognized as the most innovative political strategies, in both tactical action and political thinking: this is why they have achieved formidable changes within societies that are still heavily determined by patriarchal and homophobic cultures. By emulating traditional leftist politics, LGT politics have successfully cast small minorities into the mainstream political sphere. In the last decades the region has witnessed a growing awareness of social change codified in sexual matters. This has been largely initiated by the early feminist and women's movements' claim for reproductive rights, the onset of the AIDS epidemic that shook the already weak models of healthcare and claims of health rights, and the new cultural atmosphere of democracy installed with the universal standard of "equality" as an aspirational model to be followed by all political regimes and cultural expressions (Pecheny 2010: 113-115; Corrales 2010, see also Seligson and Moreno Morales 2010). The LGT movement emerged perhaps to be the fittest to adapt to those transitions because they contributed with *political innovations* while other movements were trying to find ways to address historical exclusions based on a patriarchal, racial and colonial order. The LGT movement has gained more visibility than those that have kept a careful distance from the institutional transformation of the state (or have been excluded from it), because they brought something new to democracies.

The claim of innovation has been one of the most visible investments of LGT politics in the region, and also one of the most scholarly records of it. Legal reforms and public policies organised a well known ephemerides of democratic development: in LGT literature there is a popular recreation of a list of "first times" in the writing of its recent history, defining in terms of novelty the evolving emancipatory value of human rights frames, even when that implies a rupture with the same leftists traditions that LGT rights are informed by (see de la Dehesa 2010: 109). This list began with records of the first

appearances of lesbian and gay groups in dictatorships (mainly as clandestine and isolated forms of resistance against military rules and nationalistic claims) and throughout the transition to democracy in different countries, giving account to the articulation of conscious awareness and social groups (typically disaggregated between gay and lesbian stories as different developments; see Mogrovejo 2000; Thayer 2010), and early minority claims within the files of Marxist, Trotskyites and communists of radical left movements (see Corrales and Pecheny 2010a; de la Dehesa 2010; Diez 2011; Brown 1999; 2010).

Soon after and in the rise of the new democratic states, the record of sexual diversity politics was determined by references to institutional recruitment of new LGT politicians, legal references to sexual diversity framed in human rights language (primarily antidiscrimination language in new constitutions and criminal codes), and the “normalisation” of sexual diversity under the codes of democratic citizenship (Figari 2010). Later (chronologically at the end of all accounts) in the *evolved* version of LGT rights, the records register the recognition of same sex marriage, civil partnership or rights related to the aspiration of marriage contracts and familial recognition. The *lists of firsts* became a barometer of recognition in the global community for different municipalities, cities or countries, which by claiming novelty would be promoted in the global ranking of modernity, tolerance and inclusiveness.

The Brazilian states of Mato Grosso and Sergipe were the first to include in their constitutions explicit mention of sexual orientation under equal protection clauses in 1989, and the first to anticipate the tradition of legal reform as a priority for LGT agendas. The tradition took almost a decade to solidify. The priority for the different LGT social movements in the early 1990s was their institutionalisation as a strategy to claim recognition and institutional-judicial equality compared to the rest of society (Figari 2010), securing strategic spaces of representation and lobbying to promote the voice and the needs of LGT population, originally with little focus on legal development. This period, from the late 1980s to mid 1990s, coincided with the political energy invested in the professionalization and claims for legal status for groups in the new culture of

NGOization of social movements, where they were expected to widen their grassroots work to become genuine intermediaries for larger civil society constituencies, and more importantly, to become the access point for new forms of knowledge about society and its organization (see Alvarez 1997, 1999, 2009). The politicization of HIV is clear example of this process. It provided governments with the opportunity to target populations that had been out of their reach and to create appropriate structures to respond to the new international mandates, to alleviate the epidemic using legal language of discrimination, framing the structural exclusions of gay men and people suffering with AIDS²²⁴ (see Brown 1999; Garcia Abreu, Noguer and Cowgill 2004: 149-151).

In 1994 Amnesty International became the first major international human rights NGO to publish a report on sexual orientation, and the UN Human Rights Committee took its first decisions in cases for the decriminalisation of sodomy (see Gross 2013: 99). With the international networks already organised on the circuits of HIV/AIDS work, frames were promoted stressing litigation back to transnational standards, triggering the revival of litigation backed by references to international law. At the same time, lesbian and gay scholarship began systematising the genealogical records that built the premises for the new political language of exclusion and discrimination²²⁵, together with the hopeful images of progress that would inform legal development, but which would also reinforce the idea of a common identity, a common agenda, and the international sense of a

²²⁴ In my research I did not cover the specific trajectory of HIV AIDS activism. Most literature, at least for the Mexican experience, has been focused on the development of social and cultural stigmatization, or on strategies for mobilization. The CONAPRED (see chapter 2) commissioned a research on the early AIDS activism in Mexico, mainly focused on the systematic record of activist and their perception on the slow inclusion of AIDS in the agenda, with not enough analyses on the specific challenges it represented in law and public policy beyond the enunciation of antidiscrimination law (Andrade, Maldonado and Morales 2010).

²²⁵ The systematization of LGT history in Latin America was influenced by the academic production of studies of sexualities, and social movement theory in the United States (see for example MacRae 1992), and later on in Spain. David William Foster (2008) offers a large literature review on the subject (inclined towards cultural studies and not politics); he recognizes the legal and political transformation of status for gay citizens in the 1980s as the trigger for the academic demand for genealogies and studies of LGT culture. There is disproportionate attention paid to studies of the movements in Argentina, Brazil and Mexico, with little attention paid to other countries (see the comparative effort of Corrales and Pecheny 2010a). This has been attributed to their particular record of urban development and sexual openness, or the specific circulation of scholars from those countries in the academic circuits in the United States. The question transcends the objectives of this chapter, but I am inclined not to support the first argument about cultural progress for reasons that will be expressed later in the chapter.

community of sexual diversity.

In 1997 the PRD in Mexico City supported for the first time the election of a lesbian activist in the Chamber of Deputies; she was in fact the first openly homosexual politician in the region. Once in office, Patria Jiménez²²⁶ facilitated a process that made the Mexican capital the first city in the region to explicitly address sexual orientation in anti-discrimination regulation on its Criminal Code (de la Dehesa 2010: 87, 110; Salinas Hernández 2010). Although Alejandra Sardá has suggested that Buenos Aires in 1996 was the first city in Spanish speaking Latin America to protect non-heterosexuals: the statute of the new autonomous city included a clause to protect “the right to be different” inferring that this implied the direct protection for sexual orientation, or at least to offer tools for activism (Sardá 1998; Brown 1999).

In 1998, the Ecuadorian Constitution in article 23(3) banned discrimination based on sexual orientation, becoming one of the first countries in the world to do so. A further period of slow legal development in Latin America followed, but, with the publication of the Yogyakarta Principles in 2006²²⁷, new global resources became available to activists who were already participating in international LGT dialogues or within feminist networks. These activists were skilled in the promotion of international standards of human rights in local spheres, quickly disseminating messages about the relevance of (or dependence on) legal reform for the recognition of the rights of all non-heterosexual people.

International news about the legal reforms of same sex marriage in the Netherlands (2000) and Belgium (2003) circulated rapidly raising the political aspirations of LG

²²⁶ Jiménez was originally an external candidate, and not a member of the PRD (her first affiliation was with a smaller *Partido Revolucionario de los Trabajadores* or Workers Party). In chapter 2 I have discussed the politics of membership of the PRD. She was not the first lesbian activist who ran for a post in elections, only the first one winning after the alliances with the PRD who was then building its electoral platform.

²²⁷ The *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* were drafted by experts in the field to formulate specific states' responsibilities to extend human rights protection on the basis of sexual orientation and gender identity, according to the binding legal standards with which states must comply according to international regimes of rights.

citizens in modern democracies. And soon after Spain surprisingly followed with its same sex marriage law of 2005²²⁸. The Spanish experience allegedly felt closer to the Latin American contexts because of cultural (and religious) similarities, but mainly as a result of the direct exchanges between Spanish activists and Latin Americans in their strategic use of political opportunities as examples for litigation (Lozano 2010; Pierceson 2013: 56). The Brazilian state of Rio Grande do Sul was the first to address the debate with the first regulation on cohabitation of same sex couples in 2011 following a decision of the *Supremo Tribunal Federal* or Supreme Court²²⁹. In 2006 Mexico City passed the first law on civil partnership in the country (*Sociedad de Convivencia*). Later, in 2008 Uruguay became the first country to adopt a national civil union law (recognising *concubinato* or common law marriage). After that, in 2009 Buenos Aires became the first city in Latin America to register a same sex marriage (for the first time in a civil law country using a judicial strategy through *amparos*, where the judge unofficially anticipated a legislative amendment) (Bustillos 2011: 1033; Corrales and Pecheny 2010b).

In big constitutional moments (those historical junctions of exceptional politics, ruptures and reforms that engage the general public in an exceptional fashion; Ackerman 1984) LGT activism has founded a crucial moment of inclusion. They want to take part in the constitution because its language defines the set up and grounds for all further strategic litigation (Morales Aché 2008: 169, 177). Ecuador's new 2008 constitution opened a path for its citizens, on its humanistic spirit and in tune with the political historical junction, for the recognition of civil unions²³⁰. The Colombian constitution of 1991, through its

²²⁸ The candidate of the center left party PSOE won the presidential election in 2005 because of an unexpected turn of events provoked by a general outcry against the conservative party's management of the terrorist attack in Madrid the weekend before the election that shifted dramatically the polls. Among his first official acts, President Zapatero rushed alliances with the LGT movement. For a lot of us who were in Spain at the time same sex marriage was a fortunate but accidental development.

²²⁹ The decision did not recognize the register of any form of new civil union, it only open a dorrd for interpretation in cases of dispute of inheritance and healthcare for stable partnerships. See http://noticias.terra.com.br/brasil/por-unanimidade-stf-reconhece-uniao-estavel-gay_f3ebdc840f0da310VgnCLD200000bbcceb0aRCRD.html Last accessed July 7th 2014.

²³⁰ The case of Ecuador deserves special attention. The article 68 infers the right to civil union, but at the same time article 67 clearly states that a marriage can only be celebrated between a man and a woman. The contradiction has been perceived as a trick in the political alliances that president Correa established with social movements, legitimizing the constituent assembly process with the promise of a citizens' revolution. (For a specific engagement with the national process see Xie and Corrales 2010, Lind 2012). The

judicialization of the language of dignity, provided considerable support to LG rights. This language of dignity directly impacted on the decision of its constitutional court in 2009 which recognised that the exclusion of patrimonial benefits of same sex couples in cohabitation was a violation of fundamental rights and a negation of the duty of the state to promote the right to free development of the personality for every person (see Encarnación 2011; Piatti-Crocker 2013; and the appendix of Corrales in Corrales and Pecheny 2010).

The Ecuadorian and Colombian experience demonstrated that the links between constitutional language, same sex marriage and civil partnerships proved to have much greater social impact than antidiscrimination clauses on their own, which only triggered appeals for tolerance and sensitivity in criminal codes in political contexts where criminal law did not have good records of enforceability. Also, the experiences of same sex marriage taught an important lesson about the benefit of using the judiciary to facilitate social change that was not forthcoming with law, and with broader political resonance. The further development of legal reforms and the judicial references stressed the need for references to the national reach of constitutions, and of tools of constitutional control that could inspire new ways of producing effective change with the same constitutional promises for rights expansion, and for the cultural transformation desired by the LGT movement.

Argentina initiated a new list of ‘firsts’ with the approval of the Gender Identity law in 2012, suggesting perhaps the next step of inclusive legislation that will follow same sex marriage laws. Already in 1993 the constitutional court of Colombia had generated jurisprudence for the first time with a *tutela*, presented by a man, to change his gender to female in all civil registers²³¹. In 2006, Panama passed a law that allowed gender modifications to be recorded in the civil register. However, there was little debate about the nature of gender: this reform was simply intended to facilitate the change of forename and surname in the civil registry, the debate on gender came only after the reform was

Ecuadorian constitution, however, still appears in comparative studies and celebratory record, therefore I emphasize its place on the list of firsts (see Piatti-Crocker 2013).

²³¹ Sentencia T-594.

passed²³². In Ecuador in 2008, the *Defensoría del Pueblo* or ombudsman enabled changes to be made to civil registers. In 2009, Uruguay approved a law that authorized the name change in official documents giving authority to a special commission within the Registry Office and a judge to evaluate specific cases²³³. The Mexican Court accepted its first *amparo* on the subject in 2008 (*Amparo Directo Civil 6/2008*); and in 2009 the Legislative Assembly of Mexico City changed its Civil Code to authorize the change of the registered sex in birth certificates, granting authority to judges to approve individual requests. In July 2014 a similar proposal was presented in Chile²³⁴, and in Mexico City the Head of Government announced a bill to shift the change of gender in the registers to legislative means thus avoiding judicial intervention²³⁵.

This list of ‘firsts’ has of course been expanded with new events of recognition of LGT rights, at different levels and in different countries, but much more slowly than this summary suggests, and perhaps in less directions. The claim of novelty with which the order of the lists of the first time LGT rights are given account in law, produces a narrative of a hopeful gay rights revolution, one that postpones plans to address the thorny relations between the legal cultures and the prevailing violence and discrimination against non-heterosexual people. More strikingly, this gay rights revolution postpones the relocation of the strategic attachments LGT people entrust to the law and their symbolic promises, and authorized legal systems to organize the ways social and sexual relations aspire to evolve (see Copper 2006). The *list of firsts* set up limits for the path that was available to all other activists who aspired to become part of the progressive wave, and who believed that those first times had the potential *to be repeated* with the same political intensity that came with novel legal development. Assuming, of course, that novelty always comes with political intensity, and through open deliberation of LGT politics.

To believe that progressive legal reforms can be replicated, that the triumph of activists in one legal context can be repeated with similar intensity in another, because we trust that

²³² Gaceta Oficial N° 25.599 July 31st, 2006.

²³³ *Publicada D.O. 17 nov/009 - N° 27858.*

²³⁴ The campaign started in 2008; see <http://leydeidentidaddegenero.cl/> last accessed July 8th 2014.

²³⁵ <http://contralinea.info/archivo-revista/index.php/2010/02/14/cambio-de-nombre-por-reasignacion-de-sexo-derecho-inalcanzable/> Last accessed July 8th 2014.

the rights claim hold on a rational core that stands coherently in a democratic environment, is to insist that *a new triumph* is always more valuable than the previous one because it takes us closer to that which we desire and that which is our ambition, and can always restart the hope for a better future in a lucid and consequential linear development. New laws are always going to be better than previous ones. Each time the transnational scenario recognises something new it rekindles the belief that there is a “community” that celebrates together and recognises its identity. As Kay Lalor argues, the LGT community supports a hope to “repeat the future” by calling for its repetition. Recommencing something better gives substance to the way we now understand gay rights are determined by what they will become, but also by the kind of connections they can make according to their predicted possibilities of the future (2013: 134). The idea of the evolution of LGT rights seems to prescribe what LGT citizens can hope for.

Rafael de la Dehesa uses the concept of “electoral activism” (2010a) to describe the way the connections established by LGT actors can become defining factors in strategic mobilization. The repetition of LGT rights events depends on the bargaining positions of strategic actors much more than on their ideological programmes, these are actors who were perhaps legitimised by their personal trajectories within the LGT movement, but largely by politicians who establish connections with social movements only because they recognise electoral profit on them. This form of activism, on the one hand, gives LGT actors direct access to the representative legislative bodies, but on the other, constrains their range of actions (see also Pecheny and de la Dehesa 2007: 43). More than the wishful repetition of human rights events, the development of LGT rights is tempered by the endorsement of strategic allies, who define the opportunities for intervention, and frame their temporalities, within the political priorities of electoral periods. Besides, the repetition of LGT rights is traditionally limited only to allies in constituencies within urban centres, often only the capital cities (Bustillos 2011; de la Dehesa 2007, 2010a; Salinas Hernandez 2009, 2010). Thus, the abstract hope for repetition has to be adapted to grounded dependence on strategic actors.

If we test the transnational optimism in local grounding we need to ask what those lists

say about each of the contexts in which they emerged, and we need to re-read Lol Kin Castañeda's announcement of the new forms of relating to one another that came with same sex marriage reform, but now through specific ethical and political choices in our reading: did they benefit all Mexicans as she hoped for? However, she was right in her basic premise; the novelty of same sex marriage had the capacity to transform history in the Country, to write a future that a whole social movement, and the subjects of rights it addresses, seemed to aspire to repeat. But that may not be the most we can aspire to.

I. 2. The global gay and the subject of rights

The exercise of charting the lists of novel progress is not exclusive to the LGT movement, it has been used previously in all other human rights agendas. Within sexual rights it has been a common feminist strategy to expand international legal language and guide strategic lobby for its implementation (see, for example, Petchesky 2000), but also to adapt transnational references and make them resonate with the (rhetorical or political) frames produced at the local level, sensitive to cultural changes (see Ferree 2003; Ram 1999; Rojas 2001). Nevertheless, without a solid, international framework in international law to be expanded in enforceable terms, for LGT rights the exercise of charting novel events reveals a different value. The lists of firsts are adopted bestowing rights and creating an illusion of progress, when there are not enough realistic opportunities for their repetition in different legal contexts, or enough reasons to believe that they would resonate in different local cultures.

The tensions that the short-term effects on a list of firsts do not suggest that there is a gap in the rational justification of a rights claim that is always postponed and repeated, but therefore never fulfilled, neither that activists are not desiring ambitious and sustainable transformation. The repetition of the sense of novelty suggests the lack of capacity of each reform to touch the fundamental power relations that sustain the epistemic authority of the law, the forms of power of the state that separate the political positions of citizens and admit only certain expressions of rights claims (the symbolic claims of representation) with no alteration of the material redistribution of conditions of

possibility. The tensions represent a structural problem where the spaces open for change only accept notions of emancipation that will not touch the state or the law.

The *lists of firsts* had then to invent a common point of reference in order to sustain the promise they make to LGT activists; a figure to identify with but always dependent on the attachment of those who recognise in the lists that the law issues a promising future. That is how the “global gay” appeared (Altman 1997; Phillips 2000) as a measurable standard of desirable expressions of the modern legal cultures, and an expression performed as the *subject of rights*, against which all other subjects of rights can, or should, be considered. In cultural terms, the global gay generated powerful assumptions about the aspirational expressions of lesbians and gays (or all non-heterosexual people in general), such as their sexual practices, schemes of socialisation, consumer patterns, and every other sign and marker of modernity (see Binnie 2004; Jackson 2011). The reference for these codes of affiliation is presumed to be superior to any autochthonous cultural referent, or any non-state-mediated political identity (Williams, quoted in Altman 2007: 427). The global gay carries with it its counterpart, the backward and conservative subject, who is easier to identify because it holds a much more coherent identity. The association between progress and lesbian, gay and transsexual citizens (and their new rights) comes with a clear conception of what backwardness means: aspiring to the measuring standards of the global gay, all citizens engaged in modern social projects are compelled to confront, or discipline, those who are lagging behind, whose ability to catch up with progressive developments prove slower than desired (Love 2007: 6).

In law, we can suggest that there are backward positions in the constitutions that make no explicit reference to sexual orientation in their antidiscrimination clauses; in legislative bodies that have not yet considered taking a position on same sex marriage and still need to be updated, or have not yet incorporated debates on gender identity within civil registers. In politics, the values of the global gay become valuable tokens of competition between political parties proving progressive and inclusive agendas, or true commitment to social movements. The global gay has already anticipated and cherished the universal paradigm that calculates the evolution of a legal system through those signs of progress,

but with premises that address only cultural patterns, and not legal structures: the modern legal and political systems (evaluated under the scrutiny of the global gay) are the ones that protect him from backward dangers²³⁶, from the expressions of homophobic, patriarchal, and machista cultures that threaten his dignity, or the free development of his personality; all cultural contexts ought to be now re-examined and adjusted to his international and universal pretensions (Gross 2013: 100; see also Stychin 2004).

That speaks about the culture, but not the legal culture in general terms. The global gay is not qualified to claim protection from democratic delays, nor from the deficit of accountability of the Latin American legal systems that have been recorded extensively as a basic limit for the enjoyment of rights, and not only for LGT people (Rodríguez Garavito 2011; Méndez, O'Donnell and Pinheiro 1999; Sieder 2010). The explanations of why LGT rights flourish in some places and not others, in the gaze of the global gay, tend to depend first on higher levels of education, economic development, and an educated public opinion, empathetic towards the transnational configuration of human rights (see Strongman 2002, Lodola and Corral 2012), but not on legal cultures and their capacity to assimilate the different political positions of all their citizens, including LGT citizens.

The global gay as a new subject of rights is qualified by an assumption of a common exposure to violence and common suffering, shared by all non-normative sexualities (see Love 2007)²³⁷; this justifies the demand for law and new law-bound practices from the state (Moran 2004) on the basis that such expressions of violence are destructive of social cohesion. This assumption authorizes uncritical attachments to the state and its authorities²³⁸, and blurs the distinctions between the varying levels of intensity in which

²³⁶ The exclusive usage of the generic male is intentional; the very enunciation of the global gay has also considered the andocentric position of the universal paradigm.

²³⁷ I have briefly engaged with the notion of suffering as a universal experience in human rights language in chapter one. For the discussion on the appropriation of suffering to legitimize human rights claims refer to Baxi 2006; Mignolo 2009; Nayar 2013.

²³⁸ Two equivalent versions of critique have reached a strong international dimension, the critique of homonationalism, and the gay agenda of development. With the shared objective on the demystification of the universal expression of gay identity and its correspondence with rights language, the first one denounces the use of legal discourses to originally redress social injustices (that LGT people suffer) but effectively authorizing (some times indirectly and sometimes intentionally) disciplinary forces over the

different people experience suffering and deprivation. This leads to a rupture between LGT rights, and the rights as they are conceived by different ideological leftist movements, and traditions of critique that have targeted projects of emancipation previously. The claim of rights abridges cultural and economic variations of sexual expressions on behalf of universal pretensions of legal recognition, dismissing the fact that sex, sexual identity, kinship, and even family, are constructed differently in different strategies by different people and in different contexts (see Alexander 1994; Parker 1991, Prieur 1998). Furthermore, sex is constructed like the law: the intervention of legal regulation to mediate the spheres of private lives and intimacy affect people unevenly, and that has more to do with the political positions in which they encounter their legal systems, and not exclusively by identity based categories.

In chapter 1 I stressed the importance of the need to acknowledge in all legal studies the varying *political positions* in which different people encounter the law and governmental institutions. Following Jorge L. Esquirol's concept (2009), I emphasised that it is ethically compulsory to recognise the epistemic erasures of subjects that have been authorised on behalf of a coherent account of progressive legal development, or as is the case here, on behalf of a project of modernity measured by a specific notion of sexual freedom and its counterpart in the social (and legal) backwardness. In chapter 1 I also presented the legal experiment of The Alternative Use of Law Movement in Brazil, summarizing its message with the *new social subject* that is defined not as a representation based on assumptions of subjugation and victimhood, but as the conscious distance the legal scholar or litigant takes from the experiences of deprivation. The new social subject is an ethical commitment towards a theoretical fiction used to understand the exclusionary hierarchy of law (De la Torre Rangel 2006b: 21).

subjects constructed as culturally or politically unfit to redress those injustices. The homonationalist debates are the denounce against the political performances of the nation-state justified with the promotion of LGT rights, most famously the debate has been circulating about the deployment of gay-friendly identity of the state of Israel in relation to the occupation of Palestinian territory (see Franke 2012; Gross 2010; Puar 2013). The other critique emphasizes the role assumed by gay activists in the West to promote human rights language as a paradigm of civilization or cultural superiority, that conditions the fluxes of material support in international advocacy with assumptions of backwardness attributed to cultural determinants (see the edited collection of Kuntsman and Miyake 2008).

The rejection of the premise of victimhood as the overriding note of the subject of rights for the Brazilian lawyers was particularly sensitive towards the meanings that victimhood had acquired in the Brazilian criminal law system at the time, and its dubious record of selective enforcement. The notion of victimhood cannot be the most effective way to relate to a legal system because it requires attaching one's political subjectivity to a subordinate status in a social context that is highly unequal to begin with. The Brazilian lawyers developed instead, a notion to identify the new subject of rights as a way to engage with those in positions of material and political dispossession, in order to enable them to *come to occupy* new political locations, and participate in the collective discussion that determines the meanings of emancipation attributed to human rights; this entails basic conditions of redistribution that play a role in the evaluation of the ethical relations she or he establishes with other social actors (Andrade 1998; De la Torre Rangel 2006b; Wolkmer 2003).

Extending this to observations about the Latin American legal systems, the new subject of rights (as defined by the Brazilian lawyers) can be read as the pedagogical project to enable citizens to occupy positions that do not imbue the identification with the global identity, but a position where they identify the hierarchies of their own legal system, including the meanings of victimhood attributed to the continuums of violence in the region that are not only unintelligible in the liberal notions of human rights, but have been left out of the notion of the democratic state all together (see Comaroff and Comaroff 2006, Rodríguez 2009). The fundamental difference between the new subject of rights of the Brazilians and the global gay as the standard for LGT rights is as follows. The former offers an ethical commitment towards the analysis of conditions of material exclusion projected towards redistribution through legal adjustment; the latter, on the other hand, is an aspirational construct invested in a future political position fed by a utopian image of rights enjoyment (see Gross 2013) that we will all profit from after the legal recognition of the universal standards of rights.

The conciliation of the Brazilian subject of rights, and LGT people recognized as a subject of rights can be presented as a pedagogical project for detachment, that believes

in the capacity of subjects to readdress, within the same sex marriage reform as a political opportunity, the relations that were established in the political regime that enabled LGT subjects of rights, and no others, to claim for new legal relations. The new subject of rights that learnt from the Brazilian movement, is focused not on the appropriation of experiences of violence as a universal condition, but on a broader and more critical problem triggered by the way human rights are being distributed in democratization in specific locations, on the way democratic states determine the conditions of attachment to liberal conceptions of rights, and the margin left to LGT subjects' capacity to test the feasibilities of imagining the expansion of legal relations to other subjects of rights. Presenting then a new subject of rights as a theoretical device, conceived in the transnational context but grounded in ethical concerns, always brings light to the epistemic exclusion of some subjects and their experiences of suffering, that occurs in the strategic placement of human rights language. This is not (always) the calculated hierarchical placement of LGT rights over others, but the indirect effect of the tight margins in which LGT activists negotiate, bargain, import, and expand the global discourses available to them in liberal democracies. The problematic notion of the LGT subject of rights, therefore, is represented here to talk about the state and the way it delivers political opportunities in a given, specific, spatial-temporal context, and not to build an argument claiming that same sex marriage is not a positive thing, or it does not have the capacity to take us closer to better relations of fairness.

II. THE JUDICIALIZATION OF THE RIGHT TO MARRY

For the Chilean queer activist and scholar Christian Cabello, gay rights in Latin America became an *aesthetic project* promoted to honor democratic political systems; they brought the language of equality, love and harmony to a notion of human rights that was perceived to be getting abstract and arid (2014: 83). Gay rights became not only projects for LGT activists but of governments and political parties looking to bolster their democratic currency. Broadly conceived, the narrative of gay rights, according to Cabello, received privileged attention from law-makers and politicians because of its potential to

educate the rest of the population with basic notions of tolerance and respect, and to *ameliorate* the civil society that is in the process of democratic establishment. In this model, the gay citizen comes to occupy a location that has an *explicative* and *informative* responsibility towards all other citizens, rather than a normative or conflictive one (2014: 142). In the transplant of the transnational conception of LGT rights, the gay citizen in local legal cultures has the task of explaining to his communities what new political subjectivities mean: from the basic redefinitions of sexual and gender identities, to the justification of the legitimate claim of recognition of diverse families. It is because of this explicative mandate that he requires the political spaces that partisan politics offers to him; he needs the novelty of judicial resolutions and legal reforms, and their repetitions, in order to teach to the rest of society new and ideal ways to relate to one another.

There have not been enough academic responses to the specific way the LGT rights are deployed in the Latin American processes of judicialization. Those who have been paying attention to courts have been particularly confident about their role in facilitating the development of LGT rights, and the willingness of the courts to learn from the contribution LGT rights make to the new constitutionalisms. There is a general sense of optimism invested in the capacity of LGT rights to repair the backwardness of the legal traditions with new relations of recognition, that can, or ought to be repeated across legal cultures. Courts are portrayed in this reading as independent institutions, displaying a strong commitment to judicial activism, which in this optimistic view would resist partisan politics, interests groups and other conservative forces that had historically prevented progress through legislative channels (Encarnación 2011; Lozano 2010, 2013; Pierceson 2013; Vaggione 2008). Thus, constitutional courts are deployed as active agents of progressive transformation (Madrado and Vela 2011; Vela Barba 2011). Because of their hierarchical rank in legal systems, they are perceived as if they have the capacity to inform and explain the meanings of constitutional rights to the rest of the judicial and legal system. They also adopt the pedagogical task of teaching the new patterns for civilised relations in democratic structures that are still lacking modernity.

The Latin American constitutional reforms of the new wave of democratization are

“especially sensitive to human rights claims, and especially inclined to see gay rights as human rights” (Encarnación 2014), or at least this is how they are perceived in such accounts. The LGT movement (and scholarship) has reciprocated with a strong attachment to constitutionalism and embraced their new role as mediators and transmitters of the new human rights language. In the same way that most academic engagements have been overwhelmingly invested towards the regional dimension in comparative studies, with the hope that legal systems can repeat the lists of firsts; embracing progressive positions and transplanting international standards to set precedents domestically (Corrales and Pecheny 2010a, 2010b).

But there are also others accounts of judicialization that are more moderate in their optimism, commonly in legal or political theory. They deploy a utilitarian version of the courts, recognising that social movements have “judicialized marriage” not because this automatically expands human rights cultures, but because the judiciary can position LGT rights as a political priority in governmental agendas in a way antidiscrimination could not. Courts became privileged arenas of influence and political publicity; they became the most convenient location for the LGT activists aiming to educate society with their notions of tolerance and respectability. This understanding of judicialization is not based on assumptions of judicial activism, but on the strategic usage of the notion of legal progress that had favoured constitutional control as one of the most elevated markers of democratization (Campana 2011; Wilson 2007).

II.1. The right to marry

As in any other form of human rights mobilization, the possibility of importing or transplanting symbolic values through local strategies depend, to a large extent, not so much on the lobbying skills of activists and promoters, but on the explicit commitment by institutional politics (Restrepo Saldarriaga 2010). Thus the typologies of legal frameworks, the set of normative state instruments prevailing at a given moment (and in a given country), as well as the effectiveness of these institutions to deal with these rights (Rios 2010: 252) will all impact on the mobilization of human rights to some degree. The

immediate history of Latin America tells us that legal framework's formal capacities rarely correspond with transnational expectations (Keck and Sikkink 1998; Petchesky 2000); that is why the claim of novelty replaces the lack of resources in constitutional language.

There are no direct references in the Mexican Constitution that suggest meanings to the notion of LGT rights, or how these can mediate the relations between LGT citizens, the government and its institutions. Mexico had a constitutional moment with the reform of 2001 where these issues could have been addressed in one of the most intense political demands for the reconsideration of the political and legal structure of the state in recent history. This opportunity, however, was not grasped. The trajectory of LGT rights claims could have started with the constitutional recognition of Mexico as a multicultural country and a radical new refurbishment of constitutional rights, but it started instead with a strong demonstration of political insularity of the liberal regime: the constitutional reform in 2001 was intended to resolve the political crisis generated around the Zapatista uprising, and to respond at the same time to the challenges against the state's authority to impose an aggressive neoliberal economic programme, over a *de facto* plural and multicultural state (vid. Espinoza Saucedo et al. 2001, 2002; Haar 2005; Hernández Navarro 1998; Rábago Dorbecker 2010). But the hope for public and participative deliberation was replaced by the promises of liberal notions of rights, the promotion of constitutional control and judicialization, and the recognition of the new and modern pattern for democratization that included the ambiguous mention of "preference" as a new clause for antidiscrimination regulation, within which all LGT citizens were supposed to fit, and celebrate one step forward towards their inclusion in society

In the legal development of human rights narratives, same sex marriage became a privileged space to rethink inclusion and the reparation of historical exclusions, when other political positions, that attempted to imbue their rhetoric with the same language, were dismissed from constitutional recognition (I am talking about the claim of Indigenous rights and legal pluralism in the process of the constitutional reform of

2001²³⁹).

