Federalism and Sub national Constitutions:
Design and Reform.
Mexico

Manuel González Oropeza
Universidad Nacional Autónoma de México

Devolution. The United Mexican States were formed by the Provinces and Territories that once belonged to New Spain in America which for three hundred years they were united under the Spanish Crown. When the Independence was achieved in 1821 the idea to emancipate all provinces from any given political center point began and autonomy had a second chance. Shortly before, the Spanish Cadiz Constitution of 1812 that ruled all the Spanish World, had already established the "Provincial Deputations" as autonomous governing bodies, represented by elected and resident officials from each Province, and a trend in political decentralization had been initiated.

When the first Mexican Constitution was framed in 1824, a tension between the unitary past and the unknown decentralized future took the energy of the first Mexicans, winning at the end the recognition that the federal system will be more in accordance to the newly Independent nation. This decision was the product of persuasion derived from the Provincial Deputation that at times took the forms of secessionist movements.

In other words, the federal system was adopted because the provinces wanted it, as a guarantee for their liberty. Independence of the new country meant also autonomy for the provinces.

The only case of voluntary integration to the Mexican Federation was Chiapas, a province that it was linked politically to Guatemala before 1824, and in that year by a plebiscite the people decided to join Mexico. The view of the Federal Constitution as a Compact among the States was a common place during the XIX century. All along the political history of the country we encounter many chapters in which States seceded and only the arms were able to get together back the Country. Some examples are exceptions that confirm the rule: Texas seceded because the central government broke the 1824 Compact of Federalism and changed for a Centralist Republic that lasted for a little more of 10 years.

Even though we have not tested the secession under a judicial scrutiny like in Canada and the United States, I think that in Mexico a reference to the people rather than States will be in place; not only because the way provinces have joined the Country, like in the case of Chiapas, but also because of the procedure that we have observed to create new provinces within the boundaries of existing provinces. The first clear example was the 1849 creation of the State

of Guerrero where without any constitutional foundation, National Congress empowered to declare the creation of new provinces respected the plebiscites conducted in the villages that will be separated from the State of Mexico, as final in the dispute to create a new State. Ever since, our Constitution has been reformed to include plebiscites whenever a portion of an existing State wants to get separated.

States of Mexico. With a population of more than 100 million inhabitants, Mexico is divided by 32 sub national units, 31 of them are full sovereign States and one Federal District, which is Mexico City, the largest city in the world. From 1824 to 1973 there were some Federal Territories that now are almost extinct, because they transformed into States, with the only exception of Mexico City. By nature, the adoption of Federal territories was intended to be transitory, because the Country relied on the fact that its associates were States, and that they were united. Any attempt to change the official name of the Country, despite its striking resemblance to the United States failed, because the founding fathers wanted to make clear that the Country will be formed by the association of States.

The curious situation of Mexico City needs some explanation. Since the 1857 Constitution, the Convention agreed that Mexico City will become one State, named the Valley of Mexico State, when the federal capital was to move outside the city. But because of the turmoil and invasions that the Country had to face during the subsequent years, the transformation was suspended, and the XX Century Revolution delayed even more the Statehood.

In 1928, when the incumbent President got reelected against all the political ideology of the Mexican Revolution, before paying the price with his life, Alvaro Obregon sent a Constitutional reform to reduce even more the condition of Mexico City as a revenge for the inhabitants had not endorsed his reelection. The reform was approved and ever since, the city does not have local governments or municipios, despite the large population and importance of the entity.

The advancement of a home rule has been avoided because political reasons: the most influential city of the Country is highly critical to any of the federal governments we have had. Although in 1997, the electorate had the chance to vote for the first time a mayor and since 1986 the city has an Assembly, and the independent Judicial Branch works since 1850, article 122 of the Federal Constitution still subjects the City to political controls by the Executive Branch and the Legislative Branch of the Federal Government.

Symmetrical Federalism. All States have the same powers in principle and the Federal Constitutions outlines the same rules for quite different States. In this sense, we see the criticism explained to the Austrian Federalism by Professor Joseph Marko the same for Mexico. Rules contained primarily in article 116 of the Federal Constitution constrain too much the States by setting fixed rules and prohibitions to all States. One of such detailed rules is the one related to non-

reelection to States and Municipal authorities, particularly State Legislatures, disallowing career oriented members of Congress which constitutes a paradox in a Civil Law Country. At the same time, since all States have to be divided into smaller circumscriptions of local governments, named Municipios, one sector of the Federal Government thinks that the Statehood for Mexico City would be impossible because if it is State it should contain at least 16 municipalities. No one thinks that States can not necessarily have Municipios because all of them have to be identical in their composition and structure.

The same goes for a Second Chamber at the State Legislature. One State recently consulted the possibility to create a Second Chamber in its Legislature as there were present in six States during XIX Century. Most of the voices were against such a measure because the Federal Constitution did not refer expressly to a Second Chamber in the Legislatures' integration.

