Trends and Developments

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White & Case, SC **see p.28**

General Litigation in Mexico: Trends and Developments

The big question when the pandemic started was: "When will we return to normality?" Two years later, we feel closer to such a date, but the effects of COVID-19 still linger in our everyday lives. Aside from the pandemic, we are now living in a world affected by the Russia-Ukraine war, which changed global geopolitics and pushed back the hopes for a quick economic recovery. Economists mention the possibility of an imminent global recession in 2023, which, along with international and domestic issues, might mean that the return to normality is still far away.

At the time of writing, governments across the world have not been able to tame inflation. They have had to adopt aggressive monetary policies, like increasing interest rates, and other measures to protect consumer welfare and mitigate risks to food security. As always, unfortunately, inflation disproportionately affects those who have less.

The Mexican government has not been deaf to these problems, imposing several measures to mitigate the effects of inflation over the past year. Some measures have been useful, like the monetary policy adopted by the Bank of Mexico, price subsidies on fuels and a consistent tax discipline. Others are questionable, like banning new oil importation permits that could generate more activity in the sector, and some are just negative, like the decision to eliminate sanitary and phytosanitary controls to ease and reduce prices – allegedly – on the importation of food products.

The measures adopted by the government to tame inflation will be in force temporarily (ie, six to 12 months) but decision-makers can always adopt new measures or extend their application. Some of these policies will harm industrial chains while not necessarily taming inflation.

Public emergencies, national security, sovereignty and food security have always been complicated concepts. These concepts need to be vague so they can be defined case-by-case, but such flexibility also illuminates their worst aspects. Policy makers and members of Congress can abuse that vagueness to justify any type of measure. Decision-makers should be sensible enough to avoid falling into what Machiavelli defined as "the ends justify the means".

Mr López Obrador's administration has had its share of controversial decisions. He has reduced transparency, accountability and the possibility of presenting judicial recourse by justifying his most polarising decisions under the tags of "national security", "public emergencies" and now "food security".

For instance, this administration evaded judicial control during the construction of Mexico City's new international airport, also known as the "Felipe Ángeles Airport", which followed a controversial decision to cancel the new airport envisioned during Mr Peña Nieto's administration, the construction of which was 32.45% complete. The same was true for the construction of the Tren Maya (Maya Train), a new rail line that will cross several states in the Southeastern

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part of Mexico to connect tourist spots despite serious environmental and safety concerns, and the construction of an oil refinery in the State of Tabasco that is in a zone prone to floods.

COVID-19, geopolitical circumstances and inflation have given the current administration the perfect formula to enact questionable decisions without the need to follow legal proceedings by justifying their need under the exception to act promptly to avoid or mitigate an emergency or for reasons of "national security".

Here is where the judicial branch has to step up and be completely objective when deciding on controversial decisions. The judicial branch has a historical responsibility to limit the powers of an unleashed administration and decide what is best for Mexicans.

Not all decisions have to be black or white, and past legal formulas will have to adapt to current circumstances. For example, the concepts of "public emergencies", "national security" and "food security" need to be scrutinised on a case-by-case basis, and courts will need to abandon deference theories that have protected controversial policies by the executive branch to ensure that those decisions do not continue to go unchecked.

The judicial branch has the opportunity to recalibrate checks and balances and limit the executive and legislative powers by enforcing the rule of law. Judges have the responsibility to support reasonable, prudent and useful measures by the government and to set limits or ban unreasonable or abusive policies and decisions, and the Supreme Court of Justice (Supreme Court) needs to go back to its roots and become a Court of Justice rather than a political actor.

Below are some examples of recent activity by the Supreme Court and federal courts that will define the role of the Supreme Court as the highest protector of the Constitution and that evidence the importance of having an independent and true arbitrator.

A new opportunity to define the hierarchy of the Constitution and the role of the Supreme Court

The Supreme Court will decide on two matters that could redefine the hierarchy of the Constitution and its own role as a constitutional tribunal. These cases will be of the utmost relevance in constitutional law and could set a standard to allow judicial review of constitutional provisions and, if needed, the possibility for federal courts to invalidate such provisions.

The object of the discussion – on Unconstitutionality Action 130/2019 and the appeal to *amparo* 355/2021 – relies on the constitutionality of automatic pre-trial detentions (ie, ex officio) included in the Constitution and laws. This constitutional and legal concept has been the subject of controversy because international courts have identified its incompatibility with human rights but, conversely, the Mexican Constitution provides a limited list of the felonies that are subject to an automatic pre-trial detention. In practice, this means that any person who is charged with any of the felonies included in the Constitution will be detained and remain in prison during the completion of the process to define their culpability, and that public prosecutors do not have to prove the need for or justify pre-trial detentions in these cases.