However, social movements, including those groups organized around sexual diversity, were explicitly included in the political constitutional debates. During the negotiation for the reform, the Senate's fraction of the PRD promoted the language of sexual preference to include all forms of sexual diversity in the first paragraph of the Constitution, the purpose of which same paragraph was to represent the new identity of the nation. The fraction of the conservative party PAN rejected the proposal, and limited the formulation to the word "preference" with no further clarification²⁴⁰. It was not until the reform of 2011, the "human rights reform", that sexual preference was clarified in the Constitution, and it finally become a "gay friendly" text according to a report of the BBC news service (de los Reyes 2011).

"[W]e are also citizens, therefore the Constitution has to protect our rights, as it does for every other person" (Castañeda 2011: 82). Lol Kin Castañeda refers here to the Constitution as a fiction of general political consent, as a reference point for a programme of expansion of rights based on the assumption that the Constitution actually protects the rights of all Mexicans. Castañeda's argument can only rely on a fictional legitimacy of the constitutional history that denies its historicity and is invested in its future rather than the experiences of the constitutional culture. The claim of inclusion detaches itself from its political context, from its actual opportunity to affect history and define the relations LG people might establish with those for whom signing marriage contracts is not part of their political imaginary. Alfredo, activist and academic, insisted in an interview on the defence of the political potential of the marriage reform²⁴¹:

"Being able to get married has indeed a political intention. We are aware of the historical problems of marriage, of the gender analysis, but the vindication of marriage, and the reform of the civil code, were ultimately defences of the secular

²³⁹ See chapter 2 for the full development of the 2001 process and the Zapatismo.

²⁴⁰ It was first the Senator Leticia Ochoa (PRD) who proposed "sexual orientation", the senator Diego Fernández de Cevallos (PAN) rejected the proposal arguing that the government should not promote objectionable conducts (De la Dehesa, 2010: 159). It was the same Fernández de Cevallos the one who opposed a constitutional reform triggered by the Zapatistas, and was in charge of the first draft of the reform (Vid. judicialization ch. 4).

²⁴¹ Interview in Mexico City in the summer of 2010.

state, an opportunity to highlight the hierarchies that determine that some can access rights and some cannot (in this case because of sexual preference/orientation)”

In this sense, defending the political possibilities of gay marriage involves speaking about the nature of the state, and enriches the general expansive programme that Castañeda suggested earlier. Alfredo expanded:

“[P]ersonally, getting married was a political project; marriage opens discussions of rights from within. For example, discussions that so far have been untouched in our country: I am talking about health care, and the fact that we, as citizens, need to prove that we work in order to access healthcare, or to live in coupledness (...). In this exercise to re-dimension marriage to national politics, again, the distribution of authority that grants the Court to ultimately define the condition of possibility for marriage remains untouched”

II.2. The right time for LG rights in Mexico

Thus far I have explained 1) that the limited institutional and legal references to LG rights conditions the frames available for rights claims, and indirectly promotes a defence for the claim of novelty supported by the attachment to the institutions that enable legal and judicial events; 2) that the relevance of the right to marry for Latin American legal cultures can be read at the same time as one of the most optimistic *and* one of the most controversial signs of democratic transformation; and 3) that the basis of optimism of LG rights is inspired by comparative analyses and transnational legalism, and only rarely by critical analyses of the authority of legislative and judicial processes.

In the period between the 2001 and 2011, and with two important constitutional reforms on each side, the LG political subject appeared in the legislative agenda of Mexico City following the same transnational trajectory: first in antidiscrimination reform, then in civil partnership, and in the end with same sex marriage. In 2002 the Civil Code of

Mexico City banned, for the first time, discrimination on the basis of sexual preference²⁴². A year later, the Federal Law to Prevent and Eliminate Discrimination followed²⁴³. The first legislation on civil partnerships arrived in 2006²⁴⁴, and subsequently the modification of the civil code in 2009²⁴⁵. Unavoidable questions should be raised about whether this type of development responds to “natural” progress of a liberal unfolding of rights, successful expansive programmes of rights for LG citizens, or whether this is driven by (not fully articulated) social victories around political opportunities that have been strategically exploited by sexual diversity movements (Brown 2010; Thayer 2010).

III. THE LEGAL REFORM. The right to marry (and have a family)

In 2006 Antonio Medina (journalist and gay activist) and his partner Jorge Cepeda became the first same sex couple to register their civil partnership (*Sociedad de Convivencia*) in Mexico City. Karla López and Karina Almaguer, both *maquila* workers, became the first couple to register under the newly created *Pacto Civil de Solidaridad*, in the northernmost state of Coahuila. In 2010 Rafael Ramírez Arana (also a gay activist²⁴⁶) and his partner Sebastián Becerril were the first same sex couple married in the city. These events reflect the evolution of same sex marriage in Mexican law, from the modest reforms on civil partnership to the *correct* demand of marriage as a full recognition of equality. But only superficially. A closer look reveals interruptions, discontinuities, disconnections, and even political rivalries between the three events. There was little legal progress between 2006 and 2010. The expansive agenda of same sex marriage only commenced in 2010 with the judicial intervention. (This will, however, be presented in

²⁴² Reform of article 281Bis from 1999, promoted by the local depute David Sánchez Camacho, representing the PRD, in alliance with the sexual diversity movement.

²⁴³ *Ley Federal para Prevenir y Eliminar la Discriminación*, published in the *Diario Oficial de la Federación* on June 11th 2003. (Vid. Chapter 4). President Fox personally promoted the Law as part of his electoral campaign.

²⁴⁴ *Ley de Sociedad de Convivencia para el Distrito Federal*, published in the *Gaceta Oficial del Distrito Federal* on November 16th 2006.

²⁴⁵ Decree that modifies the *Civil Code for the Federal District* and the *Code of Civil Procedures for the Federal District* published on the *Official Gazette of the Federal District* on December 29th 2009.

²⁴⁶ Ramírez Arana was linked to the *Asociación Ciudadana por la Diversidad Sexual*, originally associated with the PRD. In 2012, however, he became the coordinator of the Sexual Diversity work group of the PRI in Mexico City.

the final section of the chapter; the following section focuses only on the early legal development.)

The first proposal for the reform of *sociedades de convivencia* in the capital city emerged from the established (but small) circuit of activists turned politicians in Mexico City. In 2001 the local representative, and then head of the Human Rights Commission in the Assembly, Enoé Uranga²⁴⁷ reunited a group of LG activists to evaluate the possibilities of replicating, in a proposal for civil partnership, what was becoming already a priority in the transnational dialogue. After consultations and an open public debate with LGT and sexual rights activists she drafted a bill that was almost the replica of the French *Pacte Civil de Solidarité* approved in 1999. The PACS seemed to be the moderate version of marriage, but she defended it as the only viable project at the time. Before presenting the bill, she explained in several public venues to groups of activists, that the reform implied more responsibilities than rights for couples, only offered symbolic recognition and required only minimal alteration to the legal system. She called on those of us who followed the campaign to support the bill and, should it succeed, apply for the appropriate contracts: this was only the first step that had to prove its legitimacy for its later expansion.

Days before she submitted her draft, the congressman and head of the Assembly Armando Quintero Martínez, from the PRD, prepared another initiative (presuming that it was also backed by LGT activists²⁴⁸) demanding the full expansion of the institution of marriage for same sex couples²⁴⁹. After the LGT movement announced publically their lack of support for Quintero's proposal, the PRD decided not to present the bill.

²⁴⁷ Uranga is a lesbian activist that was then sponsored by the Party of Social Democracy to occupy a seat in the Legislative Assembly. The PSD was composed mainly by activists and had a short life in Mexican history: it gained its registry in 2000 and was active only for the legislative period that followed. When the party got fragmented in 2002 most of its members created another small party, *Mexico Posible*, which also had two years active. Uranga joined later the PRD, where she work currently.

²⁴⁸ Quintero Martínez was supported by external collaborators in the party, activists who were doing double militancy in the PRD, or who left their activism to join the party. But there was no open process of deliberation sponsored by him, and he did not have any record or further links with LGT activism, he was only designated by the party to present the bill. Consequently, he was not supported by the social movements, who were already supporting Uranga's project. (interview Miguel summer 2012 in Mexico City).

²⁴⁹ http://www.notiese.org/notiese.php?ctn_id=1401 Last accessed July 3th 2014.

Nevertheless, the simultaneity of both proposals effectively sabotaged the success of the *sociedades de convivencia*. Alejandro Brito, Mexican activist and journalist, attributed the failure to sabotage by the PRD, when the Mexican partisan left was competing for the appropriation of the social movements' platform of for its electoral agenda (2003). The reform was suspended until 2006 when the ALDF approved the proposal of Jesús Robles Maloof, the leader in Mexico City of the new *Partido Alternativa Socialdemócrata y Campesina* in Mexico City²⁵⁰.

Under the leadership of the feminist activist Patricia Mercado²⁵¹, the party won its official registration in 2006 with a minimum presence in the Chamber of Deputies, the same year in which Felipe Calderón from PAN won the national election. Mercado facilitated alliances with the feminist and the LGT movement in the city, despite challenges from the campesina fraction of the party²⁵², but supported by some of the groups that had earlier supported Enoé Uranga. The PRD, led in the city by Andres Manuel López Obrador, decided not to support the bill (López Obrador had declared that same sex marriage should be open for referendum to avoid electoral costs). Robles Maloof, a human rights lawyer with no direct links to the LGT movement himself, managed to lobby support for the vote from the majority of the Assembly, including the small leftist parties (and the PRD). The law was approved in November 2006²⁵³, in a backdrop of post-electoral controversies in which the PRD was focused on challenging the elections, and led to a notable tension developing between the capital and the federal government, a situation that was not replicated elsewhere in the country.

In Coahuila, the reform was promoted by the parliamentary group of the PRI, with strong

²⁵⁰ The Social Democratic and Peasant Alternative Party was created only in 2005 before the 2006 elections. The first objective of the reunite different groups dispersed across social movements and the left in Mexico, as they promoted it, it was the encounter of a social democratic column (some were former members of the PSD) and a popular and campesina base that was not being assimilated yet by the new small leftists parties. It was originally composed by intellectuals. (see <http://www.jornada.unam.mx/2005/01/31/010n2pol.php> Last accessed July 12th 2014.

²⁵¹ And former leader of *México Posible*. The links with the original proposal of PSD still kept hold of few politicians that followed the trajectory form there.

²⁵² The campesinos left the party later. In 2007 the name changed to Social Democratic Alternative Party. In 2008 it became the Social Democratic Party. In the election of 2012 the party lost its official registration.

²⁵³ Published in the local Gazette on November 16th 2006.

roots of leadership in the state. By 2007 it had the majority of seats in the local Congress (20 of 39)²⁵⁴. This legal reform took Mexicans by surprise, “in that Coahuila is largely [a] *rural and ranching* state not known for liberal policies” (Newton 2009: 108) (my italics). Newton’s statement perhaps misjudged the political development of the state, both miscalculating the will of the leadership towards progressive social development, and underestimating the visibility and relevance of local sexual politics. But attempting to explain the reform in terms of cultural arguments, rather than through the political bargaining of the legal system at the federal level, is missing an opportunity to understand it.

Unlike the process in Mexico City, the legislative process did not come from political alliances between social movements or public deliberation: it was a PRI local congresswoman, Julieta López Fuentes, who promoted the initiative. The bill was not even framed as a reform for LGT rights; in her own words, “the reform was not exclusively directed to lesbian and gay people but to all couples who did not want to marry” (quoted in Lozano 2010: 150). The process was notably simpler, faster, and more effective than the one in Mexico City. As well as gaining the support of the local Senate (22 votes against 13), the bill managed to pass a very ambitious clause: that the civil recognition of couples in Coahuila should be recognized throughout the country. Mexico City’s reform retained a strategic modesty and negotiated the *sociedades de convivencia* as a “legal exception”, validated only by authorities in the city. After the reform passed there was no political resistance from any of the institutions so authorized to present challenges against the constitutionality of the reform; neither did the reform trigger judicial intervention.

Within a year, 302 same sex couples in Mexico City and 167 in Coahuila were registered in partnership. Then, two years later in November 2009, the PRD representative David Razú, presented an ambitious new proposal to the ALDF, a full reform of the civil code

²⁵⁴ Besides the representative majority, the brother of the governor Humberto Moreira, Rubén, was also the leader of the party in the state, which was going to determine the success of any of the party’s initiatives against possible opposition. The governor Moreira has had a well known rivalry with President Calderón. The promotion of the legal reform could have been a confrontation against the president, who openly opposed partnership and marriage reforms.

of the city, extending the *right to marry* to same sex couples, surmounting the limitations of the *sociedad de convivencia* as a truly egalitarian policy. Razú's success was due in part to the strong support he received from the PRD²⁵⁵, now led by Marcelo Ebrard. With no direct links with the LGT movement, Razú brought Jaime López Vela and Lol Kin Castañeda to articulate the campaign among social movements. As I explained in chapter 2, the fact that the PRD openly supported the campaign for the first time is related to Ebrard's electoral ambition to consolidate the public support that was inclined towards López Obrador in the federal elections.

In December 2009 the official gazette of Mexico City published the reform equivalent of the Code of Civil Procedures of the Federal District in concordance with the new Criminal Code. More importantly, changes were made to the following articles: article 237 on marriage of underage **persons** (instead of a man or a woman); article 291 B on the issue of concubinage, where concubinage can now be established between "*concubinas*" and "*concubinos*" (clarifying the capacity of both men and women to be recognized as concubines²⁵⁶); article 294 on kinship and affinity links (replacing men and women for **person**); and article 724 on the constitution of family commons (adjusting the language to **spouses** and **concubines**).

But the contested sections of the reform were the new article 146 (that states the definition of marriage as the union of **two people** to share a life in common), and the appearance of article 391 in the gazette, even although *this was not reformed*. Article 391 establishes the regulations for adoption. Its mention in the Gazette is crucial in establishing the strategy of Razú's project: because it did not contribute to the reform (as article 146 did), there was no need to include article 391 in the publication; the Gazette reports only amendments in legislative texts.

The (non-reformed) article reads:

"The spouses or concubines can adopt, when they both agree in considering the

²⁵⁵ He came originally from the PSD, in fact he had the only party's legislative seat in Mexico City. When the party lost its register he joined the PRD.

²⁵⁶ The previous article 291 Bis recognized only the *concubina* (as female) and the *concubinario* (as male), defining the female figure as the passive beneficiary of the relation.

adopted as a son²⁵⁷, and when at least one of them satisfies the age requirement established in the previous article, as long as the age gap between the adopted and the adopters is of at least sixteen years.”

The article, as predicted, became the most contested in the Assembly. That was, after all, the novelty of the reform: adoption for same sex couples, a claim of rights that was not explicitly written in the law but differed to the Court to take the last word over it.

The first *dictamen*²⁵⁸ for the bill presented to the ALDF which adapted Razú’s original proposal, attempted to amend the article by adding:

“The adoption will not proceed whenever the spouses or concubines are from the same sex”

The amendment was not approved, and the article passed in the *dictámen* with no modifications. Consequently, the reform meant that reading article 146 after the new definition of marriage, *together with* article 391 on adoption, not only granted the right to marry, but the right to form a family to same sex couples.

The *acción de inconstitucionalidad*, according to the statutory regulation, targets only legal reforms. The fact that article 391 was not reformed could imply that it was deliberately left for discussion by the Court. The Court, however, would require special justification to facilitate a discussion outside of statutory precepts. Given that leaving the article untouched would enable adoptions without proper discussion, the Court did consider the article, inferring that its mere inclusion in the Gazette implied that the article was part of the legislative act, and furthermore, that it was logically chained with article 146. Article 391, the Court recognized, was not subject to invalidation “on its own vices”, but only inasmuch as it was intrinsically related to the recipients of the reform: the spouses²⁵⁹. Despite its typically formalist responses, the reason why the Court agreed to debate the article as part of the *litis* still seems ambiguous. We can however, speculate

²⁵⁷ The article uses only the male noun *hijo* in the text.

²⁵⁸ In the Mexican Assembly, the *dictamen* is the resolution of the commission or committee in charge of formally presenting a law initiative to the Parliament (or Congress) to be considered, it is a bill or a draft law. The importance of the *dictamen* is that it contains the exposition of the reasons, and each one of those is subject to vote. In some other legal cultures the *dictamen* refers to resolutions or rulings, so it ought not to be misunderstood.

²⁵⁹ *Acción de inconstitucionalidad* 2/2010, p. 35.

about the reason behind the Assembly's decision to publish it: to pass the resolution of the debate to the Court, a debate that the ALDF was not prepared to resolve, at least not successfully.

III.1. The Acción de Inconstitucionalidad 2/2010

On December 29th 2009, within 30 days of the reform being published, as regulated by statute, the new Attorney General, Arturo Chávez Chávez (henceforth *PGR*²⁶⁰) presented the corresponding *Acción de inconstitucionalidad 2/2010* to revert the decision of the Legislative Assembly of Mexico City and the Head of Government of the Federal District. This time the National Commission of Human Rights (CNDH) did not intervene. José Luis Soberanes Fernández (who presented the *acción* in the abortion case) had left the presidency in November 2009. The new president, Raúl Plascencia Villanueva declared: “We think the exercise of rights and liberties should be guaranteed with no distinction (...) In virtue of which I have considered not to present the corresponding *acción*”²⁶¹.

It is clear that the promoters of the legal reform anticipated the judicial intervention and defined a strategy that already had plans for the Supreme Court. After the experience of the abortion debate, the political tension between the PRD and president Calderón, as well as Calderón's close relationship with the PGR, the *acción* was a natural extension of the reform (unlike in Coahuila it would not attract enough national attention for political confrontation). For activists, the intervention was regarded with optimism. In an interview, the academic Alberto mentioned:

“All the different narrative of human rights, and the critiques against marriage that have been debated in many different venues and by different actors, eventually produced only rhetoric. But once the Supreme Court adopted the

²⁶⁰ The acronym in Spanish works for the *Procurador General de la República* (the Attorney), and the *Procuraduría General de la República* (the institution he presides). The acronym here is presented to refer to him, but with no conscious intention to suggest a critical distance of representation between one and the other).

²⁶¹ Quoted in *Reforma* in an interview in January 28th 2010 (available in <http://www.gaymexico.com.mx/news12/notahemeroteca11236.html> Last accessed Oct 20th 2012).

debate it was taken beyond, to a more serious and political level. [The Court] brings juridical implications to rights. If we look at what had happened in other Courts, we see that rights can even become precedents”²⁶².

Arturo Chávez Chávez arrived at the PGR’s office as a controversial figure in Mexican politics. Firstly, in September 2009 he unexpectedly replaced the previous PGR, and there was plenty of speculation about president Calderón’s control over his adjudication. Besides this, his appointment raised heated opposition from feminist and human rights groups: he had previously been District Attorney in the state of Chihuahua when the state had the highest indices of femicide, particularly in the state’s capital, Ciudad Juárez. Chávez Chávez’s office was accused of avoiding the prosecution and investigation of disappearances and murder of young women, despite more than 200 recommendations having been made to the Mexican State by international and national institutions, and civil society²⁶³. The PGR office, let us remember, is the only institution authorised to present *acciones*, with the CNDH. The adjudication of the PGR and its political profile cannot be underestimated particularly in terms of the way judicialization expands its authority.

*III. 2. The content of the acción (Be careful with what you allow, because tomorrow ... you’ll regret it*²⁶⁴)

This warning was raised by Minister Ortiz Mayagoitia, who was openly in favour of the *acción* and against the legal reform, during one of the sessions of the full Court, and it illustrates the general tone of the debate. The Minister added:

“Let’s suppose, Ministers, that one of the states of the Republic understands

²⁶² Interview in Mexico City, summer 2010.

²⁶³ For the recommendations to the state addressing the PGR’s performance in the case vid. http://www.cmdpdh.org/docs/recomendaciones_femicidio_juarez.pdf; A feminist critique of Chávez Chávez profile in <http://www.cimacnoticias.com.mx/node/44166>; and the press release against his adjudication made by the *Observatorio Ciudadano Nacional del Femicidio* and the *Red Nacional de Organismos Civiles* “*Todos los derechos para todas y todos*”, supported by other organisations and collectives http://www.amdh.org.mx/mujeres3/boletines_informativos/2009/septiembre/09.pdf

All the sites were last accessed Sept 25th 2012.

²⁶⁴ “*Cuidado con lo que permiten que mañana ... se arrepentirán*” (Minister Guillermo I. Ortiz Mayagoitia on the session of the full court on August 16, 2010, the same day when the final decision was published).

marriage as the partnership of two people, same or opposite sex, with the objective of sharing a life in common, to cohabit, and to become mutual help, with dignity and respect ... [But] our discussion cannot be determined by such a superficial smoothness ... The Legislative Assembly of Mexico City could do it, and it is the impact and magnitude of what it did what we would be looking at”²⁶⁵

The main tone of the discussion was the avoidance of a substantive confrontation about the interpretation of human rights. The Court had to take a position about the ALDF but did so in a very specific way. The *acción* repeated and confirmed only the *libre configuración* legislative, the statutory interpretation, noting again that it is legitimate for the legislator to legislate about rights, without recognising claims for rights as legitimate claims worthy of constitutional protection. Notably, the Court said nothing about how the legislative act of the Assembly could impact on an expansive programme of human rights within the reasonable limits in the democratic order; neither did it address the development of human rights language.

The format of the *acción* was different to that analysed in the previous chapter. This time, the Court worked with only one project of resolution (*proyecto de resolución*), drafted by Minister Valls, instead of the chaotic *engrose* that was published in the abortion case. The final document was also considerably shorter, better organised, and more accessible to the general public²⁶⁶. The *proyecto* presented a preliminary study, introducing the general political (and theoretical) grounds in which the *acción* and the legal reform were sustained. The study unfolds (in the first seven pages) as a dogmatic unfolding of the “contemporary understanding of family”. The study echoed the constitutional reform of 1974²⁶⁷, registering in the first paragraph of its 4th article, its support for the “ideal model of family for the ends of the Mexican state” as being one composed of father, mother, and children. For those families whose main objective is not reproduction, there were already juridical figures like concubinage or civil partnerships²⁶⁸.

²⁶⁵ Quoted in @manualdelacorte, my translation.

²⁶⁶ The document is 176 pages long, as opposed as the 1,313 pages of the *engrose* on the abortion case.

²⁶⁷ As referenced in the previous chapter: “All people, men and women, are equal under the law. And law will protect the organization and development of the family ... All individuals have the right to choose freely, responsibly, and informed the number and spacing of their children”.

²⁶⁸ *Acción de inconstitucionalidad* 2/2010: 4.

If the *conceptos de invalidez* of the *acción* against the abortion reform were in principle dependent on the absolute content of the “right to life from the moment of conception”, for this *acción* the central issue was the interpretation of the concept of family, technically an easier argument to confront in the Court because of the lack of references to sustain it. I sum up here in three points the arguments that sustained the *conceptos de invalidez* presented by the PGR for the protection of the family as an absolute value:

- There are no good justifications to legalize same sex marriage. There is already an ideal family in the constitution, the heterosexual family, and so this cannot constitute a *rights* discussion.
- The legislative reform alters the *Normative System*. It disrupts the hierarchical capacities of the Civil Code of the Federal District; therefore its direct consequences on the Mexican juridical and legal system should be repaired.
- The same sex marriage reform alters the *federal pact*; it imposes the reform of Mexico City over other jurisdictions, it grants a disproportionate and undemocratic authority to the ALDF.

III. 3. The ideal constitutional family (or actually, the motivation principle)

The PGR claimed that there is no “objective reasonability” behind the claim for same sex marriage, therefore the reform did not satisfy the request of legality. The availability of concubinage and civil partnership to same sex couples invalidated the claim of human rights violation as a legitimate motivation of the legislative²⁶⁹. Chávez Chávez justified this argument by drawing on article 16 of the Constitution:

“No one shall be disturbed in his or her person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the *motivation and justification* for the action taken.”²⁷⁰ (My translation, my italics)

There were (at least) two problematic elements in this claim. Firstly: the notion of sexual

²⁶⁹ AI 2/2010: 4.

²⁷⁰ “*Nadie puede ser molestado en su persona, familia, domicilio, papeles o posesiones, sino en virtud de mandamiento escrito de la autoridad competente, que funde y motive la causa legal del procedimiento*”.

orientation (and not marriage) as being a legitimate claim in human rights language. Secondly: the concern about the concept of family and the constitutional commitments towards it. A further problem was the interdependency of these elements: if one accepted the validity of the first as a premise, then the consideration of the second would logically follow.

First claim: sexual orientation (or “preference”), does not generate rights according to the PGR. The Universal Declaration of Human Rights does not even recognize sexual orientation as a cause of discrimination, whilst it recognizes the figure of the family founded in article 16²⁷¹. In the resolution of the OAS of July 4th 2009, and in the UN declaration of December 19th 2008 to eradicate discrimination against gay people, marriage was not contemplated as a fundamental right²⁷². What is the purpose of extending a right that is not contemplated in the treaties that are targeting the eradication of discrimination? With this question, the PGR actually highlighted the most intense internal tension of the LG rights discourse discussed in the first part of the chapter: the PGR was dismissing the assumption that same sex marriage campaigns have made in anti-discrimination platforms, arguing that there is no coherent development between the two. However, while the intention of the feminist and queer critiques enunciating similar arguments is to engage more deeply with radical commitments of rights claims and to confront the frame of the right to marry, Chávez Chávez was trying to discredit the concept of LG rights as a whole.

The original *proyecto de resolución*, submitted by Minister Valls to the full Court, dealt with the challenge in two ways: Firstly by asking whether LG citizens should be treated as equals, or if there are objective and relevant differences that justify unequal treatment. With that question the project touched on principles of equality, human dignity and free development of personality, and ended on a discussion about the assumed right to personal and sexual identity, and the right to contract marriage, inferred from the Mexican juridical order (the Minister clarified that these rights and principles *might have*

²⁷¹ AI 2/2012: 18.

²⁷² AI 2/2010: 20.

explicit protection under the Constitution or in international treaties²⁷³). Secondly: Chávez Chávez's warning about the recognition of family as a right in itself, if extended to LG citizens. Minister Mayagoitia addressed the challenge:

“[if the family is a right, then] we are saying that the other thirty one States that do not recognize these marriages are violating the constitution (...) the fact that family is not constituted by heterosexual marriage does not mean that we need to recognize same sex marriage (...) [legislators] do not have to cover both discrimination and equality”.

This debate originally promised a very rich discussion in the Court about equality, but this discussion was not taken further.

Let us remember again the Mexican political context in which the language of equality was being raised. In 2010 there was a strong political investment in a new “culture” of non-discrimination. From 2003, with the Federal Law to Prevent and Eradicate Discrimination and the institutionalisation of its national council CONAPRED, the culture of rights in Mexico was inclined to address the paradigms that justified inclusion and positive discrimination. Positive interventions were made to protect LGT citizens from violence, and largely justified as a means of making the country look transnational and ‘modern’.

But in the combination between protection and modernity, the political redress of the paradigms of victimhood was justified by perceptions of cultural backwardness, and not a reestablishment of justice systems. Same sex marriage presented the opportunity to educate the public about human rights more effectively; it played a “pedagogical” role in democracy even if it failed (again) to alleviate the actual experiences of discrimination and violence against LGT people. As a consequence, the legal system never assimilated the difference between violence suffered and the new anti-discrimination culture that is supposed to precede marriage reform. In this regard, in the language of the Constitution, there is no coherent transition from the claims of discrimination to the claims of marriage.

²⁷³ That is the opposite claim of the Yogyakarta principles and its principles of interpretation where LGT rights only confirm the coherence of human rights formulations in law. The Court, however, discredited the reference from the ALDF's *dictamen* claiming that these does not satisfy the principle of objective rationality, being an international document, but of private character (AI 2/2010: 21).

In the second claim, the attack towards the family, there is an assumption about the impact of the new article 146 in the Civil Code being a threat for someone who is not the LG subject of rights targeted by the ALDF's reform. But subjects of rights get confused with juridical goods, particularly in terms of which one should be protected by the Court. In this last argument the challenge was resolved, and indeed it was the easiest challenge to resolve. As I have said, the PGR's reference to the ideal family was drawn from the constitutional reform of article 4 from 1974, whose *Dictamen* effectively declared an ideal model. But the actual *dictamen* read:

“The historical evolution of the basic elements that compose a family shows a declining process. The traditional family, composed of a vast kinship, is now been dejected by high rates of mortality, and has been gradually transformed by technological and scientific developments (...) This is how the nuclear family emerges in modern communities (...) In developing countries like Mexico, extended families still exist; the most beneficial familial entity is composed by the father, the mother, and a few children. That is the ideal model for our future society” (Quoted in Vela Barba 2011: 149).

The Constitutional reform of 1974 did not provide a fixed content for the concept of family; there was no evidence of a Constitutional concept or a prototype of family as the PGR claimed. The reform actually responded to a historical need to address discrimination against women²⁷⁴ at least as it was conceived in 1974²⁷⁵, which can actually help to define family only as a changing *social reality*. The possible interpretations of the 1974's constitutive assembly cannot be read by the same interpretation presented by the PGR²⁷⁶. Family, therefore, is not a right, but an institution, a social institution that does not generate guarantees, that does not refer to fundamental

²⁷⁴ AI 2/2010: 137.

²⁷⁵ The discussion of December 1974 about the family was the target of a project to reshape the Mexican population. Reproductive politics were being introduced with contraception facilities as a crucial public policy, but not in the context of what we now understand as sexual rights. In January 1974, the gazette published the General Law on Population “with the objective of achieving fair and equal participation in society from economic development” (Ley General de Población, art 1). Ironically, the ideal family molded after the development projects of the state, aimed to challenge the cultural preconceptions of kinship.

²⁷⁶ The sentence also recalls the treatment of article 4 in the *acción* against abortion: “146/2007 y su *acumulada* established that the right to be a father or mother is not conceptually referable to a right of collective exercise exclusively” AI 2/2010: 138).

rights, and does not generate rights discourses.

III. 4. *The normative systems of the legislative acts*

The reform violated article 133 in the Constitution²⁷⁷ that establishes a “normative hierarchy” headed by the Constitution. With the reform, the Civil Code of the Federal District is establishing for itself hierarchical superiority, regulating on behalf of LG citizens but at the same time endangering the superior interests of a child (protected in article 1 and 4, paragraphs 5 and 6) since the reform imposed new regulation of adoption²⁷⁸. This transgression against the normative hierarchy was perceived to be the consequence of article 391 in the Civil Code (on adoption), that was published to be read *together with* the articles which had been subject to the reform extending the legal effects to adoption. The *acción* originally claimed that the ALDF did not consider the impact of the reform, as a legislative act, in the *normative system*.

The normative system here refers to explicit hierarchical relations between legislative acts: because each act is part of a process that constructs (by inclusion or exclusion) an integral normative system “in which each part finds a logical union that is indissoluble from the set”²⁷⁹ all reforms have direct consequences over other legal instances. In short, the dilemma of the normative system was that the reform affected legal figures *that were not intended to change* but effectively were transformed by this process. Minister Valls’ original working proposal called on the Court to focus the discussion around the interpretation of the intention of legislators at the moment of voting in the Assembly, and not on the effects of the reform or a possible alteration of the normative system:

²⁷⁷ “This Constitution, the laws of the Congress of the Union that emanate from there, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States” (OAS translation, available in http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf Last accessed Oct 18th 2012.

²⁷⁸ “The protection to the rights of boys and girls is sustained in the Supreme Law of the Union, mentioned in article 133 of the federal Constitution, therefore, beyond the protection already guaranteed in the Constitution, international treaties should be enforced...” (AI 2/2010: 39).

²⁷⁹ AI 2/2010: 52.

particularly as it was clear that they did *not* want to modify article 391, and its publication in the gazette was as a mere mistake²⁸⁰. But the discussion highlighted the fact that article 391 was materially modified simply because it allowed access to adoption for the new “universe of subjects” that the reform was aimed at.

III. 5. The federal pact (Yes we do, No you don't)

The PGR accused the ALDF and Head of the Government of Mexico City of violating articles 14 and 16 of the Constitution, “generating a real disruption in the juridical institutions and principles of the constitutional system, endangering the principles of legality and juridical security [*seguridad jurídica y legalidad*] and “in a disproportionate measure affecting the governed, including same sex consorts” (AI 2/2010: 159). The reform, however, did raise important practical questions for those same sex couples who were contracting marriage: how to consider their marriage in the country as a whole? Were they married only in Mexico City?²⁸¹.