Of course this opposition misinterpreted the reserved powers for States as stated in article 124 of the Constitution, which follows a Confederate rule, in the sense that requires to the federal powers explicitly grants of powers enumerated in the Constitution, but not to the States, so they can do whatever consider appropriate and does not contradict any principle or explicit prohibition contained in the Constitution.

One of the current challenges for State Constitutions in Mexico is how to innovate, after seven decades of a single party rule, States are eager to innovate and adapt new institutions to deepen the plurality and Democracy in the Country. This past created a long tradition of conservatism and innovations are considered dangerous. For instance, the new State Constitution of Veracruz, enacted in the year 2000, established a judicial remedy to protect the rights contained in the Constitutions to all inhabitants of the State. This approach that may not appear as any innovation to other countries, it was challenged before the Supreme Court as an intrusion to federal jurisdiction since the protection of human rights was an exclusive business of the Federal writ of Amparo. In a divided Bench, the Supreme Court confirmed the constitutionality of this "innovation" in Veracruz.

On the other hand, the Federal District Statehood movement organized in 1999 a plebiscite to consult whether Mexico City should have a Constitution at its own or continue to have a Congressional Act to organize the powers and functions of the City authority, and therefore to be dependent upon the Federal Congress will. Despite the plebiscite went for affirming the need to have a proper Constitution, Federal Congress did not act in accordance.

State Powers. In principle, State Constitutions do not enlist with exhaustation all the reserved powers to the States and although some Constitutions enumerate some legislative, executive and judicial powers, the rule that everything is not assigned expressly by the Constitution to the Federal Government shall be of the cognizance of the States rules the allocation of powers.

Some States are recognizing the immense power to establish new human rights: to the environment (Veracruz), to inmates (Chihuahua), to indigenous people (Oaxaca), to children and so on, but still there is confusion about how to protect them judicially. Whether the State courts have to deal with these violations or this should go entirely to the Federal Courts. The solution since one decade has been the creation of Administrative Agencies, mostly dependent upon the Executive and some of them more autonomous, called Human Rights Commissions that summarily investigate any claim without the need of formality and issues recommendations that are not binding upon the encroaching authorities, but in order for them to avoid public scandal, they accept to comply with such recommendations and an informal system of human rights protection is working.

So far, only four States have implemented judicial remedies for protecting State constitutionally recognized human rights at State Courts.

However, the main problem resulting from plurality at State level is the confrontation and controversies between the branches of Government that begin to rise with great violence. All Branches are included: Executive and Legislative around veto on budget approvals in Nayarit and Tlaxcala; Executive and Judiciary regarding appointments and independence in Tlaxcala and Jalisco. Nevertheless the Supreme Court, resulting from the 1994 Reform, has intervened in these cases through the "Constitutional Controversy"; this procedure takes at least three years to be decided and in the meantime political turmoil and social unrest develop. There is the need for solutions at local level for these controversies like the ones already established in some States.

State Constitutions Reforms. Under the single party regime, Constitutions were easy documents to reform. Many reforms were undertaken every six years whenever a new administration was taking over the State Government. For instance, since 1918 the Constitution of Guerrero has been reformed more than 100 times and many other States follow that example. For this purpose there was no obstacle to overcome the difficult procedure for constitutional reform, like special majorities and ratifications by the majority of municipalities.

In contrast, beginning in the year 2000, half of the States now are prototypes of divided governments and therefore, Constitutional Amendments are beginning to be fewer and truly difficult. This situation is paradoxical because today States need to reverse the previous reforms that emphasized all powerful Executives and institutions that don't meet the challenges of the social change needed; but the same plurality makes very difficult not only innovate but at least the get rid of the, sometimes, harmful measures approved in the past.

Federal Intervention. Still federal intervention is latent in the Constitution. Since 1869 the Federal Judiciary can review practically all judicial resolutions decided at State Courts thanks to the Amparo procedure, based on article 14 of the

Constitution that makes a constitutional problem whenever a resolution has not been dictated conforming the “letter of the Law”. This conservative approach has been used to centralize the administration of justice and to limit judicial interpretation as it is understood in Common Law countries.

The Senate in Federal Congress is empowered to solve political controversies between the branches of State Government and it has intervened in a conflict raised in the State of Yucatan, by playing the role of conciliator. Yet the Senate has another powerful tool to devastate State authorities: the power to recognize the “absence” of legitimate government in any State. This measure was widely used in the past, over one century, from 1879 to 1975, to get rid of State authorities. However this power still exists in the Constitution, its enforcement has been reduced.

The former all powerful Presidential figure is increasingly less powerful after the year 2000, but still keeps some constitutional tools to preserve his preemption among the Federal Branches. The veto power has been exercised, the treaty making power, although shared with the Senate with no lee ways like in the US, has been declared by the Supreme Court to be above domestic law (Thesis LXXVII/99), The tremendous appointment power has not been separated effectively from a spoil system and the high centralization of fiscal resources makes the President the most valuable asset in economic terms.