The contradiction between international human rights standards and the Constitution is evident. So to understand the relevance of this decision, it is important to recall first the actual interpre-

tation of the hierarchy of the Constitution in the face of human rights and, second, the opportunity for the Supreme Court to set a new standard consistent with precedents by the Inter-American Court of Human Rights and the justices' opinion on this regard.

First, the Federal Congress amended the Mexican Constitution in 2011 to include international human rights standards within the body of the Constitution. Such amendments include:

- two interpretation standards on human rights – the pro persona interpretation standard and the "conforming interpretation" standard; and
- the binding nature and hierarchy of international treaties on human rights.

These amendments changed the traditional constitutional hierarchy that established that the Constitution was at the top of the pyramid, with international treaties beneath it. Following the reforms, the Supreme Court construed that the Constitution and international treaties on human rights are at the same level, and that any authority has to apply the provisions that benefit individuals the most. Any authority could apply human rights provisions directly from the Constitution or international treaties, and could refrain from applying provisions that contradict a human right without the need for a previous judicial decision.

However, this interpretation changed with contradictory Action No 293/2011, where the Supreme Court analysed the hierarchy of constitutional exceptions to human rights in the face of international treaties. In that decision, the Supreme Court decided that constitutional exceptions supersede international treaties. Therefore, the interpretation that the Constitution sits at the top spot in the hierarchy pyramid regained prominence.

The Supreme Court now has a new opportunity to decide on the hierarchy of human rights following recent decisions by the Inter-American Court of Human Rights declaring that non-justified and automatic pre-trial detentions violate human rights. The Supreme Court will have to decide whether it abandons the interpretation in case No 293/2011 and declare if constitutional exceptions are subject to judicial scrutiny. This case is of the utmost relevance because the Supreme Court will decide on two constitutional topics:

- if the Supreme Court has the ability to decide on and scrutinise constitutional provisions; and
- the possibility of ordering civil servants to refrain from applying constitutional provisions that contradict human rights standards.

The Supreme Court began debating on this matter on 5 September 2022 but did not reach a consensus, and so decided to postpone its decision with a new opinion to reflect the position of most justices.

In such debate, Justice Luis María Aguilar presented an opinion that declared that pre-trial detentions breached human rights and thus presented the need to abandon previous hierarchy interpretations.

As expected, the debate was complex. While most justices decided that automatic pre-trial detentions breached human rights, they did not reach a consensus on the hierarchy of constitutional exceptions and the ability of the Supreme Court to analyse and decide on the "constitutionality" of constitutional provisions.

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The justices' positions may be summarised as follows.

- Justices Luis María Aguilar, Ortiz Mena, Piña Hernandez and Zaldivar proposed to abandon the doctrine set forth in 293/2011 and recognise that the Supreme Court can scrutinise constitutional provisions under human rights interpretation standards (ie, if a constitutional exception violates a human right, civil servants will have to refrain from applying such provisions).
- Justices Esquivel Mossa and Ortiz Ahlf rejected the opinion because, in their view, the Constitution should be above international treaties at all times, and the automatic pre-trial detention is a legal figure that the country requires because of current security conditions.
- Justices Perez Dayan, Pardo Rebolledo and Laynez Potisek also rejected the opinion in part where it decides to abandon the doctrine in 293/2011 because, in their view, the Supreme Court lacks the power to scrutinise the Constitution.
- Justice González Alcantara proposed a practical approach to evade the scrutiny of constitutional provisions. This position acknowledges the unconstitutionality of automatic pre-trial detentions and proposes to construe what "ex officio" means in this context. This position proposes to construe the term "ex officio" as the possibility for public prosecutors to request and justify case-by-case pre-trial detention without a request from the victim, unlike the current interpretation of the term, as an automatic decision.

Because of the lack of consensus, Justice Luis María Aguilar proposed to retire his opinion and draft a new one harmonising the arguments expressed by other justices to achieve consensus.

Mr López Obrador publicly criticised the opinion by Justice Luis María Aguilar because a decision in the sense of his opinion went against the current administration's policies on public security, and because Mr López Obrador proposed to include tax-related felonies in the constitutional exceptions list.