The last part of the claim was easily resolved. Since the first *proyecto de resolución*, the Court declared that far from leading the governed to normative chaos and uncertainty, the reform had the opposite effect: “the constitutional guarantees of juridical legality and security are to be respected by legislative authorities when the dispositions (...) create certitudes to the governed about the juridical consequences they generate” (AI 2/2012: 167). The core problem to resolve was the certitude about the responsibilities of legal authorities, and guaranteeing their ability to exercise their responsibilities free from arbitrary interpretation.

The *acción* claim was hardly addressing the interests of LG married persons, but rather those of the legislative, and concerns about the autonomy of the states:

“The states that integrate the Republic are free and sovereign to determine the

²⁸⁰ AI 2/2010: 62.

²⁸¹ The reform in Coahuila already set a precedent of national recognition of the civil status for same sex partnerships, but there were no references in this process, and that reform did not raise judicial attention.

affairs of their internal regimes, as long as the federal pact is not endangered, they ought to stay together jointly in a federation, according to the principles of Fundamental Law” (AI 2/2010: 160)”

The Constitution establishes in article 121(IV), that “the acts of civil status adjusted in the laws of one state will be valid in the other states”. This claim was much more difficult to resolve than the previous two because of its normative implications. Since marriage is a contract that modifies civil status, the legal reform did have implications and generated responsibilities for other states because the legal reform of the Federal District requires the states to recognize the full effects for new marriages, even if they do not to recognize, or explicitly forbid, the civil statute in their own legislation²⁸².

It is important to remember here the position of the federal order. Since the Federal District it is not a state, it is not ruled by its own constitution; instead, it depends directly on the federal Constitution to determine its regulatory principles, and it has limited faculties to regulate civil law, compared to the other 31 states of the federation who have their own constitution. The prospect of it imposing its rules on other states (that are indeed autonomous and sovereign) challenges the federal order. The PGR’s accusation was that the ALDF violated *the whole of the Constitution* because the reform exceeded the hierarchical structure of the federal Constitution. Since the autonomy of the states and their constitutions played a fundamental role in the project of democratisation (and new federalism) at this time, the reform in the city was perceived as purely political.

As article 121 indicates, the States of the Republic are obliged to fulfil certain *material* requirements, both procedural and substantive, towards married couples. This implies that all actions concerning civil status, such as those related to birth, recognition of children, adoption, marriage, administrative divorce and death, are celebrated according to the formalities contained in a local law, and will be valid in the federative entities as

²⁸² The southern state of Yucatán published on its gazette the reform of July 2009 (5 months before the legal reform in the capital city) of its article 94 to determine that “family is a permanent social institution recognized as the basic fundament of society on which the state evolves(...) Marriage is and institution that establishes the juridical union between a man and a woman (...) with the possibility to generate human reproduction (...) Concubinage is the union of a man and a woman, who are free from marriage, and live like spouses and can generate a family...”. The reform was published in the state’s gazette (*Diario Oficial del Gobierno del Estado de Yucatán*, July 24th 2009).

contemplated by their Codes. The “*normative conflict*” emerged with the contradiction between the reform and the Federal Civil Code’s V title, which indicates that marriage can only be celebrated between a man and a woman (AI 2/2010: 51). . Both ministers Franco and Sánchez Cordero argued in favour of limiting the consequences of the reform and actually clarified that their votes were conditional on an explicit reference to there being no obligation on the rest of the states to legislate: they called the Court for *prudence* to prevent (recalling the original warning of Minister Ortiz Mayagoitia) giving statements “*que pudieran estar de más*”²⁸³.

Minister Valls argued against the predicted threat of the reform. His *proyecto de resolución* resolved that neither the possible material conflicts nor the normative were subjects of constitutional debate: “... the *acción de inconstitucionalidad* is not a means for settling aspects that concern ‘possible’ conflicts between instances of competence in the states” (AI 2/2010: 163). Later, Minister Cossío stated:

“If the conflict of legislation in the states becomes a problem that fits in the Court’s competence, it corresponds to *amparo* writs that grant guarantee the protection of guarantees of citizens on the basis of discrimination, inequality, or whichever specific norm is considered to be violated.”

III. 6. *The decision (Yes you do, no we don’t)*

The Court failed to uphold the *acción de inconstitucionalidad*²⁸⁴. Same sex marriages were declared constitutional by eight votes against three, but with dissenting votes among the eight. With no unanimity, the decision had to be broken into isolated theses. Each one had to be voted individually, and each could generate jurisprudence with independence from the others. The *acción* generated thirteen theses; from them, only three managed to garner the minimum of eight votes, making them eligible to become jurisprudence. These theses accepted that same sex marriage authorised same sex couples in Mexico City to apply for adoptions, but only indirectly; their interest was diverted then to the protection

²⁸³ *Estar de más* is a common expression that refers to things that represent excesses, it can mean also to be out of place, be redundant or superfluous.

²⁸⁴ The sentence was published on August 16th 2010.

of the superior interest of the child. In their content, these theses did not contribute anything of novelty to previous regulations for adoption, apart from giving married same sex couples the right to apply together for adoptions (it was legally possible for single people to do so before); however, there was an explicit clarification that emphasised that this decision should not be interpreted as a dictate of the Court in favour of adoption for same sex couples. In practical terms, the decision determined a precedent, but about the unwillingness of the Court to become a source for new legal regulation in the subject.

With a majority of nine votes each²⁸⁵, the following theses were the only ones that could open paths for jurisprudence:

- The juridical possibility of married same sex couples adopting should *not* be considered as an automatic and indiscriminate authorization; it will always depend on the superior interest of the child, protected by the relevant legal system of adoptions²⁸⁶.
- Once the superior interest of the child is guaranteed, when an adoption is requested by same sex marriages, the sexual orientation of a couple should not affect the adoption request, since this would represent discrimination as formulated in article 1 Const²⁸⁷.
- A same sex marriage sanctioned in Mexico City is valid in all other states: authorities of other states should recognise the rights of married couples from Mexico City; in compliance with the protection of juridical certainty offered by the federal order to the governed. This thesis, however, clarified that the fact that one entity regulates civil institutions in a specific way *does not* suggest that the rest should do so in a similar fashion, nor that they are limited or restricted to do so²⁸⁸.

The main contents of the isolated theses, those that did not generate jurisprudence (each

²⁸⁵ For the three cases, the dissident votes came from ministers Sergio Salvador Aguirre Anguiano and Guillermo I. Ortiz Mayagoitia.

²⁸⁶ Tesis: P./J. 14/2011, related to art 391 of the Civil Code of Mexico City.

²⁸⁷ Tesis: P./J. 13/2011. The superior interest of the child is consecrated in art 4 Const.

²⁸⁸ Tesis: P./J. 12/2011, in relation to art 146 of the Civil Code of Mexico City.

with six votes in favour and three against²⁸⁹) can be summarized as follows:

- Marriage and family are not immutable concepts, nor are the legislative outcomes of the term “spouse”. Those definitions are the responsibility of the ordinary legislator, authorised to update the concepts according to the social reality and the diversity of human relations that she or he perceives. Reproduction is understood as a *potentiality* of marriage, and not the essential goal of the family. Therefore, constitutional protection should stand for the specific interpretation that the ordinary legislative is giving to it, when this is enacted in agreement with the principles of juridical legality and security²⁹⁰.
- There are no constitutional limits for the legislator to extend the concept of family; he or she has the faculty to legislate on the subject of marriage, apart from all other forms of civil partnership²⁹¹.
- Nevertheless, the access of same sex couples to the civil contract of marriage *does not constitute* an affirmative action intended to eliminate forms of historical discrimination (as the ALDF suggested in its *dictamen* in the use of article 1)²⁹².
- The reform did not contradict the content of the Constitution. It was instead a “constitutionally reasonable” measure justified because the sexual orientation of a person is recognised as a relevant element of his or her life project, and the right to the free development of personality is extended to the decision of whether one wants to marry or not. Out of respect for human dignity, the State should recognize not only the sexual orientation of people, but also their relationships, and different formats thereof²⁹³.

With special attention paid to the first set of jurisprudential theses, the substantive outcome was the clarification that the reform did not challenge the federal pact: it did not violate the authority of the legislative in the states, nor did it commit to human rights. The

²⁸⁹ For the ten cases, the dissident votes came from ministers José Ramón Cossío Díaz, Margarita Beatriz Luna Ramos and José de Jesús Gudiño Pelayo; ministers Sergio Salvador Aguirre Anguiano y and the Courts' President Guillermo I. Ortiz Mayagoitia did not participate in the voting.

²⁹⁰ Tesis: P. XXVI/2011; Tesis: P. XXI/2011; Tesis: P. XXII/2011; Tesis: P. XXV/2011; Tesis: P. XXIII/2011; Tesis: P. XXIX/2011.

²⁹¹ Tesis: P. XXVII/2011.

²⁹² Tesis: P. XX/2011; Tesis: P. XXIV/2011.

²⁹³ Tesis: P. XXVIII/2011.

legal reform in Mexico City did not generate responsibilities for the different states, or guidance for interpretation or further litigation. The arguments that reiterated the protection of the superior interest of the child, the strongest thesis in the decision, was not part of the *litis*, and it is debatable whether it was part of the process of the reform as part of the legal event. The jurisprudential theses were directed to something different than the happy judicialization imagined in its lists of first ventures.

In her evaluation of the decision, Gabriela P. commented in an interview:

“There are two important elements on this sentence: the 121 is certainly the article that defined the *ratio decidendi*: the *libre configuración legislativa*. Every state has its own capacity to define the civil status of its people. But the novelty of the case was the way the Court disarticulated the PGR’s argument. He said that 121 was determined by the 4, that it was about protecting the family (...) but the Court said NO. The Constitution does not define marriage and does not define the family, and if we read the 4 together with article 1, we can cover all types of family”²⁹⁴

In that sense, the potential transformation of the sentence, if the Court recognizes the burden of the judgment, *was going to be* the de-codification of the ideal family, and that is what inspired the celebration and fuelled further litigation.

“Now let’s take the Court’s decision to the states! There are at the moment 3 *amparo* cases in the Court coming from Oaxaca. On the 121 the PGR was right, the Court recognized it, the Constitution is setting up its own limitations; but 4 and 1 are recognizing diverse families, non-discrimination. (...) What the Court is saying is if that the family ought to be protected by the State, and the families of homosexual people are not protected... Legislator: you have to legislate SOMETHING, maybe not marriage, and that is the fail of the sentence, but you have to legislate!”

In the publication of the decision it reads:

“[I]n a democratic State abide of the rule of law, where the respect towards plurality is part of its essence, what we have to protect is the family as a social reality, and therefore its protection should include all its different forms and manifestations as they exist in reality, covering those constituted by marriage, civil

²⁹⁴ Interviewed in Mexico City. Summer 2012.

partnerships, by a mother or a father and children (mono-parental families), or any other that suggests a similar link” (AI 2/2010: 137, 138).

IV. THE DECISION IN THE STATES.

The publicity of the *acción de inconstitucionalidad 2/2012* progressed in three different channels: politicians in the state of Quintana Roo and Colima who forced same sex marriage registers in their municipalities filling legal gaps in their civil regulation²⁹⁵. Both events attracted much attention from same sex couples who came to these municipalities to apply for marriage licenses. But they also put pressure on the legislative bodies to cover those gaps and control the possibilities of marriage. The governor of Colima stood against the act, and the Legislative Assembly of the state rushed a much more modest law on civil partnerships aiming to discourage the national marriage (and adoption) debate. The second channel became legal reform, but in the same line as Colima’s, in the opposite direction to the Mexico City law. LGT activists and allies in political parties (mainly the PRD) rejected the laws. Legislative Assemblies began to anticipate the agenda of the LGT movement and blocked same sex marriage progress with conservative figures of civil partnership. In these circumstances, the most promising channel was once again, the judiciary. Couples began applying for *amparos* in individual cases, publicising positive resolutions as if they represented a step forward in Mexican law, and at the same time, the political alliance of the judiciary to LGT rights. These events triggered an ongoing campaign, organising *amparos* in a sequence aiming for

²⁹⁵ The Major of the small municipality of Cuauhtémoc in the state of Colima demanded personally to the Civil Registry Office to accept the register of the marriage of a same sex couple even when there was no legal figure to do so. The state governor later on did not recognize the marriage certificate, and groups in the civil society initiated a campaign that resulted in the legal reform that regulate the figure of “marital bond” for same sex couples. See <http://www.animalpolitico.com/2013/03/presentan-mas-solicitudes-tras-primer-matrimonio-gay-en-colima/#axzz2OYaJ5Hot> Last accessed Feb 17th 2015. The representative of the Civil Registry in Kantunilkin, in the southern state of Quintana Roo, registred two couples profiting from a legal loophole that did not restricted gender in the celebration of marriages. The marriages were later annulated by the state’s head of Civil Registry responding to a citizen’s request. The Office of Juridical Affairs of the State of Quintana Roo later intervened and invalidated the annulation of the 2 marriages, arguing a procedural failure on the annulation. The decision indirectly opened the possibility in the 10 municipalities of the state to profit from the same legal loophole, since no legal reform has amended it yet. See <http://www.jornada.unam.mx/2012/05/04/estados/034n2est> and <http://www.proceso.com.mx/?p=304595> Last accessed Feb 17th 2015.

jurisprudence that could finally push the Court to take a clear position on the issue.

IV. 1. Marriages in the legislative

In November 2011, the head of government in the municipality of Lázaro Cárdenas (Quintana Roo), Trinidad García Argüelles, finding no impediment in the Civil Code, authorized two same sex marriages. From article 682 to 695 the Code establishes the legal requirements to contract marriage, but lacks any indication that this should be established between a man and a woman. The event was a surprise because García Argüelles is affiliated with the conservative PAN; the debate was received in discussions that had only indirect political effects. Quintana Roo is a well-known touristic destination (next to the municipality of Lázaro Cárdenas is the famous beach Cancún) and the promotion of same sex marriage was welcomed in the media as aiding the reputation of the area as a gay friendly touristic destination²⁹⁶. The discussion of gay friendly cities and their relation to political progress has been assimilated in the work of Salinas Hernández (2010) who connected such political agendas with neoliberal market strategies. While gay friendly cities facilitate the visibility and possible images of LGT socialization, they still depend upon consumption patterns, urban circuits; the chances of expanding their potential in politics are limited (for a general critique on gay-friendly codes see Jackson; Binnie and Skeggs 2004). In any case, two months later the marriages were suspended and put into consideration. Later they were annulled by the state's governor, but the Secretary of State in Quintana Roo then reversed the annulments, publically promoting further marriages in the process. The timeframe for a judicial intervention expired in July 2012, and the marriages were recognized as being legitimate.

In a second event, in March 2013 the head of a town in a small municipality of

²⁹⁶ The discussion reached the point where the Minister of Tourism had intervened (with the support of LGT groups) with international campaigns promoting gay friendly destinations across the country. <http://mexico.cnn.com/nacional/2011/12/02/los-matrimonios-del-mismo-sexo-despiertan-polemica-en-quintana-roo>; <http://eleconomista.com.mx/estados/2012/07/18/bodas-gay-generan-interes-sector-turismo-quintana-roo>; <http://mexico.cnn.com/nacional/2013/10/17/el-gobierno-mexicano-promueve-el-turismo-rosa-en-redes-los-jueves> (Last accessed July 5th 2014).

Cuahtémoc in the state of Colima celebrated a same sex marriage in the civil registry. Indira Vizcaíno Silva promoted the event without having to use judicial intervention, appropriating the exercise as a statutory interpretation of the legislative: while the state constitution specifies that marriages are composed of a man and a woman, the local civil code does not include this distinction. Therefore, as Vizcaíno Silva made clear, the action was in line with the law, and above all, strengthened the decision of the Supreme Court of Justice (on the *Acción 2/2010*). Even although, the Court suggested the opposite, the case of Colima reveals itself to be more of a political confrontation. The municipality is the only one in the state governed by the PRD, and Vizcaíno Silva is both the daughter of one of the strongest leaders of the party in the state, and the first woman in office. The juxtaposition of political tradition and the symbolic power of the novelty of a woman in office have to be considered here. The couple who requested the license (only five weeks previously) were immediately given her support. The event quickly garnered national publicity as Vizcaíno Silva announced that licenses would also be considered from applications made from different municipalities of the state²⁹⁷. The governor of the state had neither refused to recognize, nor officially reject the contract, thus the first couple were unable able to initiate their own path of litigation via *amparo* to extend the benefits of the marriage contract in healthcare and other worker benefits²⁹⁸.

In the summer of 2012 the state Congress of Colima approved a legal reform on civil partnership, or “*enlace conyugal*”. Only two deputies (of thirty five) of the PRD voted against the reform, accusing it of being discriminatory, because it would cancel the marriages of more than fifteen couples who had already been married in Cuahtémoc, and would also slow the process for the extension of rights for same sex couples²⁹⁹.

That same year in local elections in Jalisco, a new governor from the PRI broke the cycle of a (particularly) conservative authority of the PAN. Jalisco is traditionally a

²⁹⁷ <http://www.animalpolitico.com/2013/03/presentan-mas-solicitudes-tras-primer-matrimonio-gay-en-colima/#axzz2OYaj5Hot> March 26th 2013.

²⁹⁸ <http://www.animalpolitico.com/2013/03/primer-matrimonio-gay-de-colima-enfrenta-desconocimiento-del-gobierno-local/#axzz2Oq5B6chJ> March 26th 2013.

²⁹⁹ <http://homozappping.com.mx/2013/07/aprueba-colima-enlace-conyugal-entre-parejas-del-mismo-sexo/> 31 Julio 2013.

conservative state, but its capital, Guadalajara, is the second largest city in the country and has traditionally had a solid LGT movement. The tourist city of Puerto Vallarta in Jalisco has long been considered a gay friendly destination, a quality that is now used to promote the city to tourists. The new Governor had promised “liberal, tolerant and inclusive” politics in his electoral campaign and supported the PRD project, the *Ley de Libre Convivencia* approved in November, but with drastic amendments made one day before the vote. The final version of the law included the explicit banning of adoption for same sex couples, and giving authority to a notary public (who is actually authorized to deal with non-contentious matters) to register same sex relationships; thus their civil status³⁰⁰ was not recognised. A month later in December, the Congress in Campeche unanimously passed the *Ley Regulatoria de Sociedades Civiles de Convivencia*³⁰¹, promoted by the PRD, but amended by the faction of the PAN in the senate to ensure that only the notary public could register civil partnerships³⁰².

IV.2. Judicializing marriage

After the reform in Mexico City, the states of Baja, California and Jalisco promoted *controversias constitucionales* in the Supreme Court against the reforms of article 146 and 391 of the Civil Code of Mexico. The *controversias*, introduced in chapter 2, were regulated at the same time as the *acciones* in the constitutional reform of 1994 to enable municipalities and states to moderate the general norms and concrete acts of each other, a tool that became predominantly a source of political confrontation between the states in the structure of the new federalism³⁰³. But in January 2012 the Court dismissed the *controversias constitucionales*, declining the legitimate interest of the states to appeal the reform: while the decision forced the states to recognize the contracts established in

³⁰⁰ Published by State's Gazette 27 bis-1nov2013. See <http://www.animalpolitico.com/2013/10/avanza-que-union-gay-en-jalisco-sean-contrato-notariado-no-estado-civil/> Last accessed 11 January 2013.

³⁰¹ Published in the State's Gazette 121-20 dic 2013.

³⁰² <http://www.jornada.unam.mx/ultimas/2013/12/20/aprueba-campeche-la-ley-de-sociedades-civiles-de-convivencia-5127.html> Last accessed February 1st 2014.

³⁰³ In the thesis I have mentioned the use of *controversias* only once in chapter 2, with 399 municipalities confronting (unsuccessfully) the “indigenous constitutional reform” <http://ceacatl.laneta.apc.org/Controv0.htm> Last accessed May 3rd 2014.

Mexico City, it did not generate obligations to legislate on same sex unions³⁰⁴.

The political forces against same sex marriage were now discouraged from pursuing further judicial interventions; the next tendency was therefore to appeal the Court to support traditional marriages. Historically this coincides with the general discouragement to use all tools of constitutional control and political mediation of the Court in human rights agendas, and the publicity given to amparos. That LGT activists took the opportunity to do so, focused the judiciary to resolve the material consequences of the registry for married couples, and initiate new processes, one by one.

In 2012 the group *Frente Oaxaqueño por el Respeto y Reconocimiento de la Diversidad Sexual*³⁰⁵ assisted by the lawyer Alex Ali Méndez Díaz, presented three different amparos to the Supreme Court requesting protection for three couples (whose request to marriage license was rejected by the public registry) against the discriminatory implementation of article 143 of the Civil Code in the state of Oaxaca, that marriage “is a civil contract celebrated by a man and a woman, united to perpetuate the specie and providing mutual help and assistance”. In December the Court found in favour of the three *amparos* granting the three couples the possibility to marry despite the opposition of the local Congress and the public rejection of the State Governor. The three amparos were published in one decision, with an isolated thesis that referred to discriminatory nature of the article³⁰⁶. The first marriage was celebrated in the state of Oaxaca in March 2013³⁰⁷.

The litigation for the *amparos* was defined in collaboration with a legislative campaign to promote in the local legislative a legal reform on the Civil code. But for the government, formed of an alliance between the PAN and leftists parties, an open dialogue was going to bring political instability, and this delicate alliance was not solid enough to confront

³⁰⁴ <http://www.proceso.com.mx/?p=295792> Last accessed July 3rd 2014.

³⁰⁵ Oaxacan Front for the Respect and Recognition of Sexual Diversity.

³⁰⁶ *Amparo directo* 457/2012, 567/2012 y 581/2012.

³⁰⁷ <http://www.noticiasnet.mx/portal/oaxaca/general/143912-consumado-primer-matrimonio-gay-oaxaca> March 29th 2013.

it³⁰⁸. Nevertheless, confirmed by Mendez Díaz, the *amparos* initiated the path for five consecutive decisions to generate jurisprudence; joining forces with the National Campaign for Equal Marriage, Mendez Díaz recruited couples from across the country who were willing to challenge the judicial system, most of them activists, hoping for a repetition of Supreme Court's interventions.

Similar actions have been organized in other states, combining the work of lawyers facilitating *amparos* as a means of saturating the judicial system in combination with simultaneous state based lobbying, advocating for legal reform.

- In December 2012, in Yucatán a campaign was started began by a couple who exhausted the judicial system, beginning with the presentation of an *amparos* in the lower courts, and ending with the final intervention in their case by the Supreme Court³⁰⁹.
- In December 2013 Jalisco celebrated its first marriage after an appeal³¹⁰.
- A lesbian activist in Chihuahua claims that more than 50 *amparos* have been passed to the Court (with only 3 resolutions and 4 accepted by the Court)³¹¹.
- In Nuevo León a couple presented an *amparo* in a local campaign which attempted to coordinate with all the other couples in the country in similar circumstances, with the intention to saturate and cause the *collapse* of the judicial system. Commenting on this campaign the activist Mariaurora Mota declared optimistically:

“Now all over Mexico we are presenting *amparos*, we are saturating the Judicial branch, and we trust that we will win them all because the Supreme Court of Justice had already issued a decision on the subject and now no judge can take it back it”³¹².

³⁰⁸ <http://ladobe.com.mx/2013/03/hay-que-desmitificar-el-derecho-alex-ali-mendez/> Last accessed July 14th 2014.

³⁰⁹ <http://www.animalpolitico.com/2013/07/pareja-gay-le-gana-a-las-leyes-en-yucatan-se-podra-casar/#axzz37a2WVpgp> Last accessed July 14th 2014. <http://www.animalpolitico.com/2012/11/piden-matrimonio-para-todos-en-yucatan/#axzz2Oq5B6chJ> Last accessed March 26th 2013.

³¹⁰ <http://mexico.cnn.com/nacional/2013/12/14/la-primera-pareja-gay-se-da-el-si-acepto-ante-un-juez-en-jalisco> Last accessed July 14th 2014.

³¹¹ <http://www.sdpnoticias.com/gay/2014/04/24/mas-de-50-amparos-y-aun-no-hay-matrimonio-gay-en-chihuahua> Last accessed July 16th 2014. In February 2014 the first couple register a marriage contract after the SCJN's resolution <http://www.eluniversal.com.mx/estados/2014/boda-gay-ciudad-juarez-987355.html> Last accessed July 14th 2014.

³¹² <http://www.proceso.com.mx/?p=357860> Nov 14 2013.

The *amparos* have not all been coordinated in this way, as Mota's statement reveals, some have political priorities but are legally limited. As I argued the Court did not issue a clear decision as Mota imagines.

The National Campaign for Equal Marriage has been the most careful campaign, legally speaking. Aware of the dispersed theses and the unlikely possibility of gathering jurisprudence soon, it has started calling for the intervention of the Inter-American Court of Human Rights³¹³. In February 2012 this court published the first decision protecting the rights of a lesbian woman (and lawyer) who had the custody of her children denied by the Chilean state³¹⁴. The case became emblematic of the new lists of firsts, feeding the imagination of activists who recognized that *amparos* were not moving the campaign forward effectively. Instead they produced repetition of procedures that consumed the political energies of the movement. Furthermore, activists were well aware that the legislature were preparing strategies to block the development of the marriage campaign with modest versions of civil partnership that were supposed to address the claims of inclusion and discrimination with incomplete laws.

As I wrote the final notes of this chapter, the Supreme Court supported what seems to be the most creative usage of *amparos* in the sphere of sexual rights. Alí Méndez facilitated the first *amparo colectivo*, resolved favorably by the Court in April 23rd 2014. Thirty-nine people signed a collective appeal in Oaxaca, demanding that article 143 of the state's Civil Code be declared unconstitutional (the code specifies that marriage can only be celebrated between a man and a woman)³¹⁵. The *amparo colectivo* was created in Mexico in 2009, and originally designed to address only conflicts in tax law. It was an attempt to break the tradition of the principle of relativity of *amparo* actions, producing similar effects as the *acción de inconstitucionalidad* by transforming the concept of "juridical interest" and expanding the reach of its concept exclusively as individual

³¹³ http://www.vanguardia.com.mx/impulsancampanaparapedirmatrimonioigualitarioenmexico-1844452.html?utm_source=hoy+en+dh&utm_campaign=aaf838e2bc-Monitoreo_del_30_de_agosto_de_2013_1_2013&utm_medium=email&utm_term=0_58473853f8-aaf838e2bc-36085789 Las accessed October 4th 2013.

³¹⁴ Inter-Am. Comm. HR, Case 12.502.

³¹⁵ *Amparo en Revisión* 152/2013.

(Ferrer Mac-Gregor 2010: 47). It was extended to human rights cases only after the reform of 2011 and the new Amparo Law of 2013³¹⁶.

The Court resolved the *amparo colectivo* declaring that article 143 of the Civil Code was not constitutional, because its enunciation was exclusionary. The wrong repaired by the *amparo* was not the refusal of the civil registry to give license to marry the thirty-nine people, but the discrimination of the enunciation of the norm and the way it affects people by its mere existence. The decision was optimistic and promising on a number of levels. Firstly, with the shifting vision of legitimate interest of a collective that presents *amparos* together: collectives did not have any other channel to access the Court, apart from the mediation of expert tutors who determine themselves what are the claims that are legitimate to bring to the Court. With the *amparo colectivo* we can also imagine a compensation in strategic litigation of human rights, for the closure of other tools of constitutional control; but more importantly, it facilitates an open debate about who the subject of rights is. The figure of *amparo colectivo* can make a counterbalance of inequalities to access if it continues to be used by other social movements.

In her analysis of *amparo* 152/2013, Geraldina Gonzalez de la Vega recognized that by acknowledging *amparos* 457/2012, 567/2012 y 581/2012 (in the sequences that the National Campaign was organizing) the new decision can suggest a new possibility of *thematic jurisprudence* that the other theses seemed to have been impeding. The full resonance of the *amparo* is yet to be seen, however. The range of news coming from further individual *amparos* across the country is circulating with the hope of saturating the judicial system. The biggest challenge will be to determine jurisprudence, and how the Court will respond to the ambition of the National Campaign, or whether *amparos colectivos* will only extend the tradition of diffuse control, that is, with judges across the judicial system shared the capacity to intervene (as opposed of forms of control concentrad in only one tribunal). González de la Vega explains: “the *amparo colectivo* in Oaxaca interrupted [the sequence] of the previous three: in those first ones the Court determined the unconstitutionality of one portion of the norm only, but the part on ‘a man

³¹⁶ Published in the Gazette on April 2nd 2013.

and a woman' was left untouched, -it did not invalidate it, and by that, it declared it valid- and ordered its interpretation. Norms are only valid or not, there is nothing in between. But now it declared the full article 134, that is the novelty, but that is also the interruption of the previous sequence"³¹⁷. If the *acciones colectivas* continue in this manner, the first was the re-commencement of the original strategy, we should be optimistic now for the outcome of the remaining.

CONCLUSION. AGAINST THE ENCHANTMENT OF JUDICIALIZATION

What is it that changed in history about same sex marriage in Mexico? Throughout this chapter I presented arguments about the way same sex marriage appeared in the contemporary history of democratisation and the culture of rights, suggesting in part that the assumptions attributed to their emancipatory potential can reinforce the attachment of the LGT movement to law and the judiciary. With the transnational (and Western-defined) critique of the same sex marriage debate, an important question has been raised about its capacity to resonate in broader human rights traditions. Trying to understand the Latin American resonance of those critiques, I have suggested that same sex marriage has been capitalised through its novelty; it inspires hope for new legal relations in new legal cultures "in the making".

The same sex marriage debate in Mexico has incredible pedagogical potential, because it throws light on how the different spaces in which the subject of rights is conceived have been shaped by Mexican politics, at the same time illustrating the specific dynamic between judicialization and legal progress. Following the general path of LGT politics in Latin American histories, I have extended the experience of the Mexican evolution from the grassroots politics of sexual diversity, the early alliances with radical left, and the decisive incorporation of LGT activists in partisan politics that shaped the ways the subject of rights are conceived within liberal politics. The LGT subject of rights is

³¹⁷ De la Vega, Geraldina (2014) Matrimonio Igualitario en México <http://gerasplace-reloaded.blogspot.co.uk/2014/04/matrimonio-igualitario-en-mexico.html> Last accessed 20th October 2014.

conceived as one capable of teaching the rest of society new ways to relate to one another through marriage and partnership reforms, an example of novel citizenship and one which might alleviate backwardness in culture. This conception implies a rupture with leftist traditions and with cultural and communitarian grounding of the conception of human rights; they are replaced by narratives of civilised legal relations that circulate in the transnational sphere. The LGT subject of rights became the one that requires protection from cultural exclusion, and not the one that is determined by its political position in relation to other systems, and her or his legal system.

I am not advocating for an idealistic view of the role of LGT rights in Mexican politics, I am only articulating the position of enunciation of the critical optimist. The pedagogical potential, as I have insited earlier, is not going to inform further expansion of rights debates or the successful repetition of strategic mobilisation, it is instead an opportunity to learn about the state, the Court, the way LGT rights are making their way through the structure of the state without challenging it, without transforming the status quo that maintains the political positions that separate different citizens to the law and the possibilities for change. LGT rights are teaching about the evolution of the Court, the transformation of perceptions about the tools for constitutional control that started in an unexpected attention from the citizens that attributed to them the capacity to open new dialogues of accountability, and ended in the concentration of *amparos* to resolve individual cases, as if those have the potential to suggest new relations between the citizenry, without changing the state, without changing the Court. That does not aim to be a lesson for the LGT activist, but an observation for the critical optimist, aimed to stimulate the detachment of the legal progress of same sex marriage in relation to the legal system, and the authority it has to select certain human rights agendas.

Same sex marriage has been capitalised as one of the most evolved legal relations in democracy, - even if it does not transform legal structures radically. At the time when the Mexican Supreme Court was narrowing the tools for constitutional control and the channels of access to the Court, same sex marriage gained unprecedented publicity, granting new legitimacy to the Court, even if its decisions remained some distance from

expressing a commitment towards LG rights. During the sessions of the *acción 2/2010* the full Court predicted that it would only be possible to take an authoritative position on same sex marriage if every single civil code in the country was reformed and challenged in *amparo* actions of individual remedies, and if all those *amparos* gave concurrent theses in jurisprudence. The *acciones de inconstitucionalidad* were discouraged (and had only been activated by conservative institutions in any case) and the *controles de constitucionalidad* of federalism underestimated; so only *amparos* could trigger responses from the Court, only in the repetition of the formalist commandment of jurisprudence and commitment towards the *libre configuración legislativa*. This leaves all expectations of judicial activism look somewhat utopian in the democratic order.

The *acción 2/2010* inspired its extension in *amparos* mobilized by legal activists, but also of the rushed legal reform controlled by party politics, and reforms that have been sabotaging the national claims for extension of same sex marriage. The reforms that are following the dialogue in legislative assemblies in the states (as I write this), lack the political juncture that Mexico City had with the local government of the PRD confronting the federal presidency and setting up electoral priorities and have mainly been restricting the progress of same sex marriage debates with moderate versions of partnership that only slow the claims for adoption or benefits of married couples. As the latest developments suggest, they are diverting the symbolic recognition of partnerships to notary publics, depriving it of the basic claim of civil recognition. It is crucial to remember that civil society cannot confront in constitutional control the restriction of legal development: only the PGR, the CNDH, or party representation in the senate can do so.

The careful analysis of the *acción* and the *amparos* becomes crucial not because of what they resolved and how they enriched a quantitative list of firsts gains, but because of the way they shaped the expectations of the LGT movement towards the Law. In the celebration of these gains, the potential to call for judicial activism in the constitutional court was postponed by LGT activists. In short, a radical redefinition of LGT rights and the reestablishment of the concept of the subject of rights has been postponed on behalf

of the strategic opportunities given by contemporary politics. But having more LGT rights in Mexico is not resulting in a 'better' Court. What are the chances then of recovering a sense of rightfulness in the celebration of legal and judicial development without the attachment to governmental institutions and party politics? How do we recover (or claim anew) an independent ideology of LGT rights capable of defining its own path of progress? Can LGT rights say something new to human rights culture that is not determined by the governmental priorities of modernisation?

My intention in the chapter was to promote the pedagogical learning of the process, the emphasis on the fact that the judicialization of LGT rights, reduced to the understanding of judicialization of same sex marriage, did not produce an expansive recognition of political positions on behalf of a radical recognition of the subject of rights. Only in the space of legal achievements, only within the celebration, can this observation be made. Same sex marriage is a positive reform, because it gives a privileged space to enunciate politics and attribute meanings to human rights' dialogues that other subjects of rights have been denied. But same sex marriage does not change history; it has been part of the history of rights that are yet to come; we now only need to produce independent language to imagine under which conditions it will be delivered.

CONCLUSIONS

There is a utopian instinct in wanting to learn things differently. When a research project is motivated by the desire for something better, for fairer legal and judicial systems, for more even political relations, there is always the need to educate our optimism, to look beyond the opportunity structures that enable progressive legal reform and inquire about our capacity to hope for social change. What I have presented here is an exercise of hope, articulated after imagining new ways of relationalities in civil society, one where the achievements of a social group are measured according to the achievements of and opportunities for others. Learning about the encounters of the judicialization of politics in Mexico, and the development of human rights narratives, implied in the research process the recreation of *what has been*, the meanings attributed to law and legal knowledge in the Latin American legal cultures and the usages of law as both obstacle for change and an instrument of emancipation for selected authorised social groups, the study of *what it is now*, the progressive legal reforms the cases that are accepted in Court and the way it deals with it, and the human rights discussions that are not acknowledged in legal epistemology, always aiming for a collectively production of that *what ought to be*. That is, to study the Supreme Court as a possibility for new relationalities, of jurisprudence, or defence and promotion of constitutional rights (not the reparation of the legislative status quo), of better political relations.

In the happy judicialization of sexual rights the Supreme Court has not been an active agent of transformation, it has been instead a passive recipient of the Mexican process of democratization. Judicialization offers traces of the *grand narrative* of a linear history of sexual rights, where the purpose of the legislative bodies and constitutional courts is to take a political community closer to its desired social, political and sexual relations. But sexual rights can also be presented as representative diagnosis of a human rights culture in a specific country and specific times. In Mexico, the regulation of sexual rights was the result of a tangled political process of democratic adjustment, new partisan opposition, and of the institutionalisation of fragmented political spaces for social movements. These

were events where the historical development of Mexican judicialization assimilated social movement dialogues. I have been inclined towards the second approach in the thesis, convinced that progressive reforms on sexual rights teach us more about the political environment of the country (and the different legal relations within) than about the meaning or emancipatory potential of sexual rights inscribed in their own autonomous history.

The first grand narrative prioritises statements about new identities and practices who must be included in the democratic history of the country because they suggest novel and evolved expressions of citizenship, new subjects who are capable to profit from the political opportunities distributed by governmental institutions, codified these last ones by transnational networks of activists beyond the epistemic borders of the state, frequently far from its own legal culture. This triggered the unintentional exclusion of those who have no access to legal means in the country because of their political positions, epistemologically erased from state-led human rights projects. The second more localised approach came as the opportunity for a critical optimist to engage in the understanding of the political and historical praxis of social claims and social transformation, with the political desire to facilitate language that can be used to attribute new meanings to human rights in social practice, to phrase new expectations in accountability, and to imagine a better process of judicialization.

A couple of years ago when I was presenting a short version of one of the chapters in a conference, an attendee approached me to challenge the outcome of the research: the main frame of critique, he claimed, is suitable only for countries that have already gained legal reforms, but it could endanger the strategic litigation of groups that are still negotiating basic terms for alliances with legal and judicial institutions. And he was right; this thesis can only speak about progressive reforms once they have been enacted, and it is short of guidance for further progress. While it was my intention at the beginning of the research to contribute with language to support more sexual rights regulation, soon the evidence started repressing that optimism, putting into evidence a heavy dependence on the attachment to the current praxis of the legal system and political actors in

personalised politics, challenging my own ethical position with the question for the best way to represent the politics of sexual rights in Mexico in a way that is both fair and responsible towards the achievements of the sexual rights movement, while defending the transgressive character of sexual rights and their capacity to critique legal and governmental institutions. Sexual rights dialogues in Latin America, when they give an account of progressive reforms in their celebration, tend to reproduce what I called in chapter six the “lists of firsts”, stimulating transnational imaginaries with historical decisions, but say very little about legal culture. Throughout the work I have claimed that *the celebration of historical transformation of sexual rights claims as its object a legal reform, but rarely the legal system*. The transnational celebration says little about the democratic delay in Latin America. What does it mean to extend human rights frames with the language of sexual rights in countries that have little record of accountability in the first instance? What happens if the happy judicialization of sexual rights is capitalised for something other than sexual rights progress?

PART I. Promises.

The first part of this thesis was written in an effort to respond to what makes the process of judicialization so attractive, a beautiful object that inspired the attachment of sexual rights movements and scholars, if it is not after-all what it promises? It is an optimistic attachment to the judiciary that legitimizes the institutional power and symbolic authority of constitutional courts in different countries in Latin America, not because of empirical evidence based on what they have delivered, but what they promise to bring about. Different people get different *ideas of the Law, about the Law*, and of *what Law can (or ought to) do for people*; constitutional courts, in general terms, occupy a privileged space in democratization because they gather the hopes of many of these people: on the one hand, politicians and legal operators who wish for the modern expression of the rule of law to materialize, with an independent judiciary capable to work as the counterbalance for the other two branches of the government; on the other hand, for activist and civil society, accustomed to unresponsive legal systems, hoping for an independent governmental authority that will bring the Constitution closer to them as a condition of

possibility for human rights that has not been experienced before.

The promise is presented as a theoretical frame in chapter one. Drawing on philosophical engagements with the concept, crises (including political crises) are resolved or postponed by images of something good that is announced to come, no matter how vague or concrete those images are. Promises are powerful because they bind people; they depend on the mutual identification of the one who promises and the one who believes in their content. As I argued, the model cannot be used to explain political relations without careful warnings: the relations that support a promise are always reciprocal, both ends in a relation can announce to the other something better to come, and that does happen in politics. The promises that state institutions make are never going to be reciprocated: they promise something such as accountability, electoral competence, an effective judiciary, justice and fairness, and depend on the citizenry believing in them, but without recognizing all citizens and the different political locations they all stand in when they receive the promise. Governmental institutions authorize first those who are invited to bond in the liberal project of progress, excluding those who still need to learn the basic means of democracy; the technology of authorization that determines what is thinkable (and the rational actors that profit from the political opportunities that are thinkable), separates the project of a feasible future from alternative projects in epistemological blocks that separate the state of illegality from the state of rights mediated by the legal, by lawful relations (Santos 2006; Dorsett and McVeigh 2012)

Legal theory has been transplanted in Latin America with a strong formalist tradition that is dependant on the status quo of the authority of state institutions to determine the viability of political ambitions. Traditional legal theory is detached from the empirical and historical evidence of inequality in the region; on strict formalist tests, all forms of political optimism invested in politics should be directed to law (or social policy) for their materialization despite its limited emancipatory potential, accommodating different expressions of the political to appropriate ways *to speak to the law*. In the introduction I mention the turn to law as the general phenomenon of juridification of social relations, the assimilation of legal knowledge together with its strict codes of authorization; it is in

that context that I claim that optimism has to be reclaimed back from institutional knowledge. In chapter 1 I evoke Paulo Freire's call to re-educate our critical optimism, to ground our theoretical efforts in the hope that it is understood as an existential and historical imperative to learn to read the present because it ought to be transformed.

Critical optimism, presented in this chapter, relates to the experience of the researcher, the academic, the development agent, on her and his task of producing knowledge about the political praxes that can bring subjects closer from naming their own *inéditos viávels*, the unedited images of a future that is yet to come and does not require the authorization of either the state nor of political and legal theory. The academic project of critical optimism is to acknowledge the barriers and boundaries that are forcing subjects into theoretical premises that represent them as if they have to wish certain things and participate from modern imagination (the subject who wishes for legal reform, who wishes for legal rights).

As a critical optimist I have represented in this work praxes, not subjects. Latin American pluralism has been commonly dismissed as incomprehensible for legal theory, and up to a certain extent, it is incomprehensible for the scope of my research project. Apart from two exceptional experiences of constitutionalism that depart from the acknowledgement of the plurality of the nation (Bolivia and Ecuador), Latin American politics remain largely insular to the identification of the different ways to attribute meanings and produce knowledge about the law, the way subjects perceived the emancipatory potential of law (or recognise it as an instrument of power of the economic elite), is dismissed as a cultural challenge attributed to the objects of national pedagogy who have yet to be trained in the principles of constitutional democracy so they will be educated on the promises that they will finally make from Latin American countries "countries of laws". It has not been my intention to unveil those subjective meanings, but I insist at different points in the thesis on how legal knowledge disqualifies them, both epistemically and politically, effectively maintaining the current socio-economic order confirmed by theoretical fictions of the rational choices of the liberal subject.

In chapter 2 I translated the notion of the promise into the historical cycles of the constitutional moments. Among the beautiful characteristics of the promise is its capacity to renovate itself when a previous one had failed. I suggest in the chapter that constitutional moments profit from those renovations. In the philosophical language is the crisis of identity that prompts the promise (the man who loses the sense of his destiny and confirms it later bonding with other men³¹⁸); in the transplant I make it is in the major political crises where we recognize how the most ambitious promises have been triggered. The metronome of the process of democratization in Latin America can be classified by its constitutions and constitutional reforms; as a theoretical model, the idea of constitutional moments presented here organised generic observations about the spirit of Latin American neo-constitutionalism (and later on the specific practices of Mexican politics in judicialization), because of the way they attract extraordinary public participation, and the circulation of symbols of hope that ensure the affiliation of parts of civil society (as I refer to them, those for whom constitutional language makes sense) to the liberal project of the rule of law.

In the Latin American constitutional moments the judiciary *appeared* in the regional political landscape, renewing the hope people had lost for law with a sense of novelty in the legal cultures, confirmed by the new legal experts (often trained in the United States and by its new culture of judicialization) that promoted the new patterns of strategic litigation in the region. Once the other basic features established in democratization achieve certain stability (democratic and competitive elections, civil and political rights ensured by the constitutions, the rule of law) the judiciary is valued according to its independence in relation to the other two branches of the government, and becomes a new terrain for political activism, with different success in different countries. In this chapter I use the notion of *idées fixées* to describe how the standards are evaluated against those features, the general prescriptions that are supposed to anticipate (and dictate) the right institutional adjustments of democratization, but also the acknowledgments of those standards as external to the political relations in a country (including legal pluralism), that travel with semantic authority as that which cannot-not

³¹⁸ Using the generic masculine that Hannah Arendt uses in her deployment of the promise.

be desired.

Latin American legal cultures still seemed to be proving unfit to apprehend those ideals, it is still the most unequal region in the world, and basic standards of justice have not yet been attained. As I have already expressed, this has commonly been attributed to cultural failures on the assimilation of democratic principles. The strategy for effective judicialization has been (in almost every country with a constitutional court) the endorsement of expert tutors (attorneys general, ombudsmen), entitled with extra-political attributions to mediate between citizens and their constitutional rights. Their presence in processes of constitutional review, at least at the theoretical level, prevents the politicization of the independent court: they absorb the burden of discriminating the human rights claims that are eligible for constitutional review, moderating the material resources for mobilization in courts, and they define the agenda of the constitutional court. Citizens and social movements rarely have open access to courts (with few exceptions such as Costa Rica or Colombia). The capacity to stand in the Court is limited to political parties and expert tutors; the advantage of expert tutors is their autonomy from electoral politics, but that does not guarantee their detachment from any other political authority.

The theoretical frame and generic comments of Latin American promises of judicialization are applied in the second section to present the historical precedents of the happy judicialization of sexual rights in the Mexican experience. Chapter 3 is dedicated to the introduction of the actors and institutions that participated in the case studies. I have presented the development of the Mexican political context in distinguishable historical phases: I have dedicated chapter 3 to present, with the new culture of electoral competition, the way oppositional politics were institutionalised in partisan politics. Less attention is put to the development of Mexican NGOisation and professionalization of activism than to the assimilation of activists in the party system; I argue that the success of sexual rights in Mexico City depends more on the junctures of electoral opposition than on the capacity of activists to yield for political opportunities, this gives an insight as to why the reforms happened in Mexico City and not in another place, and directly

challenges the transnational hope of sexual rights for governmental responses to reasonable human rights claims that can eventually achieve their universalization through demonstrating the reasonability of sexual rights claims.

PART II. Democracy and Judicialization in Mexico

Chapter 3 maps the development of the practices of democratization in Mexico City as electoral competence, starting from the recognition of the city's political autonomy to the times of the sexual rights reform. The peculiar trajectory of the institutionalisation of politics of opposition determined the conditions that enabled the reforms in the city in a way that did not happen elsewhere in the country. The original project of the PRD in Mexican politics to create the strongest oppositional party by reuniting radical activists with professional politicians, became the greatest opportunity for sexual rights activists as a platform conditioned by electoral support. The PRD was not the only institution supporting the sexual rights agenda in Mexico, but it was the one who did so the strongest. The chapter attempts to settle some ideas about the electoral capital of sexual rights, the actors that circulate them, and the political motivation with which they did so.

Chapter 4 presents the history of judicialization alone in the similar period of transformation, recreating the Mexican constitutional moments in the political contexts in which they occur. In concordance with section one, constitutional moments are deployed as the convenient strategies implemented by governments to postpone or cancel political crises. Like many other countries, the Mexican parliament has made a recurrent (or almost excessive) use of constitutional reforms, first to adapt the primary source of law to the needs of secondary legislation, but on several occasions, as a powerful political authority, to restore the relations of citizens with the legal and political system.

The last president of the PRI initiated judicialization as an insurance policy to ensure the stability of the institutional status quo that kept the party in the presidency for more than seven decades. I define the beginning of Mexican judicialization with the constitutional reform that transformed the Supreme Court, from a passive instance that only reported to

the executive's authority, to a convenient counterbalance between the three branches of the government that ensured the stability of the institutional structures of the state. The origin of Mexican judicialization has to be understood on the original political agenda of president Zedillo in order to explain the self-restrained profile of its political decisions (in comparison with other courts, like the Colombian and Argentinean, that were enabled by more cathartic political turmoil).

When the PRI lost the presidency in 2000, the new president of the PAN capitalised human rights language as a political marker against the old PRI politics (over-emphasising the publicity of official information and the freedom of expression - organised by the party system and the corporatist institutions-), and the Supreme Court got adjusted to the new programmes of modernisation. President Fox promoted a constitutional moment that was resolved with the constitutional reform of 2001, full of promising politics for individual citizens establishing the tone for the rights culture that set up the direct precedent of our sexual rights cases.

New expectations for rights enforceability, circulated with President Fox, delivered among specific identities that in appearance demanded exclusive instances of state recognition. This was a critical moment for the fragmenting of human rights in the country, the rupture with the political mobilization of human rights that preceded the elections with dialogues of resistance, solidarity, and historical reconciliation of the identity of the Mexican nation. Rights claims were ordered as differentiated claims in the constitutional reform, that were in practice put to compete for recognition in the political arena of the new democracy; a competition that benefited sexual rights (albeit with very moderate gains), not because of an ideological choice or imposition, but because, again, of the electoral capital of sexual rights narratives, and the symbolic impact that was conveniently profited to postpone a larger political conflict.

The reform of 2001 has been the most important reform for sexual rights after the 1994 inauguration of judicialization, because of the way it attracted attention to the tools for constitutional review as an opportunity for strategic litigation, and the way it re-

emphasised the federal pact of the Republic by empowering municipalities and decentralised political resources for activism. But it was the most dramatic failure in late history of grassroots politics in the country, the biggest dismissal of revolutionary and unedited imaginaries to rethink the Mexican nation, and ultimately, one of the most radical disruptions in the conception of solidarity among citizens. The most promising reform for sexual rights was also the betrayal of the indigenous movement that had been resisting the state and its neoliberal politics since the Zapatista uprising of 1994.

The reform was supposed to be the one that would acknowledge the plural identity of the country, reorganizing its legal and judicial system, but instead, it successfully shifted human rights expectations from claims of historical exclusion to the expressions of non discrimination (in constitutional language and through the establishment of government sponsored institutions), absorbing political conflict, used by the Zapatistas as a way to confront the liberal state (and at the time of the of the constitutional reform backed by unprecedented civilian support), into liberal promises of individual rights and symbolic recognition of citizenship.

This is the fragmented scenario in which I built the statement that declares that the singular achievements of one group of subjects of rights do not necessarily require the development of others for their fulfilment, or is not compromised by the retreat of peoples' rights in the liberal human rights project. The celebration of sexual rights reforms in Mexico, tends now to be formulated on the basis on historical ruptures, it often evokes phrases of historical transformation and novelty, taking the political praxes out of their contexts and allowing the merge in which the human rights project of the rule of law absorbs the transgressive potential of rights as they were originally conceived in activism.

Section II aims to compare the effect that the Mexican constitutional moments (the end of the PRI, the resolution of the Zapatista crisis in the government) had on the level of attachment gained for the Supreme Court and the restricted narratives of rights they use. The concept of constitutional moments felt like a prudent comparison with the concept of the promise: it is evoked to resolve crisis, and it depends on the intensity of the bonding

relation of the two sides of the promise. Judicialization in Mexico ensured the political stability of the political transitions suffered in the Country. It offered new (de-radicalised) language for human rights for citizens to indentify themselves with, and it authorized on its ways, the new actors (political parties, expert tutors) of democracy. At the stage when the full set up for the sexual rights cases is ready, the *inéditos viáveis* will have been already organised in institutional adjustments, those who speak the language of the law recognised, and the notion of democratic progress strongly determined by the new state and its new human rights.

Having educated civil society about the new value of constitutional law as a new platform for human rights litigation, the Supreme Court got overwhelmed by its new popularity, and by the resonance and political implications of the cases. The path of judicialization that followed the 2001 reform took the Court not only to moderate the interests of the other 2 branches, but to moderate itself and the type of decisions it takes. Constitutional review was identified by activists as a resource among the limited channels to funnel claims of justice, even though the Court never had ways to exit claims apart from recommendation to the relevant authorities. The use of the Court in that period marked the profile of Mexican judicialization: and excesses of faith in the Court to intervene where other justice institutions have not done so, and the imagination of the citizenry about the law, and what law is expected to do for the political context, with independence from its formalist prescriptions.

PART III Case Studies

There is a fundamental note that determines my own reading of the *acciones de inconstitucionalidad* against the reforms on abortion and same sex marriage in the third section of the thesis: they where not initiated by the sexual rights movement (who had no standing capacity in the Court), nor by the Court; they were initiated by the expert tutors whose original purpose was to cancel the legal reforms. The happy judicialization of sexual rights consists of the decision of the self-restrained Supreme Court to divert

authority back to the legislative: it did not take a position in favour (or against) sexual rights and that had important consequences, particularly for women's rights outside of Mexico City.

The abortion case presented in chapter 5 represented an important transition for the Court on the type of cases it receives and the implications of those. The *acción de inconstitucionalidad* was attracted at the time when other tools for constitutional review where contesting the legitimacy of the judiciary and that determined the disorganised character of the process. The president of the National Commission of Human Rights (CNDH) used his standing capacity to submit an inconsistent proposal of rights language, contradicting at the ideological level basic notions of reproductive rights and women's rights language, and at the institutional level his own political position as an ombudsman. The intervention of the Attorney General (PGR), (in both the abortion and same sex marriage cases) reminded us of the political control that the president has over the judicialization agenda. The cases present enough evidence to problematize the narrative of judicialization in Mexico as the "opening of courts to the citizenry", and the commitment of the Court towards constitutional rights (as opposed to towards constitutional order).

Unpacking the critique of the Court's intervention implies disarticulating the uncritical attachment sexual rights might have developed towards the Court. To have more rights does not imply having a better judiciary, nor better relations of governance, even if it feels like it to some groups. The reforms and the judicial responses to the *acciones* announced a culture of rights that is yet to come but that was celebrated prematurely, a culture that is so strongly desired that feeds the attachment to the authority of the Court. But these *were not the best decisions* the Court could have taken: they did not expand lawful relations; they did not consider the different political positions that citizens encounter in the law (for example, the consequences for women in other states in the country). Human rights were left almost untouched through those processes even when the Court had the material and symbolic capacities to produce better decisions with enforceable jurisprudence.

The abortion process highlighted the alarming backward effect that the publicity of the whole legal process (including the Court's intervention) had. Sexual politics at this stage were highly juridified; the strategy to keep a discreet profile in legal advocacy (to prevent the polarisation of ideological positions) got rushed by partisan agendas in the Assembly, which forced women's movements to jump in the process. This became a highly publicised case, and triggered a national debate that did not benefit the development of decriminalization of abortion across the country. The one step forward in Mexico City represented several steps backwards in the state when the *acción de inconstitucionalidad* unveiled the constitutional gaps that enabled the decriminalisation of abortion in the city, guiding the constitutional locks that ensure that similar reforms will not be implemented in the states. Feminist and women's movements had little capacity to stop the wave of constitutional reforms and prevent the legal statue of the right to life from the moment of conception from obstructing all further litigation.

The visibility of the case was followed by a violent cultural backlash against women's right to choose. The mediators of the abortion regime of exceptions (the medical and judicial authorities in charge of approving the conditions in which an exception of criminalisation would be granted) got at the same time empowered with the ideological dialogues that occupy the political and media forums, and legally unprotected by its ambiguity. Poor and indigenous women were criminalised in processes initiated with denouncements from public hospital staff attending women suffering from miscarriages (liable for assistance themselves), and punished with exceptional charges dictated by judicial authorities. Not only were the different relations that revolve around abortion overly judicialized, but the conservative states were reinforcing the political markers that distinguish them from the leftist ruling of Mexico City.

The judicialization of abortion ended in Mexico City. The new *acciones* against the constitutionality of the reforms of San Luis Potosí and Baja California were rejected, closing the controversy of decriminalization in all those states that had already blocked litigation. That was not the case with the marriage debate that only initiated in Mexico

City. If we have to represent one successful story in judicialization that would be same sex marriage (keeping always careful reserves). Despite the fact that the Mexican Supreme Court, once again, did not produce jurisprudential theses phrased on rights language (or not on lesbian and gay rights), it did legally resolve the core discussion on marriage that the Legislative Assembly had deliberately left it to resolve: the adoption debate.

The reactions to the marriage case also anticipated the next step of judicialization. The abortion case already assumed the political lumber that the Court was carrying from precious cases (I have made an emphasis on the Lydia Cacho case and the usages of the *facultad de investigación*), now, the development of same sex marriage registers instead the tendency of the latest adjustment of constitutional review and its political consequences: same sex marriage evolving through *amparos* at the same rhythm that the other tools of constitutional review are being slowly diverted to *amparos* too, judicial review is being narrowed to individual remedies that in the practice have no jurisprudential effect, with no general declaration on the law or act that motivated the case.

Having looked at the historical development of constitutional review, the type of cases that were received through the *facultad de investigación* (and the crucial political questions of justice they have raised under the auspice of the Court), and the resistance against the *controles de constitucionalidad* presented by the municipalities against the interest of the state, I still resist to recognize the optimism of the development of *amparos* as the ultimate tool of review. I did not pay attention from the beginning to all the other *amparo* cases that involved sexual rights because they have less potential to produce new knowledge about the law in the tradition of “deciding without solving” of the Mexican Court. With *amparos* the most we have learnt to hope for is the repetition of events, to go back to the appropriation of historical novelty of sexual rights that is repeated every time there is a legal reform.

The attachment to the law, when it is restored in constitutional moments and judicial

sentences that do not transform the legal relations that different individuals and groups of people have with the legal system, can eventually wear the political investments of social movements. It happened with the constitutional reform of 2001 that disarticulated the solidarity networks organised around the Zapatista movement, with the *facultades de investigación* that are still unresolved in the judicial system. The next steps of judicialization of sexual rights announce only the replicas of events that were meaningful in a specific context: the first time a marriage law is regulated in a state, the first time a law is enacted, the first time a judge decides in favour; the political value of sexual rights in their juridified version, keeps being promoted as its capacity to bring novelty to the legal culture, even with the evidence that indicates that novelty does not repair historical fractures.

Happy (and optimistic) judicialization

The analysis of the judicialization of sexual rights, in general terms, exposes a contradictory but yet peculiar prism that reflects light into three different factors: first, into new ways to negotiate the meanings of human rights for social movements (the right to choose for women, the rights of lesbian women and gay men) having now constitutional courts (and new constitutional language) as vehicles for powerful political hope; second, into new ways to identify strategic projections for rights advocacy for legal activists, involving the ways to appropriate at the local level, the meanings judicialization acquires in the whole region (courts promoting what the legislative has not as a transnational narrative), hoping for judicial processes to be replicated in different legal cultures; and the third, which ultimately becomes the condition for the previous two, brings light to the junctions and political technology of authorisation of “new legal actors” capable *to speak the language of the law* in the institutionalised politics of democracy. The three factors together have worked as instrumental to legitimize the promise of democratization, the postponement of radical politics to the future that still portrays judicialization as a historical transformation of the Latin American legal systems

that have turned to constitutional review.

To *speak the language*, and to project our own *inéditos viáveis* in the law, is a goal much more complicated to achieve than ensuring political alliances and profiting from opportunities (both determined by compromising negotiations of respectability and professionalization). In countries already embarked in optimistic transformations of their political establishment, the project for new ways to speak the language of the law is easily translated as the attachment to the law, the juridification of social relations that demands an excess of law in human rights language, favouring the formalist opportunities of language over the political hope that rights can inspire. Sexual rights have to return to be recognised as intrinsically relational projects, locations of enunciation of ethical relations that elaborate autonomous critiques and formulate their own political projects. In the criteria of the critical optimism, constitutional reforms, and constitutional tools, are ideal spaces to build collective narratives of rights, but only when the space is defined by the plural coming together of different knowledges of the law and about the law, different desires and projects of the future in the political sphere.

The democratic expression of sexual rights seems to be inclining towards the legal expressions (of the rule of law and its *idées fixes*), and away from the safe place where women's groups used to come together and confront the state and its exclusionary politics. The political platforms in which groups come together in bonding experiences of solidarity, the original spaces of ethical promises where individuals encounter each other and imagined (among other things) the state and its politics, have been dramatically narrowed by the institutions of democracy to individual remedies that require the mediation of experts for their definition. The contrast of the outcome of the two case studied suggests that sexual rights dialogues are inclined towards agendas addressing sexual identity and LGT rights, promoting rights language as if it emerges from specific forms of associations and practices, losing the creative potential that emerges from the original material claims of feminism and its ethical frame.

So, what is the best way to represent the contemporary expression of sexual rights at this

other end of democratization after the institutionalisation, professionalization and promotion of novel citizenships? The happy judicialization of sexual rights still represents a space of political interlocution that can recognize that the dialogues of the sexual rights movement *have been put to cancel* (or postpone) the fragmentation of human rights ordered throughout the democratic development. But that does not diminishes their actual emancipatory potential, they need to be understood as something different than the legal reforms in relational structures, as having their own historicity and projects of the future, not as examples of novelty, but commitments of continuity in solidarity with other rights narratives.

When the human rights agenda advances, its progress claims different meanings depending on one's experience of the changes that it brings. Different factors determine our capacity to define, critique or celebrate progress, and to evaluate its practical effects in the material transformations of everyday life. In theory, a common experience of progress would imply equal access for all to possibilities of social mobility, to the symbolic and material resources, and the channels for mobilisation opened up by legal reforms, only then we will all have a fair share of resources to imagine together a better human rights culture. The material and epistemological barriers for such hope might start with critical optimism that sees progress does not grow as a progressive linear evolution and accumulation of ephemerides in Latin. The progressive human rights agenda is the one that can be replicated in diverse experiences of citizenship, focused on compensating the hierarchical distances between subjects. Any project for change and improvement is a project to alter history not in our capacity to expand ourselves and have more rights, or repeat the events that recognize our right, but in our capacity to expand the present: to acknowledge social experiences, not only sexual but those in the full spectrum of subjective empowerment that has been formulated in human rights language. Postponing sexual politics on behalf of the attachment to law, is underestimating their transgressive capacity to revert the rhythm of liberal progress, and implies a waste of political experience, losing all chances to imagine law as a relational device projected towards a better world to come.

BIBLIOGRAPHY

- @manualdelacorte Published as an online blog in <http://eljuegodelacorte.nexos.com.mx/?p=586> (Last accessed May 5th 2012) and compiled in <http://manualdelacorte.com/matrimoniodf/el-caso/> (Last accessed May 5th 2012)
- Abramovich, Víctor and Curtis Christian (2002) *Los derechos sociales como derechos exigibles*; Madrid: Trotta
- Abramovich, Victor, and Laura Pautassi (2008) 'Judicial Activism in the Argentine Health System: Recent Trends'; *Health and Human Rights*, 10(2), pp. 53-65.
- Ackerman, Bruce (1984) 'The Storrs Lectures: Discovering the Constitution'; *Yale Law Journal* (93); 1013-1072
 - (1991) *We the People: Foundations*; Cambridge, MA: The Belknap Press of Harvard University Press.
- Ackerman, John M. (2006) '¿Autonomía disfuncional?: el diseño y desarrollo institucional de la Comisión Nacional de los Derechos Humanos (CNDH)'; in *Instituciones, legalidad y Estado de derecho en el México de la transición democrática* (ed.) *Instituciones, legalidad y Estado de derecho en el México de la transición democrática*; Mexico: Fontamara: 113-
- Acosta, Mariclaire (1999) 'Overcoming the Discrimination against women in Mexico' in Juan E. Méndez et al. (eds.) *Te (un)rule of Law & the Underprivileged in Latin America*, Indiana: University of Notre Dame Press, pp. 160-180
- Adelman, Jeremy and Miguel Angel Centeno (2002) "Between liberalism and Neoliberalism: Law's dilemma in Latin America", in Yvez Dezalay and Bryan Garth eds. *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy*, Ann Arbor: University of Michigan Press, p. 139-161.
- Aguiló, Josep (2013) "Ética Judicial y Estado de Derecho" in Cristina García Pascual (ed) *El Buen Jurista. Deontología del Derecho*; Mexico: Tirant lo Blanc.
- Alexander, Jacqui (1994) 'Not Just (Any)Body can be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas', *Feminist Review*, 48: 5-23.
 - (1997) 'Erotic Autonomy as a Politics of Decolonization: An Anatomy of Feminist and State Practice in the Bahamas Tourist Economy' in M. Jacqui Alexander and Chandra Talpade Mohanty (eds.) *Feminist Genealogies, Colonial Legacies, Democratic Futures*, New York and London, Routledge, pp. 63-100.