It could be said that the decision by Justice Luis María Aguilar was right, because if justices voted on the matter, the case would have been dismissed and the decision to postpone the debate gives the Supreme Court the opportunity to resume the decision on the matter without political interference from Mr López Obrador. However, it remains unclear when Justice Luis María Aguilar will present a new opinion; this will probably happen once Mr López Obrador's administration concludes.

Energy sector

During the past two years, modifications and amendments to laws and rules in the energy sector have been highly contested by permit holders. That tendency continues without a final decision by the Supreme Court or by Collegiate Tribunals at the time of writing.

In 2013, Articles 25, 27 and 28 of the Constitution were amended to open the energy sector to private investment, including electricity and oil and gas. Although this has benefited the sector and consumers, the current administration aims to strengthen the role and market power of state-owned enterprises in the electricity market, the Federal Commission of Electricity (CFE) and, in hydrocarbons, Petróleos Mexicanos.

This situation generated a wave of *amparos* by permit holders and the presentation of constitutional actions by Congress and the Mexican Antitrust Commission. The Supreme Court halted the decision on the *amparos* until it decided on the constitutional actions. The Supreme Court decided to dismiss those actions in April 2022 (more information below) and ordered the *amparo* proceedings to resume in October 2022.

In addition, Canada and the United States began a proceeding through the United States-Mexico-Canada Trade Agreement (USMCA) that could end with the imposition of trade sanctions against Mexico for discrimination against international companies in favour of the CFE.

The legal proceedings are far from over and will lead to one of the most relevant decisions by the judicial branch that could influence the USMCA panels and imminent international arbitration disputes.

That said, the application of the amendments to the Electricity Law and several amendments in the sector are still suspended. The judicial branch has stopped its application through several injunctions granted to permit holders. To address the inapplicability of the Electricity Law, Mr López Obrador proposed a constitutional amendment to include certain principles to favour CFE in the body of the Constitution, but Congress rejected this proposal in 2021.

Supreme Court decision on Unconstitutionality Action 64/2021

Unconstitutionality actions are abstract constitutional control mechanisms available to certain governmental entities. The legal standard to accept and initiate these types of actions does not require the plaintiff to prove that the challenged law has harmed it or that the law has been applied.

Unconstitutionality actions may lead to the invalidation of the challenged law. Because of their characteristics, unconstitutional actions are considered to be extraordinary means of constitutional control that require a qualified vote by the Justices of the Supreme Court to achieve such invalidation (ie, eight out of 11 justices). Unconstitutionality actions that do not obtain the qualified vote are dismissed; justices may nonetheless draft concurring or dissenting opinions.

Moreover, the law that governs unconstitutionality actions provides that the reasoning of the Supreme Court's decision approved by at least eight justices will become binding precedent for federal and local judicial authorities. Accordingly, for decisions to become binding precedent, they must obtain a qualified vote, and the justices' reasoning must be aligned.

Details of the decision

A minority in the Senate filed Unconstitutionality Action 64/2021 (Unconstitutionality Action) to challenge the constitutionality of several articles of the Electricity Law amended by Congress at the request of Mr López Obrador (Amended LIE).

On 5 and 7 April 2022, a plenary session of the Supreme Court held hearings to discuss and decide on the draft Unconstitutionality Action decision prepared by Justice Ortiz Ahlf. The opinion concluded that all the contested provisions of the Amended LIE were constitutional.

However, the Bench of the Supreme Court decided to declare the unconstitutionality of the following articles of the Amended LIE by six or more votes (without obtaining a qualified vote):

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- 3, section V (new definition of Legacy Electric Power Plant);
- 4, section VI (priority of Electric Derivative Contracts with Physical Delivery Commitments over renewable power plants);
- 26 (priority order that Electricity Carriers and Distributors must grant to Legacy Electric Power Plants and External Legacy Power Plants);
- 53 (elimination of competitive means to acquire electricity – ie, tenders);
- 101 (change to the dispatch order and prioritisation of Electric Derivative Contracts);
- 108, section VI (generation and consumption programmes associated with Electric Derivative Contracts with Physical Delivery Commitments); and
- 126, section II (new criteria to grant Clean Energy Certificates – CELs).

The Unconstitutionality Action as it relates to the provisions above was thus dismissed because a qualified vote was not obtained. The majority of justices who voted to declare these provisions unconstitutional found that they were unconstitutional because they violate fundamental rights to competition, free markets and environmental protection. Each justice's specific reasoning will be known once their concurring and dissenting opinions are released.