- Altman, Dennis (1997) 'Global Gaze / Global Gays' in *GLQ: A Journal of Lesbian and Gay Studies*; 3(4): 417-436
 - (2001) *Global Sex*, Chicago, IL: University of Chicago Press.
- Alvarado, Arturo and Diane Davis (2004) 'Ciudad de México, El desafío de la transición'; in Daniel Chavez and Benjamin Goldfrank (eds) *La izquierda en la ciudad: participación en los gobiernos locales de América Latina*; Barcelona: Icaria; pp. 169-206.
- Álvarez de Lara, Rosa María (2002) 'Algunos comentarios sobre el reconocimiento de la costumbre y la discriminación de la mujer en la reciente reforma constitucional en materia indígena'; in Miguel Carbonell and Karla Pérez Portilla (eds) *Comentarios a la reforma constitucional en materia indígena*; México: Instituto de Investigaciones Jurídicas/UNAM: 111-125
- Álvarez Ugarte, Ramiro (2012) 'El Constitucionismo Popular y los problemas de la "última palabra": apuntes para un Contexto Latinoamericano"; *Revista Jurídica de la Universidad de Palermo* 13(1); 75-125.
- Alvarez, Sonia (1997) 'Articulación y transnacionalización de los feminismos latinoamericanos' in *Debate Feminista*, 15: 146-170.
 - (1998) "Latin American Feminisms 'Go Global': Trends of the 1990s and challenges for the new millennium." In Sonia E. Alvarez, Evelina Dagnino and Arturo Escobar (eds.) *Cultures of Politics/Politics of Cultures: re-visioning Latin American social movements*, Boulder, CO: Westview Press
 - (1999) 'Advocating Feminism: The Latin American Feminist NGO "BOOM"' in *International Feminist Journal of Politics*, 1: 2, pp. 181-209
 - (2009) 'Beyond NGO-ization? Reflections from Latin America' in *Development*, 52(2) pp. 175-184.
- Alvarez, Sonia E., Evelina Dagnino and Arturo Escobar (ed.) (1998) *Culture of Politics, Politics of cultures, Re-visioning Latin American Social Movements*, Colorado and Oxford: Westview Press
- Amuchástegui, Ana (2013) "A Grateful Subject": Legal Abortion, Clientelism, and Health Rights in Mexico City" in *Scholar & Feminist Online*; <http://sfonline.barnard.edu/gender-justice-and-neoliberal-transformations/a-grateful-subject-legal-abortion-clientelism-and-health-rights-in-mexico-city/#sthash.Mc0wZDVO.dpuf> Last accessed June 15th 2014.

- Amuchástegui, Ana, and Edith Flores (2013) ‘Women's Interpretations of the Right to Legal Abortion in Mexico City: Citizenship, Experience and Clientelism’; *Citizenship Studies*, 17:8, pp. 912-927.
- Amuchástegui, Ana, and Rodrigo Parrini (2009) ‘Sujeto, sexualidad y biopoder: la defensa de los militares viviendo con VIH y los derechos sexuales en México’ in *Estudios Sociológicos*, XXVII: 81, pp 861-884.
- Andersen, Ellen Ann (2008) *Out of the Closets & Into the Courts; Legal Opportunity Structure and Gay Rights Litigation*; Ann Arbor: University of Michigan Press.
- Andrade, Magdalena, José Ricardo Maldonado and Claudia Morales (2010) *Memoria del Activismo en Sida en México, los primeros años*; Mexico: Consejo Nacional para Prevenir y Eliminar la Discriminación.
- Anguiano, Arturo (2008) ‘Mexico: The contradictions and uncertainties of a truncated
- Ansolabehere, Karina (2007) *La política desde la Justicia. Cortes supremas, gobierno y democracia en Argentina y Mexico*, México: FLACSO-México and Fontamara.
- Ansolabehere, Karina (2008) “Legalistas, legalistas moderados y garantistas moderados: ideología legal de maestros, jueces, abogados, ministerios públicos y diputados”; *Revista Mexicana de Sociología*, 70 (2); pp. 331-359.
 - (2009) "Oportunidades y Decisiones: la judicialización del aborto en perspectiva comparada"; *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers. Paper* 77. http://digitalcommons.law.yale.edu/yls_sela/77 Last accessed Nov 11th 2013.
 - (2010) ‘More Power, More rights? The Supreme Court and Society in Mexico’ in Javier Couso, Alexandra Huneus and Rachel Sieder (eds.) *Cultures of Legality: Judicialization and Political Activism in Latin America*; New York: Cambridge University Press; pp. 78-11. The original version in Spanish: (2008) ‘Más poder ¿más derechos? Control de Constitucionalidad y ciudadanía’, available in http://www.nuff.ox.ac.uk/repla/REPLA_ANSOLABEHERE.doc Last accessed July 29th 2011.
 - (2010b) ‘Oportunidades y decisiones. La judicialización del aborto en perspectiva comparada’ in Marcelo Alegre (ed.) *Derecho y Sexualidades*, Buenos Aires: Librería. A partial English translation: ‘Opportunities and Decisions: A Comparative Analysis of the Legal Treatment of Abortion’ available in http://www.law.yale.edu/documents/pdf/sela/SELA09_Ansolabehere_Eng_WV.pdf last accessed July 29th 2011.

- Anzaldúa, Gloria (1987) *Borderlands-La frontera. The new mestiza*; San Francisco: Aunt Lute books.
- Arantes, Rogério (2005) 'Constitutionalism, the expansion of Justice and the Judicialization of Politics in Brazil' in Rachel Sieder, Line Schojolden and Alan Angell (eds.) *The Judicialization of Politics in Latin America*, New York: Palgrave Macmillan, 231-262
- Arendt, Hanna (1961) *Between Past and Future: Six Exercises in Political Thought*; London: Faber.
 - (1973) *The Origins of Totalitarianism*; San Diego, New York & London: Harvest Book; Harcourt Brace & Company.
- Arendt, Hanna (1998) [1958] *The Human Condition*; Chicago and London: University of Chicago Press.
 - (2005) *The promise of politics*; New York: Schocken Books.
- Armas, Henry (2006) 'Exploring Linkages Between Sexuality and Rights to Tackle Poverty' in *IDS Bulletin*; 37 (5); pp-21–26.
- Ávila, Ramiro (2011) *El neoconstitucionalismo transformador. El estado y el derecho en la Constitución de 2008*, Quito: Ediciones Abya-Yala/ Universidad Andina Simón Bolívar
- Azuela, Antonio (2007) 'Mexico City: the city and its law in eight episodes, 1940-2005' in Andreas Philippopoulos-Mihalopoulos (ed.) *Law and the city*, Oxon and New York: Routledge-Cavendish; pp. 153-169.
- Barker, Nicola (2012) *Not the Marring Kind; A Feminist Critique of Same-Sex Marriage*, PalgraveMacmillan.
- Barret, Michelle (1980) *Women's Opression today*; London: Verso.
- Barreto, José Manuel (2013) 'Human Rights and emotions from the perspective of the colonised: Anthropofagi, legal surrealism and subaltern studies'; *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*; 5(2): 106-115.
- Barrett, Michele and Mary MacIntosh (1982) *The Anti-Social Family*, London: Verso Editions.
- Bartra, Roger (2007) *Fango sobre la democracia: textos polémicos sobre la transición mexicana*; México: Planeta.
- Baxi, Upendra (2006); *The Future of Human Rights*: Oxford and New York: Oxford University Press.

- Bedford, Kate (2009) *Developing Partnerships: Gender, Sexuality and the Reformed World Bank*. Minneapolis MN: University of Minnesota Press
- Bergallo, Paola (2011) 'Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina' *Texas Law Review*, 89: p. 1611-1641
- Berger, Nicolas J. (2004) *Tensions in the Struggle for Sexual Minority Rights in Europe, Que(e)rying Political Practices*, Manchester, New York: Manchester university Press. Isbn
- Berlant, Lauren (2010) *Cruel Optimism*; Durham and London: Duke University Press.
- Berlant, Lauren and Michael Warner (1998) 'Sex in Public', *Critical Inquiry* 24(2); pp. 547-566
- Bhabha, Homi (1983) 'The Other Question – the Stereotype and Colonial Discourse'; *Screen*, 24.
 - (1990) 'DissemiNation', in Homi Bhabha (ed.) *Nation and Narration*; London: Routledge, 291–322.
- Binnie, Jon (2004) *The Globalization of Sexuality*, London: Sage.
- Binnie, John and Beverley Skeggs (2004) 'Cosmopolitan knowledge and the production and consumption of sexualized space: Manchester's gay village'; *The Sociological Review*; 52(1), pp. 39-61.
- Blichfeldt, Bodil Stilling, and Grethe Heldbjerg (2011) 'Why not? The interviewing of friends and acquaintances' *Working paper 2011/1; Department of Entrepreneurship and Relationship Management*
- Bloch, Ernest (1996) *The Principle of Hope. Volume One*; trans. by Neville Plaice, Stephen Plaice and Paul Knight; Cambridge: The MIT Press.
 - (2000 [1964]) *The Spirit of Utopia*; trans. By Anthony A. Nassar; Stanford: Stanford University Press
- Bohorquez, Isabel (2008) 'Untested Feasibility in Paulo Freire: Behind the Profile of a Dream', in Carlos Alberto Torres and Pedro Noguera (eds.) *Social Justice Education for Teachers: Paulo Freire and the Possible Dream*. Rotterdam and Taipei: Sense Publishers: 177-190.
- Booth, John A., and Mitchell A. Seligson (1984) "The Political Culture of Authoritarianism in Mexico: a Reexamination"; *Latin American Research Review*, 19(1): 106-124

- Brinkerhoff, Derick W, and Arthur A. Goldsmith (2002) *Clientelism, Patrimonialism and Democratic Governance: An Overview and Framework for Assessment and Programming*, available in http://pdf.usaid.gov/pdf_docs/PNACR426.pdf last accessed Dec. 31st 2011.
- Brinks, Daniel (2005) ‘Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?’ *Texas International Law Journal*; 40: 595-622
- Briseño Becerra, Carlos Alberto (2009) ‘La reforma política del Distrito Federal de 1986-1996/1997: avances y tareas pendientes’, in *Acta Republicana, Política y Sociedad*, 8,8.
- Brito, Alejandro (2003) “Del derecho de convivencia a la conveniencia de no reconocerlo. La izquierda y el movimiento por las sociedades de convivencia en México”; *Letra S*; 2.
- Brockett, Charles D. (1991) ‘The Structure of Political Opportunities and Peasant Mobilisation in Central America’ in *Comparative Politics*, Vol. 23. No. 3, pp. 253-274.
- Brown, Stephen (1999) ‘Democracy and Sexual Difference. The Lesbian and Gay Movement in Argentina’; in Barry D. Adam; Jan Willem Duyvendak, and André Krouwel (eds.) *The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement*; Philadelphia: Temple University Press, 110-132.
 - (2010) ‘ “Con Discriminación y Represión No Hay Democracia” The Lesbian and Gay Movement in Argentina’ in Javier Corrales and Mario Pecheny (eds.) *The Politics of Sexuality in Latin America; A Reader on Lesbian, Gay, Bisexual, and Transgender Rights*, Pittsburgh, University of Pittsburgh Press
- Brown, Wendy (1995) *States of Injury: Power and Freedom in Late Modernity*; Princeton: Princeton University Press
 - (2004) ‘ “The most we can hope for...”: Human Rights and the Politics of Fatalism’ *South Atlantic Quarterly*; 103(2-3): 451-463.
- Bruhn, Kathleen (1996) *Taking on Goliath. The Emergence of a New Left Party and the Struggle for Democracy in Mexico*; Pennsylvania: Pennsylvania State University Press
- Budhiraja, Sangeeta, Susana T. Fried and Alexandra Teixeira (2010) ‘Spelling it Out. From Alphabet Soup to Sexual Rights and Gender Justice’ in Amy Lind (ed.) *Development, Sexual Rights and Global Governance*, London and New York: Routledge, pp. 131-144
- Buscaglia, Edgardo, and Pilar Domingo. (1997) ‘Impediments to Judicial Reform in Latin America.’; Documentos de Trabajo No62. México DF: CIDE
- Bustillos, Julio (2011) ‘Derechos humanos y Protección Constitucional. Breve estudio sobre el matrimonio entre personas del mismo sexo en México y en perspectiva comparada’

in *Boletín Mexicano de Derecho Comparado*, Instituto de Investigaciones Jurídicas UNAM, 132, pp. 1017-1045.

- Cabello, Christian (2011) “Iguales no somos. Libertad, sexualidad y liberalismo en la discusión mediatizada sobre matrimonio homosexual en Chile”; document presented in the *Segundas Jornadas Estudiantiles de Teoría de Género*; Law School, Universidad de Chile.
 - (2014) *Ciudadano gay. Visualidades y plusvalía sexual en tiempos liberales*; thesis presented for the Magíster en Comunicación Política; Instituto de la Comunicación e Imagen; Universidad de Chile.
- Campaña por la convención de los derechos sexuales y reproductivos (2006) *Manifiesto. Segunda versión (para el debate)* <http://www.derechossexualesyreproductivos.com/imagenes/manifiestoESP.pdf> (Last accessed March 30th 2014)
- Campana, Maximiliano Nicolás (2011) ‘¿Será justicia?... La cuestión del matrimonio igualitario en los tribunales cordobeses’ in María Candelaria Sgró Ruata et al (eds) *El debate sobre matrimonio igualitario en Córdoba. Actores, estrategias y discursos*; Córdoba: Ferreyra / CEA CONICET;105-136
- Campuzano, Guisepppe (2007) *Museo Travesti del Perú*; Perú, Institute of Development Studies
- Cancian, Francesca (1993) ‘Conflicts between Activist Research and Academic Success: Participatory Research and Alternative Strategies’; *The American Sociologist*; 24 (1): pp. 92-106.
- Cao, Lan (2007) “Culture Change”; *Virginia Journal of international Law* 47: 357- 412.
- Carbonell, Miguel (2006) ‘Notas sobre la reforma constitucional en México’ in *Revista de la Facultad de Derecho de México*, 246, pp. 229-254
 - (2007) ‘Sobre virus, bacterias y jueces’ in *Nexos*, July.
 - (2009) ‘Los derechos fundamentales en América Latina: Apuntes para una discusión’, in Miguel Carbonell, Jorge Carpizo and Daniel Zovato (eds.) *Tendencias del Constitucionalismo en Iberoamérica*, Mexico D.F: Universidad Nacional Autónoma de México: pp. 35-42.
- Carbonell, Miguel, Héctor Fix-Fierro and Rodolfo Vázquez (eds.) (2008) *Jueces y Derecho. Problemas contemporáneos*; México: Porrúa/UNAM
- Cárdenas Gracia, Jaime (2007) ‘El proceso electoral de 2006 y las reformas electorales necesarias’ in *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*,

16. available in <http://www.juridicas.unam.mx/publica/rev/cconst/cont/16/ard/ard2.htm>
Last accessed 26th September 2012.

- Carothers, Thomas (1998) 'The Rule of Law Revival' in *Foreign Affairs*; 77, 2: 95-106.
 - (2000) 'Struggling with Semi-Authoritarians', in Peter Burnell (ed.) *Democracy Assistance: International Cooperation for Democratization*; London: Frank Cass: pp. 210-25.
 - (2009) 'Rule of Law Temptations' in *The Fletcher Forum of World Affairs*, 33, I: 49-61.
- Carpizo, Jorge, (1995) 'Reformas constitucionales al poder judicial federal y a la jurisdicción constitucional, del 31 de diciembre de 1994' in *Boletín Mexicano de Derecho Comparado*, 83: 807-842.
- *Cartilla por los Derechos Sexuales de las y los Jóvenes*, available in <http://juventudesyddhh.blogspot.co.uk/2011/03/cartilla-por-los-derechos-sexuales-de.html>
(Last accessed May 5th 2011)
- Casas Becerra, Lidia (1996) 'Mujeres procesadas por aborto'; *Foro Abierto de Salud y Derechos Reproductivos*, Santiago de Chile: Foro Abierto de Salud y Derechos Reproductivos.
- Castañeda, Lol Kin (2011) "Respeto" en Ricardo Raphael y Antonio Cervantes (ed.) *El México Indignado*, México DF: Destino,; pp. 81-87.
- Castelar Pinheiro, Armando (2003) 'Direito e Economia num Mundo Globalizado: Cooperação ou Confronto?' IPEA Working Paper No. 963. Available in SSRN: <http://ssrn.com/abstract=482822> or <http://dx.doi.org/10.2139/ssrn.482822> last accessed February 27th 2012.
- Centeno, Miguel Ángel (1994) *Democracy within Reason: Technocratic Revolution in Mexico*. Pennsylvania: Pennsylvania State University Press.
- Cepeda Espinosa, Manuel José (2005) 'The Judicialization of politics in Colombia' in Alan Angell et al. (eds.) *The judicialization of politics of Latin America* Palgrave Macmillan.
- Chatterjee, Partha (2001) "The nation in heterogeneous time"; *Indian Economic Social History Review*; 38: 399-418
- Ciampolini, Francisco (2011) "La Suprema Corte de Brasil legaliza la Unión Civil entre Homosexuales"; *Amnistía Internacional*; Pulished on May 8th; available in

<http://derechos.amnestyusa.org/uncategorized/la-suprema-corte-de-brasil-legaliza-la-union-civil-entre-homosexuales/> Last accessed July 28th 2014

- Clark, David (1975) ‘Judicial Protection of the Constitution in Latin America’ in *Hastings Constitutional Law Quarterly*, 2: 405-442.
- Comaroff, John and Jean Comaroff (2006) ‘Law and Disorder in the Postcolony, an Introduction’ in John Comaroff and Jean Comaroff (eds.) *Law and Disorder in the Postcolony*, Chicago and London: University of Chicago Press, pp. 1-56.
- Comité de Liberación 25 de Noviembre AC/Asociación de Abogados Democráticos, ANAD (2009) *Memoria, ¡Justicia para Oaxaca!. Encuentro por la Justicia y contra la Impunidad. Los casos ante la SCJN*. November 18th 2009, Oaxaca.
- Connolly, William E. (1987) *Politics of Ambiguity*; Madison and London: The University of Wisconsin Press
- Cook, Rebecca J., and Mahmoud F. Fathalla (1996) Advancing reproductive rights beyond Cairo and Beijing, in *International Family Planning Perspectives*, 22(3), pp. 115-121.
- Cooper, Davina (2001) ‘Equality and the socio-legal space for same-sex marriage’ in Robert Wintemure and Mads Andenæs (eds.) *Legal Recognition of same sex partnerships; A study of National, European and International Law*; Oxford and Portland: Hart Publishing; 75-96.
 - (2006) ‘Active citizenship and the governmentality of local lesbian and gay politics’; *Political geography*; 25 (8); 921-943
 - (2007) ‘Speaking Beyond Thinking. Citizenship, Governance and Lesbian and Gay Politics’ in Vanessa E Munro and Carl F. Stychin (eds.) *Sexuality and the Law. Feminist Engagements*; Oxon: Routledge Cavendish; 171-200.
 - (2014) *Everyday Utopias: The Conceptual Life of Promising Spaces*; Durham: Duke University Press.
- Cornell, Drucilla (1995) *The imaginary domain; Abortion, pornography & sexual harassment*; Routledge: London and New York.
- Corrales, Javier (2010) ‘Latin American Gays: The Post-Left Leftists’; *Americas Quarterly*; <http://www.americasquarterly.org/gay-rights-Latin-America> Last accessed July 3rd 2014.
- (2011) Brazil’s Recognition of Same-Sex Unions; *Americas Quarterly*; <http://www.americasquarterly.org/node/2528> Last accessed June 30th 2014.

- Corrales, Javier, and Mario Pecheny (eds.) (2010) *The Politics of Sexuality in Latin America; A Reader on Lesbian, Gay, Bisexual, and Transgender Rights*, Pittsburgh, University of Pittsburgh Press
 - (2010b) “Six reasons why Argentina legalize gay marriage first” in *Americas Quarterly*, available in <http://www.americasquarterly.org/node/1753> last accessed 15 February 2012.
- Corrêa, Sonia (1997) ‘From Reproductive Rights to Sexual Rights: Achievements and Future Challenges’ in *Reproductive Health Matters*, 5 (10) pp. 107-116.
 - (2003) ‘Los derechos sexuales y reproductivos en la arena política’ in *Aportes al Debate: Campaña por la Defensa de la Salud Reproductiva en Uruguay*; available in <http://www.mysu.org.uy/IMG/pdf/libro2.pdf> Last accessed Jan 12th 2013.
 - (2006) “Sexualities and Development: A story in pictures” in *IDS Bulletin*, Vol. 37, Number 5, pp. 12-20.
 - (2008) ‘Cruzando la línea roja: Cuestiones no resueltas en el debate sobre los derechos sexuales’ in Ivonne Szasz and Guadalupe Salas (eds) *Sexualidad, derechos humanos y ciudadanía*; Mexico: El Colegio de México: 25-55.
- Corrêa, Sonia and Gloria Careaga (2004) ‘Is Sexuality a non Negotiable Component of the Cairo Agenda?’ in DAWN, available in: http://www.dawnnet.org/uploads/documents/PAPER_SONIA_Is%20Sexuality%20a%20Non-Negotiable%20Component%20of%20Cairo%20Agenda_SRRH.pdf Last accessed Jan 12th 2013.
- Corrêa, Sonia and Rosalind Petchesky (2003) “Reproductive and sexual rights: a feminist perspective” in Carole R. McCann and Seung-kyung Kim (eds.) *Feminist Theory Reader: local and global perspectives*, London” Routledge, pp. 88-102.
- Corrêa, Sonia, Rosalind Petchesky and Richard Parker (2008) *Sexuality, Health and Human Rights*, London and New York: Routledge.
- Cossío, José Ramón (2002) *La teoría constitucional de la Suprema Corte de Justicia*, México: Fontamara.
- Curtis, Christian (2006) ‘Judicial Enforcement of Social Rights: Perspectives from Latin America’ in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.) *Courts and social Transformation in New Democracies. An Institutional Voice for the Poor?*, Cornwall, Ashgate, pp: 167-184

- (2008) 'Reyes desnudos. Algunos ejes de caracterización de la actividad política de los tribunales' in Miguel Carbonell, Héctor Fix-Fierro and Rodolfo Vázquez (eds.) *Jueces y Derecho. Problemas contemporáneos*; México: Porrúa/UNAM; 389-417
- Couso, Javier (2004) "Consolidación Democrática y Poder Judicial: los riesgos de la judicialización de la política"; *Revista de Ciencia Política*; 24: 29-48.
 - (2005) 'The judicialization of Chilean Politics: The rights revolution that never was'; in Sieder, Rachel, Line Schjolden and Alan Angell (eds.) *The Judicialization of Politics in Latin America*, New York: Palgrave MacMillan; 105-129.
 - (2006) 'The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.) *Courts and social Transformation in New Democracies. An Institutional Voice for the Poor?*, Cornwall, Ashgate: pp. 61-79.
 - (2008) 'The judicialization of Chilean Politics: The Rights Revolution that never was' in Alan Angell et al. (eds.) *The judicialization of politics of Latin America* Palgrave Macmillan
 - (2010) 'The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America' in Javier Couso, Alexandra Hunneus and Rachel Sieder (eds.) *Cultures of Legality. Judicialization and Political Activism in Latin America*, New York: Cambridge University Press, pp. 141-160
- Couso, Javier, Alexandra Hunneus, and Rachel Sieder (2010) 'Cultures of Legality: Judicialization of Political Activism in Contemporary Latin America' in Javier Couso, Alexandra Hunneus, and Rachel Sieder (eds.) *Cultures of Legality; Judicialization and Political Activism in Latin America*, New York: Cambridge University Press: 2-21.
- Craske, Nikki and Maxine Molyneux (2002) 'The Local, the Regional and the Global: Transforming the Politics of Rights' in Nikki Craske and Maxine Molyneux (eds) *Gender and the Politics of Rights and Democracy in Latin America*, Hampshire and New York: Palgrave.
- Cuevas Gayoso, José Luis (2004) 'La costumbre jurídica de los Pueblos indígenas en la constitución del Estado de Veracruz, México (2000). De la norma a la praxis', in José Emilio Rolando Ordóñez Cifuentes (ed.) *La construcción del estado nacional: democracia,*

justicia, paz y Estado de derecho; Mexico: Instituto de Investigaciones Jurídicas de la UNAM, UNAM; pp. 25-58.

- Culbertson, Tucker and Jack Jackson (2009) 'Proper objects, different subjects and juridical horizons in radical legal critique' in Martha Albertson Fineman, Jack E. Jackson and Adam P. Romero (eds.) *Feminist and queer legal theory. Intimate encounters, uncomfortable conversations*, Surrey and Burlington: Ashgate; pp.135-152.
- Currah, Paisley (2009) 'The transgender rights imaginary' in Martha Albertson Fineman, Jack E. Jackson and Adam P. Romero (eds.) *Feminist and queer legal theory; intimate encounters, uncomfortable conversations*, Surrey and Burlington: Ashgate; pp. 245-257.
- Dagnino, Evelina (1998) 'Culture, Citizenship and Democracy; Changing Discourses and Practices in Latin American Left', in Sonia E. Alvarez, Evelina Dagnino and Arturo Escobar (eds) *Cultures of Politics/Politics of Cultures: Revisioning Latin American Social Movements*, Boulden, Colorado: Westview Press, pp. 33-64.
- Dakolias, Maria (1995) 'A Strategy for judicial reform: The Experience in Latin America' in *Virginia Journal of International Law*, 36 (1), pp. 167-231.
- Damsky, Issac Augusto (2006) 'La construcción del derecho a la salud en Argentina a partir de la internacionalización de los ordenamientos jurídicos' in David Cienfuegos Salgado and María Carmen Macías Vázquez (eds.) *Estudios en homenaje a Marcia Muñoz de Alba Medrano. Bioderecho, tecnología, salud y derecho genómico*, México DF: Universidad Nacional Autónoma de Mexico.
- Davis, Kevin E., and Michael Trebilcock (2008) "The Relationship between Law and Development: Optimists Versus Skeptics"; *American Journal of Comparative Law*; 56: 895
- De Arruda Jr., Edmundo Lima (1992) 'Reflexões sobre um ensino jurídico alternativo' in Amilton Bueno de Carvalho (Ed.) *Revista de Direito Alternativo n° 1*, São Paulo, Editora Acadêmica
- De Carvalho, Amilton Bueno (1992) *Magistratura y Derecho alternativo*; San Pablo: Acadêmica.
- De la Dehesa, Rafael (2007) 'Global Communities and Hybrid Cultures; Early gay and lesbian electoral activism in Brazil and Mexico' in *Latin American Research Review*, 42 (1); 29-51
 - (2010) *Queering the public sphere in Mexico and Brazil. Sexual rights in emerging democracies*; Durham and London: Duke University Press.

- De la Peña, Guillermo (2006) ‘A New Mexican Nationalism? Indigenous rights, constitutional reform and conflicting meanings of multiculturalism’; *Nations and Nationalism*; 12 (2); 279-302.
- De la Torre Rangel, Jesús Antonio (2006 [1984]) *El derecho como arma de liberación en América Latina. Sociología jurídica y uso alternativo del derecho* San Luis Potosí: CENEJUs, Facultad de Derecho de la Universidad Autónoma de San Luis Potosí/ Comisión Estatal de Derecho Humanos de San Luis Potosí.
 - (2006b) “Hermenéutica Analógica, Justicia y Uso Alternativo del Derecho”, en Epikeia, Derecho y Política, Revista Electrónica del Departamento de Ciencias Jurídicas de la Universidad Iberoamericana, León, No. 3, septiembre-noviembre, 2006. www.epikeia.leon.uia.mx
- De Lima Lopes, José Reinaldo (2006) ‘Brazilian Courts and Social Rights: a Case Study Revisited’ in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.) *Courts and social Transformation in New Democracies. An Institutional Voice for the Poor?*, Cornwall, Ashgate, pp: 185-210
- De Soto, Hernando (1998) “Protection of Property Rights and Civil Society”, in Edmundo Jarquin and Fernando Carrillo (eds.) *Justice Delayed: Judicial Reform in Latin America*; IADB.
- Derrida, Jacques (1989-1990) ‘Forde de Loi: le “fondement mystique de l’autorité”’ in *Cardozo Law Review*, 11: pp. 920-1045.
- Dezalay, Yves, and Bryant G. Garth (eds) (2002) *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. Chicago: University of Chicago Press
 - (2011) *Lawyers and the Rule of Law in an Era of Globalization*; London: Routledge.
- Diez, Jordi (2011) ‘Argentina: A queer tango between the Lesbian and Gay Movement and the State’ in Manon Tremblay, David Paternotte and Carol Johnson (eds.) *The Lesbian and Gay Movement and the State; Comparative Insights into a Transformed Relationship*; Farnham and Burlington: Ashgate; 13-25.
 - (2011) La trayectoria política del movimiento Lésbico-Gay en México; *Estudios Sociológicos; El Colegio de México*; XXIX, (86): pp.687-712
 - (2012) ‘Presidentialism and Policy-making in Latin America: The Case of Mexico’ in Jordi Diez and Susan Franceschet (eds.) *Comparative Public Policy*

in Latin America, Toronto, Buffalo and London: University of Toronto Press: 34-53

- Digby, Tom (ed.) (1998) *Men Doing Feminism (Thinking Gender)*; New York: Routledge.
- Dinerstein, Ana C. (2014) *The Politics of Autonomy in Latin America: The Art of Organising Hope*; Basingstoke: Palgrave Macmillan.
-
- Domingo, Pilar (1996) 'Rule of Law, Citizenship and Access to Justice in Mexico'. *Documentos de Trabajo No.57*. Mexico DF: CIDE.
 - (1999) 'Rule of Law, Citizenship and Access to Justice in Mexico' in *Mexican Studies / Estudios Mexicanos*, Vol. 15; No. 1, pp. 151-191.
 - (2004) 'Judicialization of politics or politicization of the judiciary? Recent trends in Latin America'; *Democratization*; 11(1), pp, 104-126.
 - (2005) 'Judicialization of Politics: The Changing Political Role of the Judiciary in Mexico' in Rachel Sieder, Line Schjolden and Alan Angell (eds.) *The Judicialization of Politics in Latin America*, New York: Palgrave Macmillan, 21-46.
 - (2006) 'Introduction' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.) *Courts and social Transformation in New Democracies. An Institutional Voice for the Poor?*, Cornwall, Ashgate, pp: 1-9
 - (2009) 'Rule of Law, Citizenship and Access to Justice in Mexico', *Mexican Studies/Estudios Mexicanos*, 15(1): 151-191.
 - (2010) 'Novel Appropriation of the Law in the Pursuit on Political Social Change in Latin America' in Javier Couso, Alexandra Huneeus, and Rachel Sieder (eds.) *Cultures of Legality; Judicialization and Political Activism in Latin America*, New York: Cambridge University Press: 254-278
- Domingo, Pilar and Rachel Sieder (eds.) (2001) *Rule of Law in Latin America: The International Promotion of Judicial Reform*, London: Institute of Latin American Studies, University of London.
- Dorsett, Shaunnagh and Shaun McVeigh (2007) 'Questions of Jurisdiction' in Shaun McVeigh (ed). *Jurisprudence of Jurisdiction*; Oxon and New York: Routledge-Cavendish.
- Dries-Daffner, Ingrid, Sandra G. García and Eileen A. Yam (2006) 'Abortion Opinion Research in Latin America and the Caribbean: A Review of the Literature' in *Sources in Family Planning*, Vol. 37, No 4. pp. 225-240.

- Duclos, Nitya (1991) 'Some complicating thoughts on same-sex marriage' in *Law and Sexuality*; 31(1)
- Dussel, Enrique (1986) *El derecho que nacedel pueblo*; Aguascalientes, Mexico: Centro de Investigaciones Regionales de Aguascalientes.
 - (1986) *Ética comunitaria*. Petrópolis: Vozes.
 - (1998) *Ética de la liberación en la Edad de la Globalización y de la Exclusión*; Madrid: Trotta; México; UNAM
- Eaton, Mary (1995) 'Homosexual unmodified: Speculations on law's discourse, race, and the constructions of sexual identity'; in Didi Herman and Carl Stychin (eds.) *Legal inversions; lesbians, gay men and the politics of law*; Philadelphia: Temple University Press; 46-73...
- Elizondo Mayer-Serra, Carlos, and Ana Laura Magaloni (2010) 'La forma es fondo: Cómo se nombran y cómo deciden los ministros de la Suprema Corte de Justicia de la Nación' in *Revista Mexicana de Derecho Constitucional*, No. 23, pp. 27-60.
- Elizondo, Carlos and Ana Laura Magaloni (2008) 'Cómo decide la corte' in *Nexos*, 367, pp. 57-63.
- Encarnación, Omar (2011) 'Latin America's Gay Rights Revolution' in *Journal of Democracy*, 22,2: 104-118
 - (2014) "High Courts Have Taken a Stand"; The New York Times, <http://www.nytimes.com/roomfordebate/2014/01/29/why-is-latin-america-so-progressive-on-gay-rights/why-latin-american-courts-favor-gay-rights>, last accessed June 24th 2014.
- Epp, Charles (1998) *The rights revolution. Lawyers, activist and Supreme Courts in comparative perspective*, Chicago-London: University of Chicago Press.
 - (2009) *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*; Chicago and London: The University of Chicago Press.
- Escalante Gonzalbo, Fernando. 2006. "México, fin de siglo." In José Antonio Aguilar Rivera et al. (eds) *Pensar en México*, Mexico: Fondo de Cultura Económica, pp. 19-36.
- Escobar, Arturo (1992) 'Culture, Economics and Politics in Latin American Social Movements. Theory and Research' in Arturo Escobar and Sonia E. Alvarez (eds.) *The Making of Social Movements in Latin America; Identity, Strategy and Democracy*; Boulder, San Francisco and Oxford: Westview Press; pp. 62 – 85.

- (1992b) ‘Imagining a Post-Development Era? Critical Thought, Development and Social Movements’ on *Social Text*, No. 31/32, pp. 20-56.
- Eskridge Jr., William (2001) ‘The ideological structure of the same-sex marriage debate (and some postmodern arguments for same-sex marriage) in Robert Wintemure and Mads Andenæs (eds.) *Legal Recognition of same sex partnerships; A study of National, European and International Law*; Oxford and Portland: Hart Publishing; 113-129
- Espinoza Saucedo, Guadalupe, Francisco López Barrenas and Abigail Zúñiga Balderas (2002) *Los pueblos indígenas ante la Suprema Corte de Justicia de la Nación*, Mexico: Centro de Orientación y Asesoría a Pueblos Indígenas, A.C. / Comisión Independiente de Derechos Humanos de Morelos / Convergencia Socialista.
- Espinoza Saucedo, Guadalupe, Yuri Escalante Betancourt, Ximena Gallegos Toussaint, Francisco López Bárcenas, and Abigail Zúñiga Balderas (2001) *Los derechos indígenas y la reforma constitucional en México*; México: Centro de Orientación y Asesoría a Pueblos Indígenas, A.C./ Ce-Acatl / Redez.
- Esquirol, Jorge L. (2003) ‘Continuing Fictions of Latin American Law’; *Florida Law Review*; 55: 41-114.
 - (2009) ‘Writing the Law of Latin America’, *George Washington International Law Review* 40: 693-732.
 - (2011) "The Turn to Legal Interpretation in Latin America"; *American University International Law Review*; 26 (4): 1031-1072.
 - (2012) ‘The “Three Globalizations” in Latin America’; *Comparative Law Review*; 3 (1): 1-12.
- Evans, David T. (1993) *Sexual Citizenship: The Material Construction of Sexualities*; London: Routledge
- Facio, Alda (1995) “Por qué soy feminista” in Lorena Aguilar, Mitzi Barley et.al. (eds) *¿Feminismo en Costa Rica? Testimonios, Reflexiones, Ensayos*, San José: C.R. Editorial Mujeres, pp. 139-157.
 - (1999) “Hacia otra Teoría Crítica del Derecho”, in Lorena Fries and Alda Facio (eds.): *Género y Derecho*; La Morada, Santiago de Chile: LOM Ediciones
 - (2000) in Gioconda Herrera (ed). *Las fisuras del patriarcado, Reflexiones sobre Feminismo y Derecho*; Quito: FLACSO; 15-43
- Falcão, Joaquim A (ed.) (1984) *Conflicto de propiedad - Invasiones urbanas*; Rio de Janeiro: Forense.

- Ferrajoli, Luigi (2006) 'Pasado y futuro del Estado de Derecho', in Miguel Carbonell (ed) *Teoría del neoconstitucionalismo. Ensayos escogidos*. Madrid: Trotta/UNAM; pp. 13-29
- Ferraz Júnior, Tércio Sampaio (1985) *Constituinte: assembléia, processo, poder*; São Paulo: Editora Revista dos Tribunais.
- Ferree, Myra Marx (2003) "Resonance and radicalism: Feminist abortion discourses in Germany and the United States" in *American Journal of Sociology*, 109 (2), pp. 304-344.
- Ferrer Mac-Gregor, Eduardo (2010) "Amparo colectivo en México: Hacia una reforma constitucional y legal". En: Eduardo Ferrer Mac-Gregor, Y Danés Rojas, E., (eds.) *La protección orgánica de la constitución. Memorias del III Congreso mexicano de Derecho procesal Constitucional*, México, D.F.: IIJ-UNAM: 45-86
- Ferrer Mac-Gregor, Eduardo, and Rubén Sánchez Gil (2009) *Efectos y contenidos de las sentencias en acción de inconstitucionalidad; Análisis teórico referido al caso "Ley de Medios"*, México Df: Instituto de Investigaciones Jurídicas.
- Ferreyra, Raúl Gustavo (2004) "Poder, Democracia y Configuración Constitucional" in *Cuestiones Constitucionales: Revista Mexicana de Derecho Constitucional*, no. 11, pp. 30-31 Available in <http://www.juridicas.unam.mx/publica/rev/cconst/cont/11/ard/ard3.htm> last accessed 13th september 2011
- Figari, Carlos (2010) "El movimiento LGBT en América Latina: institucionalizaciones oblicuas", in Astor Massetti, Ernesto Villanueva, and Marcelo Gómez (eds) *Movilizaciones, protestas e identidades colectivas en la Argentina del bicentenario*; Buenos Aires: Nueva Trilce. 225-240
- Fineman, Martha Albertson (1995) *The neutered mother, the sexual family, and other twentieth century tragedies*, New York: Routledge.
- Finkel, Jodi (2003) 'Supreme Court Decisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court'; *Journal of Latin American Studies*; 35(4); 777-799.
 - (2005) 'Judicial Reform as Insurance Policy: Mexico in the 1990s' in *Latin American Politics and Society*, 47,1: 87-113.
- Fiss, Owen (1993) 'The Rights Degree of Independence' in Irwin P. Stotzky (ed.) *Transition to Democracy in Latin America: The Role of the Judiciary*, Boulder, San Francisco and Oxford: Westview Press: pp. 55-72
 - (2000) 'The autonomy of Law'; paper presented in the *Seminar SELA Seminario en Latinoamérica de Teoría Constitucional y Política*; available in

http://www.law.yale.edu/documents/pdf/Fiss_The_Autonomy_of_Law.pdf Last accessed September 8th 2014.

- Fitzpatrick, Peter (2007) 'Is Humanity Enough? The Secular Theology of Human Rights'; *Law, Social Justice and Global Development*; 1, 10
- Fix Fierro, Héctor (1995) 'La reforma judicial de 1994 y las acciones de inconstitucionalidad' in *Revista del Instituto de Documentación e Investigación Jurídicas de la Facultad de Derecho de la Universidad Panamericana*, no. 13, special issue. Available in http://works.bepress.com/hector_fix_fierro/22/ last accessed in January 2nd 2012.
 - (2003) 'Judicial Reform in Mexico: What's Next?' in Eric G. Jensen and Thomas C. Heller (eds) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford: Stanford University Press.
 - (2003b) 'La reforma judicial en México: ¿De dónde viene? ¿Hacia dónde va?' available in <http://www.juridicas.unam.mx/publica/librev/rev/refjud/cont/2/rjf/rjf15.pdf> Last accessed Dec 29th 2011. English translation published as 'Judicial Reform in Mexico: What Next?' in Eric g. Jensen and Thomas C. Heller (eds.) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*; Stanford: Stanford University Press.
- Fix Zamudio, Héctor (1981) 'The Writ of Amparo in Latin America' in *Lawyer of the Americas*, 13, 3, pp. 361-391.
 - (1994) 'Jurisdicción constitucional y protección de los derechos fundamentales en América Latina' in *Contribuciones*, XI, No. 2, pp. 84 y ss.
- Flores, Imer B. (2006) 'Sobre las repuestas (in)correctas en el derecho: A propósito del "desafuero" de Andres Manuel López Obrador'; *Cuestiones Constitucionales.Revista Mexicana de Derecho Constitucional*; 14: 253-382.
- Foster, David William (2008) 'El Estudio De Los Temas Gay En América Latina Desde 1980'; *Revista Iberoamericana*, LXXIV (225), PP. 923-941.
- Foucault, Michel (1981) "De l'amitié comme mode de vie (interview with R. de Ceccaty, J. Danet and J. Le Bitoux)", *Gai Pied*, 25, pp. 38-39. Digital version available in <http://libertaire.free.fr/MFoucault174.html> Last accessed March 21st 2014.
- Frampton, Caelie, Gary Kinsman, A.K. Thompson, and Kate Tilleczek. (2006) 'Social Movements/Social Research: Towards Political Activist Ethnography'; in Caelie Frampton,

Gary Kinsman, A.K. Thompson, and Kate Tilleczek (eds.) *Sociology for Changing the World: Social Movements/Social Research*; Halifax: Fernwood Publishing.

- Franke, Katherine M. (2012) 'Dating the State: The Moral Hazards of Winning Gay Rights'; *Columbia Human Rights Law Review*, 49(1); pp. 1-46
- Fraser, Nancy (1997) *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition*. New York: Routledge.
- Freire, Paulo (1985) *The Politics of Education: Culture, Power and Liberation*, trans. Donaldo Macedo; Westport: Bergin & Garvey Paperback
 - (1992) *Pedagogía de la esperanza. Un reencuentro con la pedagogía del oprimido*; Mexico: Siglo XXI Ed.
 - (2005 [1970]) *Pedagogy of the Oppressed*; translated by Myra Bergman Ramos; New York and London: Continuum
- Friedman, Lawrence (1975) *The Legal System: a social Science Perspective*; New York: Rusell Sage Foundation.
- Friedman, Lawrence and Harry N. Scheiber (1996) *Legal Culture and the Legal Profession*; Voulder: Westview Press.
- Friedman, Lawrence M., and Rogelio Pérez Perdomo (eds.) (2003) *Legal Cultures in the Age of Globalization*. Stanford: Stanford University Press.
- Fries, Lorena (2000) "Los derechos humanos de las mujeres: aportes y desafíos"; in Gioconda Herrera (ed) *Las fisuras del patriarcado. Reflexiones sobre feminismo y derecho*. Ecuador: FLACSO-CONAMU; 45-64
- Fruhling, Hugo (1992) "Political Culture and Gross Human Rights Violations in Latin America" in An-Na'im, Abdullahi Ahmed (ed.) *Human Rights in Cross-Cultural Perspectives: A quest for consensus*, Philadelphia: University of Pennsylvania Press pp 253-275
- Fudge, Judy, and Harry Glasbeek (1992) "The Politics of Rights: a Politics with Little Class"; *Social & Legal Studies* 1(1):45-70.
- Gandler, Estefan (2005) ¿Por qué el ángel de la historia mira hacia atrás? In Bolívar Echeverría (ed) *La mirada del ángel: en torno a las tesis sobre la historia de Walter Benjamin*; Mexico: Ediciones Era/UNAM: 45-88
- Garcia Abreu, Anabela; Isabel Noguera, and Karen Cowgill (2004) *El VIH/SIDA en países de América Latina. Los retos futuros*; Washington, Organización Panamericana de la Salud/Banco Mundial.

- García Canclini, Néstor (2005) *Hybrid Cultures. Strategies for Entering and Leaving Modernity*; translated by Christopher L. Chiappari and Silvia L. López Minneapolis: University of Minnesota Press.
- García Del Castillo, Rodolfo (1996) “Los gobiernos locales en México ante el Nuevo Federalismo”; *Política y Cultura*, 7: 97-122
- García García, Raymundo (2013) ‘Del Institucionalismo Histórico al Neoinstitucionalismo en la Docencia e Investigación del Constitucionalismo Mexicano’; in *Constitucionalismo, dos siglos de su nacimiento en América Latina*; Mexico: Instituto de Investigaciones Jurídicas UNAM. Available in <http://biblio.juridicas.unam.mx/libros/7/3455/3.pdf> Last accessed April 5th 2014.
- García Villegas, Mauricio (1993) *Eficacia simbólica del derecho*, Bogotá, Universidad de los Andes.
 - (2000) ‘Estado, derecho y crisis en Colombia’; *Estudios Políticos*; 17: 11-44
 - (2001) ‘Constitucionalismo Aspiracional: Derecho, Democracia y Cambio Social en América Latina’ *análisis político*; n° 75: 89 – 110.
 - (2002) ‘Law as hope. Constitutions, courts and social change in Latin America’; *Wisconsin International Law Journal*, 20(2); 352-370.
 - (2002b) ‘Notas preliminares para la caracterización del derecho en América Latina’; *El otro derecho*; 26-27: 13-38.
 - (2003) ‘Symbolic Power without Symbolic Violence ? Critical Comments on Legal Consciousness Studies in USA’ in *Droit et société*, 1 n°53, p. 137-163.
 - (2012) ‘Constitucionalismo aspiracional: Derecho, democracia y cambio social en América Latrina’, *Análisis Político*, 75; 89-110
- García Villegas, Mauricio (ed.) (2010) *Normas de papel; la cultura del incumplimiento de reglas*; Bogotá: Siglo del Hombre.
- García Villegas, Mauricio, and César A.Rodríguez (2001) “Notas Preliminares para la Caracterización del Derecho en América Latina” working paper for the workshop “Bases para la construcción de una sociología jurídica latinoamericana”. Instituto Internacional de Sociología Jurídica. Oñati, Spain, July 16 and 17.
 - (2003) ‘Law and Society in Latin America: Toward the Consolidation of Critical Sociolegal Studies’; *Beyond Law*; 9(26); 11-57.
- Garcia, Jonathan and Richard Parker (2006) ‘From global discourse to local actions: the makings of a sexual rights movement’; *Horizontes Antropológicos*, 12(26): pp. 13–42.

- Gargarella, Roberto (1993) ‘Judicial Power and Three Conceptions of Impartiality; in Irwin P. Stotzky (ed.) *Transition to Democracy in Latin America: The Role of the Judiciary*, Boulder, San Francisco and Oxford: Westview Press: pp. 107-124
 - (2006) ‘Theories of Democracy, the Judiciary and Social Rights’ in Roberto Gargarella Pilar Doming and Theunis Roux (eds.) *Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor?;* Hampshire and Burlington: Ashgate; 13-34.
 - (2010) *Los fundamentos legales de la desigualdad. El constitucionalismo en America (1776-1860)*; Buenos Aires, Siglo XXI.
 - (2013) *Latin American Constitutionalism, 1810-2010; The Engine Room of the Constitution;* Oxford: Oxford University Press.
 - (2013b) “Nuevo Constitucionalismo Latinoamericano y Derechos Indígenas. Una Breve Introducción”; *Boletín Onteaiken*, No.15
- Gargarella, Roberto and Christian Curtis (2009) ‘El Nuevo constitucionalismo latinoamericano: promesas e interrogantes’; *CEPAL -Políticas sociales*
- Gargarella, Roberto, Pilar Domingo and Theunis Roux (2006) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?;* Aldershot: UK and Burlington, VT: Ashgate.
- Gil Domínguez, Andrés (2008) “Neoconstitucionalismo y Última Palabra”, *La Ley*, 14-III-08
- Gil Villegas Montiel, Francisco (1996) ‘Cambio Constitucional en México durante el sexenio de Carlos Salinas de Gortari’ in *Foro Internacional*, 35, 1-2: 158-187.
- Gimeno, Beatriz, and Violeta Barrios (2009) ‘La institución matrimonial después del matrimonio homosexual’ in *Íconos. Revista de Ciencias Sociales*; 35: 19-30.
- GIRE Grupo de Información en Reproducción Elegida, A.C. (2009) *Constitucionalidad de la ley sobre aborto en la Ciudad de México*, México DF, GIRE, available in http://www.gire.org.mx/publica2/ConstitucionalidadAbortoCiudad_TD8.pdf last accessed May 11th 2011.
 - (2011), *Reformas aprobadas a las constituciones estatales que protegen la vida desde la concepción/fecundación 2008-2011*, updated until March 14th 2011. Available in http://www.gire.org.mx/publica2/ReformasAbortoConstitucion_Marzo14_2011.pdf last accessed June 10th 2011.

- Giroux, Henry A., and Peter McLaren (1997) 'Paulo Freire, Postmodernism, and the Utopian Imagination: A Blochian Reading', in Jamie Owen Daniel and Tom Moylan (eds.) *Not Yet. Reconsidering Ernst Bloch*; London and New York: Verso: 138-162.
- Gloppen, Siri (2008) 'Public Interest Litigation, Social Rights and Social Policy'; in Anis Ahmad Dani and Arjan de Haan (eds.) *Inclusive States. Social Policy and Structural Inequalities*; Washington D.C.: World Bank; 343-368
- Gloppen, Siri, Roberto Gargarella and Elin Skaar (2003) 'Introduction: the accountability function of the courts in new democracies'; *Democratization*, 10(4), 1-6.
- Gloppen, Siri, Roberto Gargarella and Elin Skaar (eds.) (2004) *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*; London: Frank Cass Publishers
- Goirand, Camille (2009) 'Analysing Social Movements: A Comparison of European and Latin-American Approaches since the 1970s', Documentos CIDOB, No. 30, Barcelona: Fundación CIDOB.
- Goldstein, Daniel M. (2007) 'Human Rights as Culprit, Human Rights as Victim: Rights and Security in the State of Exception' in Mark Goodale and Sally Engle Merry (eds.) *The Practice of Human Rights. Tracking Law Between the Global and the Local*, Cambridge: Cambridge University Press: 49-77.
- Gómez, Eduardo J. (2010) 'Friendly government, cruel society: AIDS and the politics of homosexual strategic mobilization in Brazil' in Javier Corrales and Mario Pecheny (eds.) *The politics of sexuality in Latin America*; Pittsburgh: University of Pittsburg Press; pp. 233-250.
- Gomez, Manuel (2010) 'Political activism and the Practice of Law in Venezuela' in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds.) *Cultures of Legality: Judicialization and Political Activism in Latin America*; New York: Cambridge University Press; pp.182-206
 - (2011) 'Greasing the squeaky wheel of justice; Networks of Venezuelan lawyers from the pacted democracy to the Bolivarian Revolution' in Yves Dezalay and Bryant Garth (eds.) *Lawyers and the Rule of Law in an Era of Globalization*; New York: Routledge; pp. 19-38.
- Góngora Pimentel, Genaro David (2007) "La justicia constitucional veracruzana en la transformación del Nuevo federalismo mexicano", Lecture dictated

- González de la Vega, Geraldina (2011) “Los derechos que vienen” in *Sinembargo.mx* <http://www.grupopolitico.com/2011/02/los-derechos-que-vienen-geraldina.html> last accessed January 25th 2012.
- González Ocampo, Ezequiel (2013) ‘Speaking with an elite accent: human rights and the "masses"’; in *Open Democracy*; <http://www.opendemocracy.net/openglobalrights/ezequiel-gonz%C3%A1lez-ocantos/speaking-with-elite-accent-human-rights-and-masses> Last accessed Jan 30th 2014.
- Goodale, Mark (2006) “Ethical Theory as Social Practice” *American Anthropologist*, 108 (1), pp. 25–37
- Goodrich, Peter (1996) *Law in the Courts of Love. Literature and other minor jurisprudences*; London: Routledge
- Grimes, Daniel A., Janie Benson, Susheela Singh, Mariana Romero, Bela Ganatra, Friday E Okonofua, Iqbal H Shah (2006) “Unsafe abortion: the preventable pandemic” in *Lancet*, Oct; 65-76.
- Gross, Aeyal (2010) ‘Israeli LGBT politics between queerness and homonationalism’, available in <http://bullybloggers.wordpress.com/2010/07/03/israeli-glb-t-politics-between-queerness-and-homonationalism/> last accessed April 17th 2012
 - (2013) ‘Post/Colonial Queer Globalisation and International Human Rights: Images of LGBT Rights’; *Jindal Global Law Review*; 4(2), 98-130.
- Gruskin, Sofia (2000) ‘The Conceptual and Practical Implications of Reproductive and Sexual Rights: How Far have we Come?’ in *Health and Human Rights*, 4(2), pp. 1-6.
- Haar, Gemma van der (2005) “El movimiento zapatista de Chiapas: dimensiones de su lucha” in *LabourAgain*, IISH; available in <http://www.iisg.nl/labouragain/documents/vanderhaar.pdf> last accessed January 2nd 2012.
- Haas, Liesl (2005) ‘Feminist Policy-making in Latin America’ Paper presented at “When Women Gain, so does the World,” IWPR’s Eighth International Women’s Policy Research Conference.
- Hall, Peter A.; and Rosemary C. T. Taylor (1996) ‘Political Science and the Three New Institutionslisms’; *Political Studies*; 44: 936-57.
- Halley, Janet (2001) ‘ Recognition, rights, regulation, normalization: rhetorics of justification in the same-sex marriage debate’ in Robert Wintemure and Mads Andenæs (eds.) *Legal Recognition of same sex partnerships; A study of National, European and International Law*; Oxford and Portland: Hart Publishing; 91-112.

- Hartsock, Nancy (1983) *Money, Sex, and Power: Toward a Feminist Historical Materialism*, Boston: Northeastern University Press
- Harvey, David (2000) *Spaces of Hope*; Berkeley: University of California Press
- Herman, Didi (1990) 'Are we Family?: Lesbian Rights and Women's Liberation' in *Osgoode Hall Law Journal*, 28, 790-815.
- Hernández Castillo, Rosalva Aída (2004) 'Entre el etnocentrismo feminista y el esencialismo étnico. Las mujeres indígenas y sus demandas de género'; in *Debate Feminista*; 12 (24); pp. 206-229.
- Hernández Navarro, Luis (1998) 'Serpientes y escaleras: los avatares de la reforma constitucional sobre derechos y cultura indígena' in Luis Hernández Navarro and Raúl Vera Herrera (eds.) *Acuerdos de San Andrés*, Mexico: Ediciones ERA.
- Hernández, Luis (1991) "Respuestas campesinas en la época del neoliberalismo"; *El Cotidiano*; 39. Available in <http://ceccam.org/sites/default/files/Respuestas%20Campesinas%20en%20la%20Epoca%20del%20Neoliberalismo.pdf> Last accessed December 30th 2013.
- Herrera Flores, Joaquín (1985) 'A proposito de la fundamentacion de los derechos humanos y de la interpretación de los derechos fundamentales' *Revista de Estudios Políticos (Nueva Época)*; 45: 177-212.
 - (2000). "Las lagunas de la ideología liberal: El caso de la Constitución Europea". in Joaquín Herrera (Ed.) *El vuelo de Anteo. Derechos humanos y crítica de la razón liberal*. Bilbao: Editorial Desclée de Brouwer.
 - (2010) 'Los derechos humanos en el contexto de la globalización: Tres precisiones conceptuales' in David Sánchez Rúbio, Joaquín Herrera Flores, Salo de Carvalho (eds.) *Direitos humanos e globalização. Fundamentos e possibilidades desde a Teoria Crítica*; Porto Alegre: Anuário Ibero-americano de Direitos Humanos/Edipucra 72-109.
- Herrera Flores, Joaquín, and David Sánchez Rubio (1993) 'Aproximación al derecho alternativo en Iberoamérica'; *Jueces para la democracia*; 20(3): 87-93.
- Herrera, Joaquín (1987) 'Reflexiones teóricas sobre el uso contemporáneo del derecho natural como método'; *Doxa*, 4.
- Hinojosa, Claudia (2007) 'challenging an old (and false) dilemma: Economic (and sexual) justice revisited' *Thought paper: Toward a Vision of Sexual and Economic Justice*,

Barnard College. Available in <http://bcrw.barnard.edu/justice/papers/hinojosa.pdf> Last accessed June 5th 2013.

- Hirschl, Ran (2006) ‘The New Constitution and the Judicialization of Pure Politics Worldwide’; *Fordham Law Review*; 75; 721-753
- hooks, bell (2000) *Feminism is for everybody: Passionate Politics*; Cambridge, Ma: South End Press.
- Hull, Kathleen E. (2006) *Same-sex marriage; the cultural politics of love and law*, Cambridge and New York: Cambridge University Press.
- Human Rights Watch (2008) “Mexico’s National Human Rights Commission A Critical Assessment”; *Human Rights Watch*, 20(1)B. Available in http://www.hrw.org/sites/default/files/reports/mexico0208_1.pdf Last accessed April 16th 2014.
 - (2009) *Por El Mismo Camino, Por Caminos Diferentes: El activismo en torno a la orientación sexual y la identidad de género en el mundo*; HRW, available in <http://www.hrw.org/sites/default/files/reports/lgbt0509spwebwcover.pdf> Last accessed February 12th 2014.
- Huneeus, Alexandra, Javier Couso and Rachel Sieder (2010) ‘Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America’ in Couso et al. (eds.) *Cultures of Legality. Judicialization and Political Activism in Latin America*, New York: Cambridge University Press, pp. 3-21
- Huneeus, Alexandra (2010b) ‘Judging with a Guilty Conscience: The Chilean Judiciary’s Human Rights Turn’; *Law & Social Inquiry*; 35.
- Ibarra Olguín, Ana María, and Ana Laura Magaloni Kerpel (2008) “La configuración jurisprudencial de los derechos fundamentales. El caso del derecho constitucional a una defensa adecuada” in *Cuestiones constitucionales; Revista Mexicana de Derecho Constitucional*, No. 19. available in <http://www.juridicas.unam.mx/publica/rev/cconst/cont/19/ard/ard5.htm> Last accessed Feb 13th 2012.
- Ibarra Palafox, Francisco (2009) “El caso Lydia Cacho en la SCJN y la ponderación de la prueba ilícita” in *Revista Iberoamericana de Derecho Procesal Constitucional*, 12, pp. 251-260.
- Ingraham, Chrys (1999) *White Weddings: Romancing Heterosexuality in Popular Culture*; New York: Routledge

- Inter-American Bank of Development (2009) *Honouring the Past, Building the Future. Fifty Years of Development in Latin America and the Caribbean*; Washington D.C.: IDB.
- International Council of Human Rights Policy (2009) Sexuality and Human Rights. Discussion paper. Available in http://www.ichrp.org/files/reports/47/137_web.pdf Last accessed 22nd July 2014.
- Jackson, Peter (2011) 'Bangkok's early Twenty-First-Century Queer Boom', in Peter A. Jackson (ed.), *Queer Bangkok: Twenty-First-Century Markets, Media, and Rights*, Hong Kong University Press, Hong Kong China, pp. 17-42.
- Jaramillo Sierra, Isabel Cristina, and Tatiana Alfonso Siera (2008) *Mujeres, cortes y medios: la reforma judicial del aborto*, Bogotá: Universidad de los Andes and Siglo del hombre editores.
- Johnson, Rebecca, and Thomas Kuttner (2000) 'Treading on Dicey Ground; Citizenship and the politics of the rule of law' in Carl Stychin and Didi Herman (eds.) *Sexuality in the Legal Arena*, London: The Athlone Press, 181-193
- Jones, Gareth (1998)'Resistance and the Rule of Law in Mexico' *Development and Change*; 29: 499-523.
- Kapczynski, Amy (2005) 'Historicism, Progress, and the Redemptive Constitution,'" *Cardozo Law Review*; 26: 1041-1117
- Kapiszewski, Diana (2010) 'How Courts work: Institutions, Culture, and the Brazilian *Supremo Tribunal Federal*' in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds.) *Cultures of Legality: Judicialization and Political Activism in Latin America*; New York: Cambridge University Press; 51-77
- Kapiszewski, Diana and Matthew Taylor (2008) "Doing Courts Justice? Studying Judicial Politics in Latin America"; *Perspective on Politics*; 6: 741-67.
- Kapur, Ratna (2005) *Erotic Justice. Law and the New Politics of Postcolonialism*; London, Sydney and Portland, Oregon: Glasshouse Press
 - (2014) 'In the Aftermath of Critique We Are Not in Epistemic Free Fall: Human Rights, the Subaltern Subject, and Non-Liberal Search for Happiness'; *Law and Critique*; 25: 25-25.
- Kaufman, Michael (1994) 'Men, Feminism and Men's Contradictory Experiences of Power', in Harry Brody Michael Kaufman (eds.) *Theorizing Masculinities*, Thousand Oaks: Sage Publications, 1994, pp. 142-165

- Keck, Margaret, and Katherine Sikkink (1998) *Activist beyond borders: Advocacy networks in international politics*; Ithaca, N.Y.: Cornell University Press.
- Khan, Khalid S., Daniel Wojdyla, Lale Say, A Metin Gülmezoglu, Paul F A Van Look (2006) “WHO analysis of causes of maternal death: a systematic review” in *Lancet*, Apr, 367(9516):1066-74.
- Khanna, Akshay (2012) ‘Seeing Citizen Action through an “Unruly” Lens’; *Development*, 55(2); pp. 162-172.
- Kuntsman, Adi and Esperanza Miyake (eds.) (2008) *Out of Place: interrogating Silences in Queerness/Raciality*, York: Raw Nerve Books.
- Lalor, Kay (2011) ‘Constituting sexuality: rights, politics and power in the gay rights movement’; *The International Journal of Human Rights*, 15(5); 683-699.
- Lamas, Marta (1997) ‘The Feminist Movement and the Development of Political Discourse on Voluntary Motherhood in Mexico’ in *Reproductive Health Matters*, Vol. 5, No, 10, pp. 58-67.
 - (2000) ‘De la identidad a la ciudadanía; *Cinta moebio* 7: 18-23.
 - (2001) "Movimiento feminista y discurso político: Los derechos sexuales y reproductivos en la construcción de una ciudadanía moderna", in Juan Figueroa, and Claudio Stern (eds); *Encuentros y desencuentros en la salud reproductiva. Políticas públicas, marcos normativos y actores sociales*, México: El Colegio de México.
 - (2008) ‘Género, desarrollo y feminismo en América Latina’; *Pensamiento iberoamericano*, pp. 133-152.
 - (2008b) ‘El aborto en la agenda del desarrollo en América Latina’; *Perfiles Latinoamericanos*; 16(31); pp. 65-93.
 - (2009) “La despenalización del aborto en México”, in *Nueva Sociedad* No 220, available in www.nuso.org, last accessed in April 22nd 2011
- Lamas, Marta, and Sharon Bissell (2000) ‘Abortion and Politics in Mexico: “Context is All”’ in *Reproductive Health Matters*, 8(16), pp. 10-23.
- Lambie Sarah, (2012) *Epistemologies of possibility: Social movements, knowledge production and political transformation*; Phd Dissertation, Kent Law School, University of Kent.