The Bench of the Supreme Court also decided to declare the constitutionality of the following articles of the Amended LIE by six or more votes:

- 3, section XII (definition of Electricity Derivative Contract), section XII-Bis (definition of Electricity Derivative Contract with Physical Delivery Commitments) and section XIV (definition of Legacy Contract for Basic Supply);
- 4, section I (authority to grant open access to the national transmission grid and general distribution lines when technically feasible);
- 12, section I (authority to grant permits considering the National Electric System planning criteria);
- 35 (possibility that power plants and load centres are aggregated to perform interconnection works);
- 108, section V (authority to assign and dispatch following the National Electric System's criteria for security, reliability, quality and continuity);
- Fourth Transitory (authority to revoke self-supply permits that are found to have been obtained in violation of the law); and
- Fifth Transitory Article (authority to review the legality and profitability of the Contracts to Commit Generation Capacity and Electricity Supply executed with independent energy producers).

The constitutionality or presumption of constitutionality of a law is granted by the legislative proceeding that gives it origin. Therefore, by deciding on the Unconstitutionality Action, the Supreme Court of Justice only validates its constitutionality.

The effect of the Supreme Court's decision on ongoing amparos challenging the Amended LIE

The Supreme Court's decision did not reach a qualified vote to declare the unconstitutionality of the Amended LIE. Therefore, the Amended LIE will continue to be seen as valid until its constitutionality is reviewed by another mechanism of constitutional control (eg, *amparo* trials).

The majority vote on certain provisions (whether to declare its unconstitutionality or validity) serves as a guide to anticipate the reasoning that courts, magistrates or justices will follow

in the *amparo* trials. This is because arguments presented in the *amparo* trials are similar to the arguments that the Senate made in the Unconstitutionality Action.

Since only a simple majority is required in an *amparo* decision to declare that a law is unconstitutional, it is reasonable to expect that the Amended LIE provisions that were found to be unconstitutional by majority in the Unconstitutionality Action will also be seen as unconstitutional in the context of *amparos*. On the other hand, the Amended LIE provisions that were found to be constitutional by majority in the Unconstitutionality Action may be treated as valid in the context of *amparo* actions. To assess the consequence fully, however, the Supreme Court or Collegiate Tribunal's assessment on legal standing and relativity principles (ie, particular or general effects of the *amparo* decision) will be relevant.

The Unconstitutionality Action decision does not affect the injunctions that the Specialised Courts have granted: because those injunctions are still in force, the executive branch cannot apply the Amended LIE.

Telecommunications

On 16 April 2021, Congress enacted several amendments to the Telecommunications Law to create the Panaut, a registry containing sensitive data concerning the owners or users of mobile phones. Such amendments included provisions to bind telecommunications users to register sensitive information (ie, biometric information) with the Telecommunications Regulator; if the owner of a mobile line declined to provide its personal and biometric data, the carrier or mobile operator would have to cancel or deny service without the possibility of reconnecting the line. The amendment also allows the government to access the personal and biometric information of the owner or user without a judicial order.

The measure to create and maintain this registry goes against the constitutional right to privacy and the order to seek universal digital inclusion and to provide the telecommunication services with competence, plurality, continuity and universal coverage because it imposes barriers to obtaining telecommunications services. Thousands of telecommunications users challenged this decision though *amparos*, and a minority of the Federal Congress also presented an unconstitutionality action.

District Courts dismissed the *amparos* because telecommunications users were not yet affected by the Panaut and therefore lacked the legal standing to appeal. At the same time, the Supreme Court admitted the Unconstitutionality Action, granted an injunction against the application of Panaut and, ultimately, decided that Panaut breached several human rights.

Nine justices out of the 11 members of the Bench of the Supreme Court decided to invalidate Panaut. The justices in the majority decided that the national registry of mobile phone users is not consistent with democratic principles, and that Panaut was an abusive measure that had not justified its need in the face of the right to privacy.

Other upcoming Supreme Court decisions

For the rest of 2022 and 2023, the Supreme Court will have to decide on other landmark decisions that will define its role as Mexico's maximum tribunal and reaffirm checks and balances, such as:

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- the decision on the hierarchy of the Constitution;
- the participation of the military in civil affairs;
- the controversies filed by the Antitrust and Telecommunications Regulators against Mr López Obrador's decision to not propose new commissionaires;
- a final ruling on the *amparos* related to the new labelling system on pre-packaged food and beverages; and
- the modifications to the rules that govern the commissions charged by Mexican pension funds.

The Supreme Court will face some of its most challenging decisions in the years to come, and the justices will need to step up to confirm the role of the Supreme Court as a Court of Justice.

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