- Lara, Roberto, Raúl Mejía y Francisca Pou (2007) ‘¿De verdad queremos una corte redentora?’ in Rodolfo Vázquez (ed.) *Corte, jueces y política*, México DF: fontamara/Nexos, pp. 135-147.
- Lawrence-Lightfoot, Sara, and Jessica H. Davis (1997) *The art and Science of Portraiture*; San Francisco: Jossey-Bass.
- Lemaitre Ripoll, Julieta (2007) ‘Fetichismo legal: derecho, violencia y movimientos sociales en Colombia’, in *Derecho y pobreza*, Puerto Rico: Editores del Puerto, pp. 83-96. English Translation available in [http://www.law.yale.edu/documents/pdf/sela/JulietaLemaitre_English .pdf](http://www.law.yale.edu/documents/pdf/sela/JulietaLemaitre_English.pdf) Last visited May 12th 2011.
 - (2007b) ‘Legal Fetishism at Home and Abroad’; *Unbound journal of the Legal Left*, 3(6): 6-18.
 - (2008) ‘Legal fetishism: law, violence, and social movements in Colombia’; *Revista jurídica de la Universidad de Puerto Rico*; 77 (2): 331-344.
 - (2009) *El derecho como conjuro: fetichismo legal, violencia y movimientos sociales*, Bogotá: Siglo del Hombre editores/Uniandes.
 - (2009a) ‘El amor en tiempos de cólera: Derechos LGBT en Colombia’, in *Sur* available in http://www.surjournal.org/esp/conteudos/getArtigo11.php?artigo=11,artigo_04.htm; Last accessed Nov 9th 2011. English version available as (2009) ‘Love in the time of Cholera: LGBT rights in Colombia’ in *Sur. International journal on Human Rights*, English edition; 6, 11.
 - (2013) ‘Laicidad y resistencia: movilización católica contra los derechos sexuales y reproductivos en américa latina’ in *Colección de cuadernos Jorge Carpizo para entender y pensar la laicidad*; México DF, UNAM
- Lemaitre, Fernando Atria (1993) “El Tribunal Constitucional y la objeción democrática” *Revista chilena de derecho*, 20 (2-3) 367-378
- León, Magdalena (2001) “El empoderamiento de las mujeres: Encuentro del primer y tercer mundos en los estudios de género”; *La Ventana*; 13: 94-106.
- Levitas, Ruth (2013) *Utopia as Method: The Imaginary Reconstitution of Society*; Houndmills: Palgrave Macmillan.
- Lind, Amy (2003) ‘Gender and Neoliberal States: Feminist Remake the Nation in Ecuador’ in *Latin American Perspectives*, Vol. 30, No. 1, pp. 181-207

- (2012) "Intimate Governmentalities, the Latin American Left, and the Decolonial Turn," *feminists@law*, 2(1). Available in <http://journals.kent.ac.uk/index.php/feministsatlaw/issue/view/5> Last accessed July 3rd 2014.
- Lind, Amy and Sofia Argüello Pazmiño (2009) "Ciudadanías y Sexualidades en América Latina"; *Íconos. Revista de Ciencias Sociales*; 35, pp. 13-18
- Lodola, Germán and Margarita Corral 'Support for Same-Sex Marriage in Latin America' in Jason Pierceson, Adriana Piatti-Crocker and Shawn Schulenberg (eds.) *Same-sex marriage in Latin America: Promise and Resistance*; Maryland: Lexington Books: 41-52.
- López Ayllón, Sergio and Héctor Fix Fierro (2003) "'Faraway, So Close!'" The Rule of Law and Legal Change in Mexico, 1970-2000' in Lawrence M. Friedman and Rogelio Pérez-Perdomo (eds.) *Legal Culture in the Age of Globalization; Latin America and Latin Europe*, Stanford: Stanford University Press: 285-351.
- López Medina, Diego (2004) *Teoría Impura del Derecho: La transformación de la cultura jurídica latinoamericana*; Bogotá: Legis.
- López Ugalde, Antonio (2010) *Desempeño de la CNDH en la atención de quejas contra la Procuraduría General de la República*; Mexico City; Programa Atalaya.
- López, María Milagros (2001) 'Solidarity as an event, communism as personal practice, and disencounters in the politics of desire' in Ileana Rodríguez (ed.) *The Latin American Subaltern Studies Reader*. Durham and London: Duke University Press: pp. 64-80
- Love, Heather (2007) *Feeling Backward; loss and the politics of queer history*, Cambridge and London: Harvard University Press.
 - (2009) 'Emotional rescue' in David M. Halperin and Valerie Traub (eds.) *Gay shame*; Chicago and London: University of Chicago Press; 256-276
- Lozano, Genaro (2010) 'Same-sex relationships equality in Mexico' in Jason Pierceson, Adriana Piatti-Crocker and Shawn Schulenberg (eds.) *Same-sex marriage in the Americas: Policy innovation for same-sex relationships*; Maryland: Lexington Books, pp. 129-180.
 - (2013) "The Battle for Marriage Equality in Mexico, 2001-2011; in Jason Pierceson, Adriana Piatti-Crocker and Shawn Schulenberg (eds.) *Same-sex marriage in Latin America: Promise and Resistance*; Maryland: Lexington Books 151-166.
- Macdonald, Laura and Lisa Mills (2010) 'Gender, Democracy and Federalism in Mexico: Implications for Reproductive Rights and Social Policy' in Melissa Haussman, Marian

Sawer and Jill Vickers (eds.) *Federalism, Feminism and Multilevel Governance*, Farnham and Burlington, VT: Ashgate, 187 - 198

- Macklin, Ruth (1996) 'Ethics and Reproductive Health: A Principled Approach', *World Health Stat Q.*, 49 (2): 148-53.
- MacRae, Edward (1992) "homosexual Identities in Transitional Brazilian Politics", in Arturo Escobar and Sonia E. Álvarez (eds.) *The Making of Social Movements in Latin America: Identity, Strategy and Democracy*; Boulder: Westview.
- Madrazo Lajous, Alejandro (2006) 'Under the Radar. Infra-Constitutional Powers of the Executive: The Case of Tobacco Regulation in Mexico'. Panel presented in the Seminario en Latinoamérica de Teoría Constitucional y Política SELA, University of Yale. Available in http://www.law.yale.edu/documents/pdf/Under_the_Radar.pdf Last accessed Feb 14th 2012.
 - (2009a) "Derecho a decidir o derecho a la procreación" in *Derecho y Sexualidades*, SELA (Available in English in <http://bit.ly/gmsqwh> last accessed September 25th 2012)
 - (2009b) "The evolution of Mexico City's abortion laws: from public morality to women's autonomy" *International Journal of Gynecology and Obstetrics*, 106(3), pp. 266-269.
- Madrazo, Alejandro and Estefanía Vela (2011) 'The Mexican Supreme Court's (Sexual) Revolution?' in *Texas Law Review*, Vol. 89, Issue 7, pp. 1863-1895.
- Magaloni Kerpel, Ana Laura and Ana María Ibarra Olguín (2008) 'La configuración jurisprudencial de los derechos fundamentales. El caso del derecho constitucional a una defensa adecuada' in *Cuestiones Constitucionales*, No. 19, México: Instituto de Investigaciones Jurídicas, UNAM
- Magaloni, Ana Laura (2008) '¿Por qué la Suprema Corte no ha sido un instrumento para la defensa de los derechos fundamentales?' in Eduardo Ferrán y Arturo Saldívar (eds.) *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho. Tomo II, Tribunales Constitucionales y Democracia*, Mexico: UNAM-III: 271-289
 - (2011) 'La Suprema Corte y el obsoleto sistema de jurisprudencia constitucional' in *Documento de trabajo CIDE*, 57; Mexico, CIDE.
- Magaloni, Ana Laura and Arturo Zaldívar (2006) "El ciudadano olvidado", in *Nexos*, No 342, June, México, Ed. Nexos.

- Magaloni, Ana Laura, and Layda Negrete (2000) ‘Desafueros del poder: la política judicial de decidir sin resolver’ in *Trayectorias. Revista de Ciencias Sociales de la Universidad Autónoma de Nuevo León*, México, No. 2.
 - (2001) ‘El poder judicial y su política de decidir sin resolver’ in *Documento de trabajo CIDE*, 1. Mexico, CIDE
- Magaloni, Beatriz (2003) ‘Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico’ in Scott Mainwaring and Christopher Welna (eds.) *Democratic Accountability in Latin America*, Oxford Scholarship Online; pp 266-306.
- Malik, Waleed Haider (1996) “El desarrollo económico y la reforma judicial: experiencias internacionales e ideas para América Latina” in José Luis Soberanes et al. (eds.) *La reforma del estado. Estudios comparados*, México, Dirección General de Asuntos Jurídico de la Presidencia de la República-UNAM, Instituto de Investigaciones Jurídicas: pp. 91-102
- Mandel, Michael (1992) *The Charter of Rights and the Legalization of Politics in Canada*, Toronto, Thompson.
- María de Lourdes Souza, “Del uso alternativo del derecho al garantismo: una evolución paradójica”, en *Anuario de Filosofía del Derecho*, Tomo XV, Madrid, 1998, p.234.
- Marsiaj, Juan P. (2011) ‘Brazil: From AIDS to Human Rights’ in Manon Tremblay, David Paternotte and Carol Johnson (eds.) *The Lesbian and Gay Movement and the State; Comparative Insights into a Transformed Relationship*; Farnham and Burlington: Ashgate;57-71.
- Martínez, Yesenia (2008) ‘Las mujeres hondureñas y su incorporación en los derechos políticos y sociales’ en Yamile Delgado de Smith y María Cristina González (eds.), *Mujeres en el Mundo: Migración, género, trabajo, historia, arte y política*, Valencia, Venezuela: Universidad de Carabobo.
- May, Tim (1998) ‘Reflexivity in the age of reconstructive social science. Social Research Methodology’; 1 (1): 7–24
- McAdam, Doug (1996) “Conceptual Origins, Current Problems, Future Directions.” In Doug McAdam, John D. McCarthy, and Mayer N. Zald (eds.) *Comparative Perspectives on Social Movements*, Cambridge: Cambridge University Press; 23-40.
 - (1996) “Political opportunities: conceptual origins, current problems, future directions” in Doug McAdam, John D. McCarthy and Mayer N. Zald (eds.)

Comparative perspectives on social movements, Cambridge: Cambridge University Press.

- McAdam, Doug, John D. McCarthy, and Mayer Zald (1996) "Introduction: Opportunities, Mobilizing Structures, and Framing - Toward a Synthetic Comparative Perspective on Social Movements." In IDEM (eds.) *Comparative Perspectives on Social Movements*, Cambridge University Press: Pp. 1-20
- McAdam, Doug, Sidney Tarrow and Charles Tilly (2001) *Dynamics of Contention*; Cambridge: Cambridge University Press.
- McCann, Michael W. (1991) 'Legal Mobilisation and Social Reform Movements: Notes on Theory and its Application' in *Studies in Law, Politics and Society*, 11: 225-254.
 - (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Chicago: University of Chicago Press. (ed.)
 - (2006) *Law and Social Movements*, Hantsand Burlington: Ashgate.
- McNaughton, Heathe, Ellen M.H. Mitchell, and Marta María Blandón (2004) 'Should Doctors Be the Judges? Ambiguous Policies on Legal Abortion in Nicaragua'; *Reproductive Health Matters*, 12 (24, Supplement 1) 18-26.
- Medina Rosas, Andrea (2004) "Las y los jóvenes en Jalisco. Un análisis jurídico de sus derechos sexuales y reproductivos" working document, Elige, Red de Jóvenes por los Derechos Sexuales y Reproductivos; available in <http://issuu.com/eligeperla/docs/dsdrhistoria>, last accessed June 8th 2013.
- Méndez, Juan (1998) 'Partidos y Representatividad' in Ricardo Córdova Macías y Carlos Guillermo Ramos (eds.) *Partidos y elecciones en Centroamérica*; San Salvador, El Salvador :Fundaungo y Fundación Friedrich Ebert,
 - (1999) 'Institutional Reform, Including Access to Justice: Introduction' in Juan E. Méndez, Guillermo O'Donnell and Paulo Sérgio Pinheiro (eds.) *The (Un)Rule of Law and the Underprivileged in Latin America*; Notre Dame, IL: University of Notre Dame Press: 221-242.
- Méndez, Juan E., Guillermo O'Donnell and Paulo Sérgio Pinheiro (eds.) (1999) *The (Un)Rule of Law and the Underprivileged in Latin America*; Notre Dame, IL: University of Notre Dame Press.
- Menon, Nivedita (2007) 'Outing heteronormativity: nation, citizen, feminist disruptions', in Nivedita Menon (ed.) *Sexualities*; New Delhi, Women unlimited; 3-51.

- Merchant, David and Paul Rich (2003) 'Prospects for Mexican Federalism: Roots of the Political Issues'; *The Policy Studies Journal*; 31(4)
- Merino Acuña, Roger (2012) *Comparative Law from Below; The construction of a critical project in Comparative Legal Studies*; LAP Lambert Academic Publishing AG & Co KG
- Merry, Sally Engle (1988) 'Legal Pluralism' *Law & Society Review*; 22(5); 869-896
 - (1982) 'The Articulation of Legal Spheres' in Margaret Jean Hay and Marcia Wright (eds.) *African Women and the Law: Historical Perspectives*; Boston: Boston University African Studies Center; pp. 68-89.
 - (2006) *Human Rights and Gender Violence: Translating International Law into Local Justice*; Chicago: University of Chicago Press.
- Meyer David S., and Debra C. Minkoff (2003) "Conceptualizing Political Opportunity" *Social Forces* 82(4): 1457-1492.
- Meyer, David S. (2004) 'Protest and Political Opportunities' in *Annual Review of Sociology*. 30: pp. 125-45.
- Mignolo, Walter D. (2000) *Local histories/global designs: Coloniality, subaltern knowledge and border thinking*; Princeton: Princeton University Press.
 - (2005) *The Idea of Latin America*; Malden, Oxford and Victoria: Blackwell.
 - (2009) "Who Speaks for the 'Human' in Human Rights?"; Ana Forcinito, Raúl Marrero-Fente, and Kelly McDonough (eds.) *Hispanic Issues On Line 5.1. Human Rights in Latin American and Iberian Cultures: 7-24*. available in http://spanport.cla.umn.edu/publications/HispanicIssues/pdfs/MIGNOLO_HRLA_IC.pdf Last access Jan 1st 2013.
- Miller, Alice (1999) "Human Rights and Sexuality: First Steps Toward Articulating a Rights Framework for Claims to Sexual Rights and Freedoms"; *American Society of International Law*; 93; pp. 288-303
 - (2000) 'Sexual but not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights' in *Health and Human Rights*, 4(2), pp. 68-109
 - (2002) 'Las demandas por derechos sexuales' in *Derechos sexuales. Derechos reproductivos. Derechos humanos*; Comité de América Latina y el Caribe para la Defensa de los Derechos Humanos de la Mujer (Cladem): Lima.

- (2004) “Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection” in *Health and Human Rights*, 7 (2), pp. 16-47
- Miller, Geoffrey P. (1993) ‘Constitutional Moments, Precommitment, and Fundamental Reform: The Case of Argentina’; *Washington University Law Quarterly* (71): 1061-1086.
- Millett, Kate (1969) *Sexual Politics*, New York: Ballantine Books.
- Mills, Lisa, (2010) ‘Citizenship, Reproductive Rights, and Maternal Health in Mexico’; *Canadian Journal Of Development Studies/Revue Canadienne D’etudes du Développement*, 31 (3–4), 417–438.
-
- Miyazaki, Hirokazu (2002) ‘Economy of Dreams: Hope in Global Capitalism and Its Critiques’; *Cultural Anthropology*; 21 (2), pp. 147–172.
 - (2004) *The method of hope. Anthropology, philosophy, and Fijian Knowledge*; Stanford, California: Stanford University Press.
 - (2006) ‘Economy of Dreams: Hope in Global Capitalism and Its Critiques’; *Cultural Anthropology*; 21(2): 147-172.
- Mogrovejo, Norma (2000), *Un amor que no se atrevió a decir su nombre. La lucha de las lesbianas y su relación con los movimientos homosexual y feminista en América Latina*; Mexico: cdahl/Plaza Valdés
- Mogul, Joey L., Andrea J. Ritchie and Kay Whitlock (2011) *Queer (In)Justice: The Criminalization Of Lgbt People In The United States*; Beacon Press.
- Mohanty, Chandra Talpade (1988) “Under Western Eyes: Feminist Scholarship and Colonial Discourses”; *Feminist Review*; 30: 61-88.
- Molyneux, Maxine (1985) ‘Mobilization without Emancipation? Women's Interests, the State, and Revolution in Nicaragua’; *Feminist Studies*; 11(2): pp. 227-254
 - (1988) ‘The Politics of Abortion in Nicaragua: Revolutionary Pragmatism, or Feminism in the Realm of Necessity?’; *Feminist Review*, 29; pp. 114-132.
 - (2000) ‘Twentieth-Century State Formations in Latin America’ in Elizabeth Dore and Maxine Molyneux (eds.) *Hidden Stories of Gender and the State in Latin America*, Durham & London: Duke University Press, pp. 33-81
 - (2002) ‘Gender and the Silences of Social Capital: Lessons from Latin America’ in *Development and Change*, 33(2): 167-188.

- (2006) ‘Mothers at the Service of the New Poverty Agenda: Progres/Oportunidades, Mexico's Conditional Transfer Programme’; *Social Policy & Administration*; 40 (4): 425–449.
- Monsiváis, Carlos (2003) “Nosotros somos la puerta. Crónica de la marcha Zapatista” in *EZLN: Documentos y Comunicados, vol 5. La Marcha del Color de la Tierra*; Mexico City: Ediciones Era: 13-52.
- Moore, Henrietta L. (2011) *Still Life: Hopes, Desires and Satisfaction*; Cambridge: Polity Press.
- Morales Aché, Pedro (2008) ‘ Los derechos sexuales desde una perspectiva jurídica’ in Ivonne Szasz and Guadalupe Salas (eds.) *Sexualidad, derechos humanos y ciudadanía: Diálogos sobre un proyecto en construcción*, México DF: El Colegio de México; pp.137-184.
- Morales Ramírez, Arturo César (2007) ‘Facultad de investigación de la Suprema Corte de Justicia de la Nación’ in *Revista del Instituto de la Judicatura Federal*, 25: 119-146.
- Moran, Leslie (2004) ‘The Emotional Dimensions of Lesbian and Gay Demands for Hate Crime Reform’; *McGill Law Journal*; 49; 925-949
- Morineau, Marta (1997) ‘Aguas Blancas, estudio de un caso de aplicación del segundo párrafo del artículo 97 de la Constitución Política de los Estados Unidos Mexicanos’ in *Boletín Mexicano de Derecho Comparado*, 89
- Morris, Stephen D. (2009) ‘Contextualizing Corruption: Politics and the (un)Rule of Law in Mexico’; Paper presented at the Congress of the Latin American Studies Association, Rio de Janeiro, Brazil June 11-14, 2009.
- Mouffe, Chantal (2000 [1988]) ‘Hegemony and New Political Subjects: Toward a New Concept of Democracy’ in Kate Nash (ed.) *Readings in Contemporary Political Sociology*, Massachusetts and Oxford: Blackwell Publishers, pp. 295-309.
- Mouffe, Chantal and Ernesto Laclau (2001 [1985]) *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*; New York and London: Verso.
- Muñoz, José Esteban (2009) *Cruising Utopia. The Then and There of Queer Futurity*; New York and London: New York University Press.
- Natale, Alberto A. (2000) ‘La reforma constitucional argentina de 1994’ in *Cuestiones constitucionales*, 2, México: Universidad Nacional Autónoma de México: 219-237.
- Navia, Patricio and Julio Ríos Figueroa (2005) ‘The Constitutional Adjudication Mosaic of Latin America’ *Comparative Political Studies*; 38 (2): 189-217

- Nayar, Jayan (2013) 'The Politics of Hope and the Other-in-the-World: Thinking Exteriority'; *Law and Critique*, 24: 63-85.
- Negretto, Gabriel L. (2008) 'The Durability of Constitutions in Changing Environments: Explaining Constitutional Replacements in Latin America'; Working Paper # 350, The Helen Kellogg Institute for International Studies.
- Newton, David E. (2009) *Gay and Lesbian Rights: A Reference Handbook*, Santa Barbara, California: Greenwood publishing group.
- Nietzsche, Friedrich (2008) *On the Genealogy of Morals*; trans by Douglas Smith; Oxford and New York: Oxford University Press.
- Nino, Carlos Santiago (1989) 'Transition to Democracy, Corporatism and Constitutional Reform in Latin America'; *Miami Law Review*; 44, 129-164
- Novoa Monreal, Eduardo (2006 [1975]) *El derecho como obstáculo al cambio social*; Mexico, Buenos Aires and Madrid: Signo Veintiuno Editores.
- Nun, Jose (1987): "La teoría política y la transición democrática", in José Nun and Juan Carlos Portantiero (eds.) *Ensayos sobre la transición democrática en la Argentina*; Buenos Aires: Puntosur.
- O'Donnell, Guillermo (1977) 'Corporatism and the Question of the State' in James Molloy (ed.) *Authoritarianism and corporatism in Latin America*; Pittsburgh: University of Pittsburgh Press; 47-88
 - (1993) *Modernization and Bureaucratic Authoritarianism: Studies in South American Politics*, Berkeley: University of California.
 - (1996) "Otra Institucionalización" in Guillermo O'Donnell (ed.) *Contrapuntos*, Buenos Aires, Barcelona and México: Paidós.
 - (1999) 'Horizontal accountability and new polyarchies' in Andreas Schedler et al. (eds.) *the self-restraining state: Power and accountability in New Democracies*, Boulder and London: Lynne Rienner: 29-52.
 - (1999b) 'Horizontal Accountability in New Democracies' in Andreas Schedler, Larry Jay Diamond, and Marc F. Plattner (eds) *The self-restraining state: power and accountability in new democracies*; Boulder: Lynne Rienner Publishers; pp. 29-51
 - (1999c) 'On the state, democratization, and some conceptual problems: a Latin American view with glances at some postcommunist countries', in Guillermo

- O'Donnell (ed.) *Counterpoints: selected essays on authoritarianism and democratization*; Notre-Dame: University of Notre Dame Press; pp. 133-157.
- (2004) 'Accountability horizontal: la institucionalización legal de la desconfianza política' in *Revista Española de Ciencia Política*, 11: 11-31
 - (2005) 'Afterward' in Rachel Sieder, Line Schjolden, and Alan Angell (eds.) *The judicialization of Politics in Latin America*; New York: Palgrave MacMillan.
 - (2006) "On Informal Institutions, Once Again"; in Gretchen Helmke and Steven Levitsky (eds.) *Informal Institutions and Democracy: Lessons from Latin America*; John Hopkins University Press; 285-9
- Obando, Ana Elena (1997) "¿A qué tenemos derecho las mujeres?"; Paper presented to the Legislative Assembly of Costa Rica.
 - Offe, Claus (1985) *New Social Movements: Challenging the boundaries of International Politics*, in *Social Research* 52: pp. 817-68
 - Olson, Susan M. (1995) 'Comparing Women's Rights Litigation in The Netherlands and the United States' in *Polity*, 28, pp. 189-215
 - Oquendo, Angel (2008) 'Upping the Ante: Collective Litigation in Latin America'; *Columbia Journal of Transnational Law*; 47: 248-291.
 - Orozco Henríquez, Jesús (2007) 'Judicialización de la política y legitimidad judicial' in Rodolfo Vázquez (ed.) *Corte, jueces y política*, México DF: fontamara/Nexos, pp. 97-108
 - Ortega Ortiz Adriana (2005) "Women's fundamental rights perspective and the Statutory Defence for abortion based on health risks in Mexico", LLM Thesis, Faculty of Law, University of Toronto, Toronto, ON.
 - (2008) 'La autonomía de las mujeres y la perspectiva adversarial' in Juan A. Cruz Parcero and Rodolfo Vázquez (ed.) *Debates constitucionales sobre derechos de las mujeres*, Mexico: Suprema Corte de Justicia de la Nación; 183-199.
 - Ortega Ortiz, Adriana (ed.) (1999) *Derechos reproductivos de las mujeres. Un debate sobre justicia social en México*, México: Edamex, Universidad Autónoma Metropolitana
 - Ortega Ortiz, Reynanldo Yunuen (2010) 'El Partido de la Revolución Democrática y los Movimientos Sociales' in Ilán Bizberg and Francisco Zapata (eds.) *Los grandes problemas de México. IV. Movimientos sociales*; Mexico: COLMEX; 227-250

- Otto, Dianne (1996) “Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society”; *Human Rights Quarterly* 18(1); pp. 107-141.
- Ovalle Favela, José (2011) ‘Las controversias constitucionales y los órganos autónomos’ in *Revista Mexicana de Derecho Constitucional*, 25.
- Palacio, Germán (1993) *Pluralismo Jurídico*. Bogotá: IDEA/Universidad Nacional.
- Palma, Esperanza and Rita Balderas (2004) ‘El problema de las corrientes al interior del PRD’; *El Cotidiano*; 125: 63-67.
- Parker, Richard (1991) *Bodies, Pleasures, and Passions*; Boston: Beacon.
 - (1997) ‘Sexual rights: concepts and actions’ *Health and Human Rights*; 2 (3), pp. 31-37.
- Parker, Richard, Regina Maria Barbosa, and Peter Aggleton (eds.) (2000) *Framing the sexual subject: the politics of gender, sexuality and power*; Berkeley: University of California Press.
- Parrini, Rodrigo, and Ana Amuchástegui (2009) ‘Sujeto, sexualidad y biopoder: la defensa de los militares viviendo con VIH y los derechos sexuales en México’ in *Estudios Sociológicos*, 27, 81: 861-884.
- Parrini Roses, Rodrigo and Alejandro Brito Lemos (2012) *Crímenes de odio por homofobia: un concepto en construcción*; Mexico: Indesol, CDHDF, Letra S.
- Patel, Neha (2006) Talking about pleasure: how does language make a difference; in *Women in Action*; 1; pp. 66-74
- Patterjee, Partha (2001) “The nation in heterogeneous time”; in *The Indian Economic and Social History Review*; 38(4) 399-418.
- Pecheny, Mario (2010) ‘Political agents or vulnerable victims? Framing sexual rights as sexual health in Argentina’ in Peter Aggleton and Richard Parker (eds.) *Routledge Handbook of Sexuality, Health and Rights*; Oxon: Routledge. 359-369.
 - (2010b) ‘Sociability, Secrets, and Identities. Key Issues in Sexual Politics in Latin America’, in Javier Corrales and Mario Pecheny (eds.) *The Politics of Sexuality in Latin America; A Reader on Lesbian, Gay, Bisexual, and Transgender Rights*, Pittsburgh, University of Pittsburgh Press; pp. 132-134.
 - (2012) ‘Gender, Justice, and Neoliberal Transformations’; *Scholar and Feminist Online* (11.1-11.2). Available in <http://sfonline.barnard.edu/gender-justice-and-neoliberal->

[transformations/sexual-politics-and-post-neoliberalism-in-latin-america/#](#) Last accessed Feb 15th 2014.

- Pecheny, Mario and Rafael de la Dehesa (2011) “Sexualidades y Políticas en América Latina: un Esbozo para la Discusión” in Sonia Corrêa and Richard Parker (eds.) *Sexualidade e Política na América Latina: Histórias, Interseções e Paradoxos*, Rio de Janeiro: Sexuality Policy Watch. pp. 31-79.
- Pérez Luño, Antonio Enrique (2005) ‘Derechos humanos, Estado de Derecho y Constitución’, Madrid: Tecnos.
- Pérez Perdomo, Rogelio (2005) ‘Judicialization and Regime transformation: The Venezuelan Supreme Court’ in Rachel Sieder, Line Schjolden and Alan Angell (eds.) *The judicialization of politics in Latin America*, New York: Palgrave Macmillan, pp. 131-160.
- Pérez Perdomo, Rogelio, and Lawrence Friedman (2003) ‘Latin Legal Cultures in the Age of Globalization’ in Lawrence M. Friedman and Rogelio Pérez Perdomo (eds.) *Legal Culture in the Age of Globalization: Latin America and Latin Europe*, Stanford: Stanford University Press
- Peruzzotti, Enrique, and Catalina Smulovitz (eds.). (2006) *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies*; Pittsburgh, PA: University of Pittsburgh Press.
- Petchesky, Rosalind (1986) *Abortion and women’s choice. The state, sexuality, and reproductive freedom*; London: Verso.
 - (2000) ‘Sexual rights: inventing a concept, mapping an international practice’ in: Richard Parker; Rosa Maria. Barbosa, and Peter Aggleon (ed.). *Framing the sexual subject: the politics of gender, sexuality and power*; Berkeley: University of California Press. pp. 81-103.
 - (2000b) “Reproductive and Sexual Rights: Charting the Course of Transnational Women’s NGOs”; *United Nations Research Institute for Social Development; Occasional Paper No.8*.
 - (2000c) ‘Rights and Needs: Rethinking the Connection in Debates over Reproductive and Sexual Rights’ in *Health and Human Rights*, vol. 4, No. 2, pp. 17-29.
- Phillips, Oliver (2000) ‘Constituting the Global Gay. Issues of Individual Subjectivity and Sexuality in Southern Africa’; in Didi Herman and Carl Stychin (eds.) *Sexuality in the Legal Arena*; London: Athlone; pp. 17-34

- (2005) “A brief introduction to the relationship between sexuality and rights”. *Georgia Journal of International and Comparative Law*, 33 (2). pp. 451-466.
- Piatti-Crocker, Adriana (2013) ‘Diffusion of Same Sex Marriage Policies in Latin America’ in Jason Pierceson, Adriana Piatti-Crocker and Shawn Schulenberg (eds.) *Same-sex marriage in Latin America: Promise and Resistance*; Maryland: Lexington Books: 3-21
- Pierceson, Jason (2013) ‘Variations in the Judicialization of Same-Sex Marriage Politics in Latin America’ in Jason Pierceson, Adriana Piatti-Crocker and Shawn Schulenberg (eds.) *Same-sex marriage in Latin America : promise and resistance*; Plymouth: Lexington Books: 53-72
- Plácido, Elizabeth (2007) ‘An Inter-American Convention on Sexual Rights and Reproductive Rights, We’re Campaigning!’ in Lydia Alpízar Durán, Noël D. Payne and Anahi Russo (eds.) *Building Feminist Movements and Organizations, Global Perspectives*, London & New York: Zed Books, pp. 239-249.
 - (2010) *Challenging Religious Fundamentalisms in Mexico: The Separation of Church and State and the Reaffirmation of Women’s Reproductive Rights*; Washington, AWID and Catholics for a Free Choice.
- Poder Judicial de la Federación/Suprema Corte de Justicia de la Nación (2006) *Libro Blanco de la Reforma Judicial: una agenda para la Justicia en México*, Mexico: SCJN.
- Polikoff, Nancy (2008) *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law*; Boston: Beacon Press.
- Pou Giménez, Francisca (2010) ‘Género y Protección de Derechos en México: Virtualidades y Límites de la Jurisdicción Constitucional’ in Juan A. Cruz Parceró and Rodolfo Vázquez (eds.) *Debates Constitucionales sobre Derechos de las Mujeres*, México: Suprema Corte de Justicia de la Nación/Fontamara: 45-102.
 - (2011) ‘Justicia constitucional y protección de derechos en América Latina: el debate sobre la regionalización’ in César Rodríguez Garavito (ed.) *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, Argentina: Siglo XXI ed. 231-250.
- Pou Jiménez, Francisca (2009) ‘El aborto en México: el debate en la Suprema Corte sobre la normativa del Distrito Federal’ in *Anuario de Derechos Humanos*, Santiago: Centro de Derechos Humanos de la Universidad de Chile:137-152. Available in http://www.cdh.uchile.cl/media/publicaciones/anuarios/anuario05/6_Perspectivas_regionales/PerspectivasRegionales_FranciscaPou.pdf Last accessed October 19th 2011.

- Prieto Sanchís, Luis (1995) 'Igualdad y minorías' in *Derechos y libertades: revista del Instituto Bartolomé de las Casas*, II(5); pp. 111-143.
 - (2006) "El constitucionalismo de los derechos"; in Miguel Carbonell (ed) *Teoría del neoconstitucionalismo. Ensayos escogidos*. Madrid: Trotta/UNAM
- Prieto, Luis (2002) "Tribunal Constitucional y positivismo jurídico", in Miguel Carbonell (ed.) *Teoría de la Constitución. Ensayos escogidos*; México: Porrúa/UNAM: 305-342.
- Prieur, ANNICK (1998) *Mema's house, México City: On transvestites, queens, and machos*. Chicago: University of Chicago Press.
- Prillaman, William C. (2000) *The Judiciary and Democratic Decay in Latin America: Declining confidence in the Rule of Law*, Westport: Praeger.
- Puar, Jasbir K.(2013) 'Homonationalism As Assemblage: Viral Travels, Affective Sexualities'; *Jindal Global Law Review*; 4(2), 23-43.
- Rábago Dorbecker, Miguel (2010) 'Territorial Projection of Law from the Left: Cities' in *International Law Review Online Companion*, 2, 2.
- Rabasa, Emilio O. (1992) 'Reforma al artículo 102 constitucional: creación de la Comisión Nacional de Derechos Humanos (CNDH), a nivel constitucional'; *Boletín Mexicano de Derecho Comparado*: 573-580. available in <http://www.redalyc.org/articulo.oa?id=42707409> Last accessed February 3rd 2014.
- Radcliffe, Sarah A. (2001) 'Development, the state, and transnational political connections: state and subject formations in Latin America' in *Global Networks* 1, 1, pp. 19-16.
- Ram, Kalpana (1999) 'Ná Shariram Nádhi, My body is mine: The urban women's health movement in India and its negotiation of modernity'; *Women's Studies International Forum*, 21 (6).
- Ree, Gerard van der (2007) 'Modernisation in Chile: From the "Revolution in Liberty" to "Growth with Equity"' in *Bicentenario. Revista de Historia de Chile y América* Vol. 6, No. 2, pp. 39-69.
- Reinharz, Shulamit (1992) *Feminist Methods in Social Research*; New York and Oxford: Oxford University Press.
- Restrepo Saldarriaga, Esteban (2010) *Advancing sexual health through human rights in Latin America and the Caribbean*, working paper commissioned by the World Health Organization.

- Reyes Maciel, Laura (2011) ‘Los crímenes de odio en contra de personas homosexuales, en la sombra’ *CNN México*, published on May 17th. Available in http://www.asylumlaw.org/docs/sexualminorities/MexicoCNN0_51711.pdf Last accessed June 6th 2012.
- Richardson, Dianne (2000) “Constructing sexual citizenship: theorizing sexual rights”; *Critical Social Policy*; 20: 105-135.
 - (2005) ‘Desiring sameness? The rise of a neoliberal politics of normalization’, *Antipode*; 37: 515-35.
- Ricœur, Paul (1992 [1940]) "Une herméneutique philosophique de la religion: Kant," in his *Lectures 3 : Aux frontières de la philosophie*; Paris: Éditions du Seuil.
- Riles, Annelise (2005) "A New Agenda for the Cultural Study of Law: Taking on the Technicalities"; *Buffalo Law Review*; 53: 973-1033.
 - (2006) “Anthropology, Human Rights, and Legal Knowledge: Culture in the iron cage”; *American Anthropologist*; 108 (1); pp. 52-65.
 - (2010) "Is the Law Hopeful?"; *Cornell Law Faculty Working Papers*. Paper 68; http://scholarship.law.cornell.edu/clsops_papers/68 Last accessed Oct 5th 2013.
- Rincón Gallardo, Gilberto (2001) ‘Presentación al Informe General de la Comisión Ciudadana de Estudios contra la Discriminación intitulado La discriminación en México: por una nueva cultura de igualdad’; *Revista Mexicana de Ciencias Políticas y Sociales*, XLIV (183): 261-319.
- Ríos Figueroa, Julio (2007) ‘Fragmentation of Power and the Emergence of an effective Judiciary in Mexico, 1994-2003’ in *Latin American Politics and Society*, 49, 1: 31-57.
- Ríos Figueroa, Julio and Matthew Taylor (2006) ‘Institutional Determinants of the Judicialization of Policy in Brazil and Mexico’ in *Journal of Latin American Studies*, 38 (4): 739-66.
- Rios, Roger Raupp (2006) ‘Para um Direito Democrático da Sexualidade’ in *Horizontes Antropológicos*, 12 (26) pp. 71-100
 - (2010) ‘Sexual Rights of Gays, Lesbians, and Transgender Persons in Latin America: a judge’s view’ in Javier Corrales and Mario Pecheny (eds.) *The Politics of Sexuality in Latin America; A Reader on Lesbian, Gay, Bisexual, and Transgender Rights*, Pittsburgh, University of Pittsburgh Press.
- Ríos, Viridiana (2014) “Rarezas constitucionales”; *Nexos*, available in <http://www.nexos.com.mx/?p=18391> Last access April 4th 2014.

- Robson, Ruthman (2009) ‘Compulsory Marriage’ in Martha Albertson Fineman, Jack E. Jackson and Adam P. Romero (eds.) *Feminist and queer legal theory; intimate encounters, uncomfortable conversations*, Surrey and Burlington: Ashgate; pp. 313-328.
- Rodríguez Garavito, César (2001) ‘Un nuevo mapa para el pensamiento jurídico latinoamericano’ in César Rodríguez Garavito (ed.) *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, Argentina: Siglo XXI ed. 11-22.
 - (2011) “Beyond the courtroom: The Impact of Judicial Activism on Social and Economic Rights in Latin America”; *Texas Law Review*; 89(7): 1807-1935.
 - (2012) *Legalismo mágico: activismo judicial y justicia social en un país inconstitucional*; Bogotá, Ediciones Uniandes.
- Rodríguez, Ileana (2009) *Liberalism and its limits. Crime and terror in the Latin American cultural text*; Pittsburgh; University of Pittsburgh Press
- Rojas, Olga Lorena (2001) “El debate sobre los derechos sexuales en México”; *Documentos de Trabajo núm. 7, Programa Salud Reproductiva y Sociedad*, México: El Colegio de México.
- Romão, José Eustáquio (2005) ‘Dilemas e desafios da educação contemporânea: uma (re) leitura de Paulo Freire no cenário de Immanuel Wallerstein’ *Revista Portuguesa de Educação*; 18 (1); pp. 7-21.
- Rosa de Andrade, Lédio (1998) O que é direito alternativo?, Obra Jurídica Florianópolis, Ed., 1998, págs. 46-48
- Rosenberg, Gerald N. (1991) *The Hollow Hope. Can courts bring about social change?*, Cicago and London: The University of Chicago
- Rosenn, Keith (1987) ‘The Protection of Judicial Independence in Latin America’; *University of Miami Inter-American Law Review*, 19(1): 1-35.
- Rubin, Gayle (1976) “The Traffic in Women: Notes on the Political Economy of Sex,” in Rayna Reiter (ed.), *Toward an Anthropology of Women*; New York: Monthly Review Press.
- Rueda, Pablo (2010) ‘Legal language and Social change during Colombia’s economic crisis’ in Javier Couso, Alexandra Huneus and Rachel Sieder (eds.) *Cultures of Legality: Judicialization and Political Activism in Latin America*; New York: Cambridge University Press; pp. 25-50
- Sabatini, Christopher (2007) “Advocacy, Ideology and Partisanship: Human Rights in the Electoral Arena” in Rachel A. May and Andrew K. Milton (eds.) *(Un)Civil Societies*.

Human Rights and Democratic Transitions in Eastern Europe and Latin America; Lanham, MD, and Plymouth: Lexington Books: 269-288

- Salazar Ugarte, Pedro (2007) 'Justicia constitucional y democracia: el problema de la última palabra' in Rodolfo Vázquez (ed.) *Corte, jueces y política*; Mexico: Fontamara/Nexos: 37-50
 - (2011) 'Pobreza', in Héctor Fix-Zamudio and Diego Váldez (eds) *Instituciones sociales en el constitucionalismo contemporáneo*; Mexico: Instituto De Investigaciones Jurídicas/El Colegio Nacional; 299-307.
 - (2014) 'Un caso, cuatro postulados y una preocupación sincera (A propósito de la justicia constitucional en México)', Paper presented in SELA, Yale Law School, May 15th 2014; Available in: http://www.law.yale.edu/documents/pdf/SELA14_Salazar_CV_Sp.pdf Last accessed ctober 1st 2014.
- Salinas Hernández, Héctor Miguel (2009) 'Liderazgo carismático y sociedades de convivencia en la ciudad de México' in S. Vargas (ed.) *Políticas públicas y cambio organizacional*, Mexico: Porrúa; pp. 225-264.
 - (2010) *Políticas de Disidencia Sexual en América Latina. Sujetos sociales*; Mexico DF: Ediciones Eón.
- Sampaio Ferraz Júnior, Tércio (1985) *A ciencia jurídica e seus dois maridos*, Santa Cruz do Sul, Facultades Integradas de Santa Cruz do Sul,
- Sánchez Mejorada, Carlos (1946) 'The Writ of Amparo. Mexican Procedure to Protect Human Rights, in *Annals of the American Academy of Political Social Science*, 243, pp. 107-111.
- Sánchez Rubio, David (1994) "Filosofía de la liberación y derecho alternativo. Aplicaciones concretas para una apertura de diálogo", in *Crítica jurídica*, 15: 147-178
- Sánchez, Arianna, Beatriz Magaloni, and Eric Magar (2009) "Legalist vs. Interpretativist: The Supreme Court and the Democratic Transition in Mexico"; *Stanford Public Law Working Paper*, 1499490.
- Sandoval, Chela (2002) 'Dissident globalizations, emancipatory methods, social-erotics' in Arnaldo Cruz-Malaveé and Martin F. Manalsan IV (eds) *Queer globalizations: Citizenship after the afterlife of colonialism*. New York: New York University Press, 20-32.
- Santos, Boaventura de Sousa (1999) *Reinventar la democracia, reinventar el estado*; Buenos Aires, Ciudad de México, Madrid: Sequitur

- (2002) *Towards a New Legal Common Sense: Law, Globalization and Emancipation*, London: Butterworths, London.
- (2004) 'A Critique of Lazy Reason: Against the Waste of Experience' in Immanuel Wallerstein (ed.) *The Modern World-system in the Longue Durée*, Boulder and London: Paradigm Publishers; pp. 157-197
- (2005) *Reinventar la democracia: Reinventar el Estado*; Buenos Aires: CLACSO.
- (2006) 'The heterogeneous state and legal pluralism in Mozambique'; *Law and Society Review*; 40(1): 39-76.
- (2007) 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges', *Review Fernand Braudel Center* 1: 45–89.
- (2008) 'The World Social Forum and the Global Left', in *Politics & Society*, 36, 2, 247-270.
- (2008b) *Another knowledge is possible; beyond northern epistemologies*, London: Verso.
- (2009) 'If God Were a Human Rights Activist: Human Rights and the Challenge of Political Theologies Is Humanity Enough? The Secular Theology of Human Rights', *Law, Social Justice & Global Development Journal (LGD)*; available in http://www.go.warwick.ac.uk/elj/lgd/2009_1/santos (Last accessed June 11th 2014)
- (2010) 'La difícil construcción de la plurinacionalidad', in SENPLADES (Comp.) *Los nuevos retos de América Latina. Socialismo y sumak kawsay*, Quito: SENPLADES.
- Santos, Boaventura de Sousa, and César A. Rodríguez-Garavito (2001) "Colombia: El Revés del Contrato Social de la Modernidad" in Boaventura de Sousa Santos and César A. Rodríguez-Garavito (Eds.) *El caleidoscopio de las justicias en Colombia: análisis socio-jurídico*; Bogotá: Ediciones Uniandes, Siglo del Hombre, 11-84.
 - (2005) 'Law, Politics, and the Subaltern in Counter-hegemonic Globalization' in Boaventura de Sousa Santos and César A. Rodríguez Garavito (eds.) *Law and Globalization from Below*; Sao Paulo and Cambridge: Cambridge University Press 1-26.
- Sardá, Alejandra (1998) "Lesbians and the gay movement in Argentina"; *NACLA Report on the Americas*, 31(4); 40(2)

- Sarles, Margaret (2001) “USAID’s Support of Justice Reform in Latin America” in Pilar Domingo and Rachel Sieder (eds.) *Rule of Law in Latin America. The International Promotion of Judicial Reform*, London: Institute for Latin American Studies, University of London.
- Scheingold, Stuart A. (1974) *The Politics of Rights: Lawyers, Public Policy and Political Change*, New Haven and London, Yale University Press.
- Schild, Verónica (1998) ‘New subjects of Rights? Women’s Movement and the Construction of Citizenship in the “New Democracies”’ in Sonia E. Alvarez, Evelina Dagnino and Arturo Escobar (ed.) *Culture of Politics, Politics of cultures, Re-visioning Latin American Social Movements*, Colorado and Oxford: Westview Press, pp. 93-117.
- Scholjden, Line (2002) *Suing for Justice: Labor and the Courts in Argentina 1900-1943*; PhD dissertation, University of California, Berkeley.
- Sedgh, Gilda, Stanley Henshaw, Susheela Singh, Elisabeth Åhman, Iqbal H Shah (2007) “Induced abortion: estimated rates and trends worldwide” in *Lancet* October, pg. 1338-45, vol 370. Available in www.thelancet.com last accessed April 22nd 2011
- Seligson, Mitchell A., and Daniel E. Moreno Morales (2010) ‘Gay in the Americas’; *Americas Quarterly*; <http://www.americasquarterly.org/node/1316#1301> Last accessed July 3rd 2014.
- Serrano Migallón, Fernando (2006) ‘Meta-Constitutional Powers of the Executive Branch In Mexico’ Panel presented in the Seminario en Latinoamérica de Teoría Constitucional y Política SELA, University of Yale. Available in http://www.law.yale.edu/documents/pdf/Meta_Constitutional_Powers.pdf Last accessed Feb 14th 2012.
- Sexuality Policy /watch (2007) *SexPolitics: Reports from the Frontlines*; available in <http://www.sxpolitics.org/?p=242&cat=48> Last accessed Jan 9th 2014.
- Shankland, A., Burns, D, Hossain, N., Akshay Khanna., Scott-Villiers, P and Tadros, M. (2011) ‘Unruly Politics: A manifesto’, Brighton: IDS (mimeo)
- Shapiro, Ian (ed.) (2008) *Abortion, the Supreme Court Decisions 1965-2007*, Indiannapolis: Hackett Publishing Company.
 - (2003) ‘Judicial review in developed democracies’; *Democratization*; 10(4), pp. 7-26.
- Shapiro, Martin and Alec Stone Sweet (2002) *On Law, Politics, and Judicialization*, Oxford and New York: Oxford University Press.

- Shepard, Bonnie (2000) ‘The “Double Discourse” on Sexual and Reproductive Rights in Latin America: The Chasm between Public Policy and Private Actions’ in *Health and Human Rights*, 4(2), pp. 110-143.
- Shihata, Ibrahim F.I. (1995) “Judicial Reform in Developing Countries and the Role of the World Bank” in *The World Bank in a Changing World. Selected Essays and Lectures (V.II)* The Hague, London and Brussels: Martinus ijhoff Publishers: pp. 147-182
- Sieder, Rachel (2007) ‘The judiciary and indigenous rights in Guatemala’ *I•CON*; 5(2): pp. 1–31.
 - (2010) ‘Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala’ in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds.) *Cultures of Legality: Judicialization and Political Activism in Latin America*; New York: Cambridge University Press; pp. 161-181
 - (2011) ‘“Emancipation” or “regulation”? Law, globalization and indigenous peoples’ rights in post-war Guatemala’; *Economy and Society*; 40(2); pp: 239-265.
- Sieder, Rachel and Jessica Witchell (2001) “Advancing indigenous claims trough the law: reflections on the Guatemalan Peace process”; in Jane K. Cowan, Marie-Benedicte Dembour, and Richard A.Wilson (eds.) *Culture and Rights: Anthropological Perspectives*. New York: Cambridge University Press.
- Sieder, Rachel, Line Schjolden and Alan Angell (eds.) (2005) *The judicialization of politics in Latin America*; New York and Hampshire; Palgrave Macmillan.
- Sierra, María Teresa (2004) *Haciendo justicia: Interlegalidad, derecho y género en regions indígenas*; Mexico: CIESAS.
- Sikkink, Kathryn (1996) ‘The Emergence, Evolution, and Effectiveness of the Latin American Human Rights Network’ in Elizabeth Jelin and Eric Hershberg (eds.) *Constructing Democracy: Human Rights, Citizenship, and Society in Latin America*; Boulder: Westview Press; pp.59-84
 - (2005) “The Transnational Dimension of the Judicialization of Politics in Latin America: in Rachel Sieder, Line Schjolden and Alan Angell (eds.) *The judicialization of Politics in Latin America*, New York: Palgrave Macmillan, pp. 263-292 . the translated version (2008) “La dimensión transnacional de la judicialización de la política en América Latina”, in Rachel Sieder, Line Schjolden, Alan Angell (eds.) *La judicialización de la política en América Latina*, Colombia: Universidad del Externado, pp 315-349.

- Silva García, Fernando and Alfredo Villeda Ayala (2011) “Libertad de configuración legislativa e irretroactividad de las leyes” in *Revista del Instituto de la Judicatura Federal*, 31: 177, 210.
- Slater, David (1985) *New Social Movements and the State in Latin America*, Amsterdam: CEDLA
 - (1991) ‘New Social Movements and Old Political Questions; Rethinking State-Society Relations in Latin American Development’ in *International Journal of Political Economy*, 21; pp. 32-65
- Smart, Carole (1984) *The ties that bind: law, marriage and the reproduction of patriarchal relations*; London: Routledge & Kegan Paul.
- Smith, James F. (1993) “Confronting Differences in the United States and Mexican Legal Systems in the era of NAFTA”; *U.S.-Mexico Law Journal*; 1: 85-107.
- Smith, Rogers M. (2008) ‘Historical Institutionalism and the Study of Law’; in Gregory A. Calderia, R. Daniel Kelemen, and Keith E. Wittington (eds) *The Oxford Handbook of Law and Politics*; Oxford: Oxford University Press: 46-61
- Smulovitz, Catalina (2005) ‘Petitioning and creating rights: Judicialization in Argentina’ in Sieder, Rachel, Line Schjolden and Alan Angell (eds.) *The Judicialization of Politics in Latin America*, New York: Palgrave MacMillan; 161-185.
 - (2010) ‘Judicialization in Argentina: Legal culture or Opportunities and Support Structures?’ in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds.) *Cultures of Legality: Judicialization and Political Activism in Latin America*; New York: Cambridge University Press; pp. 234-253.
 - (2012) ‘Public Policy by Other Means: Playing the Judicial Arena’ in Jordi Díez and Susan Franceschet (eds.) *Comparative Public Policy in Latin America*, Toronto, Buffalo and London: University of Toronto Press: 105-125.
- Smulovitz, Catalina and Urribarri Daniela (2006) ‘Organizaciones sociales e Incidencia en Políticas Públicas: actores y contexto en el caso argentino’ Available in http://new.lasociedadcivil.org/docs/ciberteca/incidencia_argentina.pdf Last accessed June 5th 2013.
- Snediker, Michael D. (2009) *Queer Optimism: Lyric Personhood and Other Felicitous Persuasions*; Minneapolis and London: University of Minnesota Press.

- Somuano, María Fernanda (2010). ‘Movimientos sociales y partidos políticos en México: Una relación voluble y compleja’ in Ilán Bizberg and Francisco Zapata (eds.) *Los grandes problemas de México. Tomo 6. Movimientos sociales*; México, El Colegio de México, 2010
- Sotelo Gutiérrez, Arturo (2010) *Dejad que los ciudadanos se acerquen a mí. Entre la legitimidad y la representación: Las audiencias públicas ante la Suprema Corte de Justicia de la Nación en el caso de la despenalización del aborto en el Distrito Federal*, Maestría thesis, Social Sciences Programme, FLACSO, Sede Académica México.
- Speed, Shannon (2005) ‘Dangerous Discourses: Human Rights and Multiculturalism in Neoliberal Mexico’; in *PoLAR*, 28 (1): pp. 29-51.
- Speed, Shannon and Alvaro Reyes (2002) “‘In Our Defense’’: Rights and resistance in Chiapas’; in *PoLAR*, 25 (1): pp. 69-89.
- Spivak, Gayatri (1993) *Outside in the Teaching Machine*; New York: Routledge.
 - (1988) “Can the Subaltern Speak?” in Cary Nelson and Larry Grossberg, eds. *Marxism and the interpretation of Culture*. Chicago: University of Illinois Press, 1988: 271-313.
 - (2012) *An Aesthetic Education in the Era of Globalization*, Cambridge and London: Harvard University Press.
- Stone Sweet, Alec (2000) *Governing with Judges: Constitutional Politics in Europe*; Oxford: Oxford University Press.
- Stotzky, Irwin P. and Carlos S. Nino (1993) ‘The difficulties of the Transition Process’ in Irwin P. Stotzky (ed.) *Transition to Democracy in Latin America: The Role of the Judiciary*, Boulder, San Francisco and Oxford: Westview Press: pp. 3-20
- Strongman, Roberto (2002) ‘Syncretic Religion and Dissident Sexualities’ in Arnaldo Cruz-Malavé and Martin F. Manalansan, *Queer Globalisations: Citizenship and the Afterlife of Colonialism*, New York: New York University Press.
- Stychin, Carl (1995) *Law’s desire; Sexuality and the limits of justice*; London and New York: Routledge.
 - (1998) *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights*; Philadelphia: Temple University Press.
 - (2004) ‘Same-Sex Sexualities and the Globalization of Human Rights Discourse’ *McGill Law Journal*; 49; pp. 951-968.
- Szasz, Ivonne and Guadalupe Salas (eds.) (2008) *Sexualidad, derechos humanos y ciudadanía. Diálogos sobre un proyecto en construcción*, México: El Colegio de México.

- Tarrow, Sidney (1998) *Power in Movement: Social Movements, collective action, and politics*; New York: Cambridge University Press.
- Taus, Patricia (2014) *The Ecumenical Violence from a Gender Perspective*; California: Windmills Ed.
- Taylor, Matthew M. (2004) 'El Partido de los Trabajadores y el uso político del poder judicial' in *América Latina Hoy*, Vol. 37.
- Tchouaffe, Olivier (2006) 'Homosexuality and the politics of sex, respectability and power in postcolonial Cameroon' in *postamble* 2(2); 4-15
- Téllez Parra, Andrés (2003) "La construcción de legitimidad en torno a la candidatura de Andrés Manuel López Obrador a jefe de gobierno del Distrito Federal", in Angélica Cuéllar Vázquez, and Arturo Chávez López (eds) *Visiones transdisciplinarias y observaciones empíricas del derecho*; Mexico: Coyoacán/UNAM: 325-348.
- Tena Suck, Rafael (2006) 'Alcances del Amparo Social'; *Revista Latinoamericana de Derechos Social*; 3: 147-161.
- Thayer, Milie (2010) 'Identity, Revolution and Democracy; Lesbian Movements in Central America' in Javier Corrales and Mario Pecheny (eds.) *The Politics of Sexuality in Latin America*; Pittsburgh: University of Pittsburgh Press; 144-172
- Trebilcock, Michael J. and Ronald Joel Daniels (2008) *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Cheltenham and Northampton: Edwards Elgar.
- Tremblay, Manon, David Paternotte and Carol Johnson (2011) *The lesbian and gay movements and the state; comparative insights into a transformed relationship*, Surrey and Burlington: Ashgate.
- Trubek, David M, and Alvaro Santos (eds.) (2006) *The New Law and Economic Development. A Critical Appraisal*; New York: Cambridge University Press.
- Trubek, David M. and Marc Galanter (1974) "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States"; *Wisconsin Law Review*; 1062: pp. 1080-1102
- Trubek, David M., (2006) 'The "Rule of Law" in Development Assistance: Past, Present and Future' in David M. Trubek and Alvaro Santos (eds.) *The New Law and Economic Development: A Critical Appraisal*, New York: Cambridge University Press, 74-94
- Türmen, Tomris (2000) 'Reproductive Rights: How to Move Forward?' in *Health and Human Rights*, 4 (2): pp. 31-36.

- Ubaldi Garcete, Norma (2006) ‘Con Paulina ganamos todas. Aprendizajes del caso y otras acciones exitosas en materia de aborto’; *Debate Feminista*; 34: pp. 206-220.
- Ugalde, Vicente (2010) ‘Distribución de competencias y relaciones intergubernamentales en el sistema federal mexicano’; in José Luis Méndez (ed.) *Los grandes problemas de México. Tomo 13. Políticas Públicas*; México: El Colegio de México; pp. 449-494.
- Uildriks, Niels (2010) *Mexico’s Unrule of Law. Implementing Human Rights in Police and Judicial Reform under Democratization*; Plymouth: Lexington Books.
- Uprimny, Rodrigo (2000) Justicia constitucional, derechos sociales y economía: un análisis teórico y una discusión de las sentencias de UPAC’; *Pensamiento Jurídico*; 13.
 - (2005) “Bloque de constitucionalidad, derechos humanos y nuevo procedimiento penal”, Available in *De Justicia* http://www.dejusticia.org/index.php?modo=interna&tema=estado_de_derecho&publicacion=73 Last accessed February 13th 2012.
 - (2006) ‘The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates’; in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.) *Courts and social Transformation in New Democracies. An Institutional Voice for the Poor?*, Cornwall, Ashgate: 127-152.
 - (2011) ‘The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges’; *Texas Law Review*; 89; 1587-1609.
- Uprimny, Rodrigo, César Rodríguez Garavito and Mauricio García Villegas (2006) *¿Justicia para todos? Sistema judicial, derechos sociales y democracia en Colombia*; Bogotá: Editorial Norma
- Vaggione, Juan Marco (2008) “Las familias más allá de la heteronormatividad” in Cristina Motta y Macarena Sáez (eds.) *La Mirada de los Jueces*; Bogotá: Siglo del Hombre Editores: 13-87
- Vaihinger, Hans (2001 [1924]) *The Philosophy of the “as if”*, London: Routledge.
- Valadés, Diego (1988) ‘Los límites del constitucionalismo local’; *Estudios en homenaje al doctor Héctor Fiz-Zamudio en sus treinta años como investigador de las Ciencias Jurídicas. Tomo I*. Mexico: Instituto de Investigaciones Jurídicas/UNAM; pp. 787-802.
- Vargas, Gina (2001) ‘American Feminism in the 90s - Reflections by Gina Vargas’, *International Feminist Journal of Politics*, 1: 2, pp. 300 — 310.
- Vargas, Jorge A. (1994) ‘NAFTA, the Chiapas Rebellion, and the Emergence of Mexican Ethnic Law’; *California Western International Law Journal*; 25(1): 1-79

- (2005) ‘Concubines under Mexican law; with a comparative overview of Canada, France, Germany, England and Spain’ in *Southwestern Journal of International Law*; 12,1: 45-96.
- Vargas, Virginia (1996) ‘La equidad de género como tema de debate y de políticas públicas’ in *Encrucijadas del Saber: Los estudios de Género en las Ciencias Sociales*, Lima: Ed. Pontificia Universidad Católica
 - (1999) ‘Latin American Feminism in the 90s—Reflections by Gina Vargas (Interviewed by Nira Yuval-Davis)’ in *International Feminist Journal of Politics* 1 (2), pp. 300–310.
 - (2002) ‘The Struggle by Latin American Feminism for Rights and Autonomy’ in Nikki Craske and Maxine Molyneux (eds) *Gender and the Politics of Rights and Democracy in Latin America*, Hampshire and New York: Palgrave.
- Vázquez, Rodolfo (2014) ‘Por una defensa incondicional de los derechos de las mujeres y un mínimo de racionalidad científica’; in *Debate Feminista*; 25 (49), pp. 148-160.
- Vázquez, Rodolfo (ed.) (2011) *Corte, jueces y política*; Mexico: Fontamara/Nexos.
- Vela Barba, Estefanía (2011) *La Suprema Corte y el matrimonio: una relación de amor*, (Tesis para obtener el título de Licenciada en Derecho) ITAM.
- Vidarte, Paco (2007) *Ética marica. Proclamas libertarias para una militancia LGTBQ*, Barcelona, Madrid: Egales.
- Vilhena Vieira, Oscar (2011) ‘Desigualdad estructural y Estado de Derecho’, in César Rodríguez Garavito (ed.) *El Derecho en América Latina: Un mapa para el pensamiento jurídico del siglo XXI*, Buenos Aires: Siglo Veintiuno: pp. 25-46.
- Villamil, Jenaro (2010) ‘Crímenes de odio por homofobia, la conspiración del silencio’. Published on May 17th 2010. Available in <http://jenarovillamil.wordpress.com/2010/05/17/crimenes-de-odio-por-homofobia-la>
- Villegas Montiel, Francisco Gil (1996) ‘Cambio constitucional en México durante el sexenio de Carlos Salinas de Gortari’; *Foro internacional*, 36 (1-2): 158-187
- Waites, Matthew (2005) ‘The fixity of sexual identities in the public sphere: Biomedical Knowledge, Liberalism and the Heterosexual/Homosexual Binary in Late Modernity’ in *Sexualities*, 8(5), 539-69.
- Wall, Ilan rua (2012) *Human Rights and Constituent Power. Without Model or Warranty*; Oxon and New York, Routledge

- Ward Peter M., and Victoria E. Rodríguez (1999) 'New Federalism, Intra-governmental Relation and Co-Governance in Mexico' in *Latin American Studies*, 31: 673-710.
- Weeks, Jeffrey (1998) 'The Sexual Citizen'; *Theory, Culture & Society*; 15 (3): 35-52.
- Whitehead, Jaye Cee (2011) *The Nuptial Deal: Same-Sex Marriage and Neoliberal Governance*; Chicago: University of Chicago Press.
- Wilson, Ara (2010) "NGOs as Erotic Sites", in Amy Lind (ed.) *Development, Sexual Rights and Global Governance*, London and New York: Routledge; pp. 86-98.
- Wilson, Bruce (2007) 'Claiming individual rights through a constitutional court: The example of gays in Costa Rica'; *International Journal of Constitutional Law*; 5(2): 242-257.
 - (2005) 'Changing Dynamics: The Politics Impact of Costa Rica's Constitutional Court, in Rachel Sieder, Line Schjolden and Alan Angell (eds.) *The Judicialization of Politics in Latin America*, New York: Palgrave MacMillan: 47-65
 - (2007) 'Claiming individual rights through a constitutional court: The example of gays in Costa Rica' in *I•CON*, 5: 242-257.
 - (2009) 'Institutional Reform and Rights Revolutions in Latin America: The Cases of Cost Rica and Colombia'; *Journal of Politics in Latin America*, 1(2): 59-85.
- Wilson, Bruce M. and Juan Carlos Rodríguez Cordero (2006) 'Legal opportunity structures and social movements: The effects of Institutional Change on Costa Rican Politics' in *Comparative Political Studies*, 39: 325-351.
- Wolkmer, Antonio Carlos (2003) *Pluralismo jurídico: nuevo marco emancipatorio en América Latina*; Documento de Trabajo; CENEJUS/CLACSO.
- Xie, Selena and Javier Corrales (2010) 'LGBT Rights in Ecuador's 2008 Constitution' in Corrales, Javier, and Mario Pecheny (eds.) *The Politics of Sexuality in Latin America; A Reader on Lesbian, Gay, Bisexual, and Transgender Rights*, Pittsburgh, University of Pittsburgh Press, 224, 229.
- Yashar, Deborah (1996) 'Indigenous protest and democracy in Latin America' in Jorge I. Domínguez and Abraham F. Lowenthal (eds.) *Theorizing citizenship*' Albany: State University of New York Press, 179-207
- Yoshino, Kenji (2000) 'The Epistemic Contract of bisexual erasure' in *Stanford Law Review*, 52: 353-461.

- Yúdice, George (2003) *The Expediency of Culture. Uses of Culture in the Global Era*; Durham and London: Duke University Press.
- Yuval-Davis, Nira (1998) *Gender and Nation*; London: Sage.
- Yuval-Davis, Nira (1999) “The 'Multi-Layered Citizen'”; *International Feminist Journal of Politics*; 1(1): 119-136
- Zaffaroni, Eugenio Raúl (2008) ‘Dimensión política de un poder judicial democrático’ in Miguel Carbonell et al. (eds.) *Jueces y derecho. Problemas contemporáneos*; Mexico: Editorial Porua/Universidad Nacional Autónoma de México 113-149
- Zaffaroni, Raúl (1993) “La mujer y el poder punitivo”, in *Programa Mujer, Justicia y Género, Sobre patriarcas, jerarcas, patrones y otros varones*, Costa Rica: ILANUD
- Zaldívar, Arturo (2008) ‘El juicio de amparo, el gran olvidado de la transición democrática’ in Eduardo Ferrer Mac-Gregor, and Arturo Zaldívar Lelo de Larrea (eds.) *La Ciencia del Derecho Procesal Constitucional. Estudios en Homenaje a Héctor Fix-Zamudio en sus Cincuenta Años como Investigador del Derecho*, Tomo VII, Mexico, Universidad Nacional Autónoma de México/Instituto Mexicano de Derecho Procesal Constitucional /Marcial Pons: 683-701.
- Zemelman, Hugo (1995) “Sobre bloqueo histórico y utopía en latinoamerica”; *Política y Cultura*; 4, pp. 43-51
- Zournazi, Mary (2002) *Hope: New philosophies for change*; New York: Routledge.