

## UNFINISHED REVOLUTIONS: CONSTITUTIONAL PASTS AND FUTURES IN IRELAND AND MEXICO

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**ABSTRACT:** In 2016 and 2017 two seemingly unrelated states celebrated centenaries of nation-defining revolutions. Mexico marked the centenary of the 1917 Constitution, which gave formal expression to the demands of the Mexican Revolution that began in 1910. Ireland commemorated 1916, the date of the Easter Rising; a rebellion against rule by the British Empire which led ultimately to independence. This article examines how both Ireland's and Mexico's constitutional histories for the past century relate to two 'unfinished revolutions', in which the hopes and aspirations of the initial revolutions in each state have been only partially realised. In doing so, the article recognises the significant constitutional progress that has been achieved in each state, but also the challenges faced and remaining deficiencies in meeting the aspirations of each revolution, as well as growing threats in the current febrile international climate. Although the constitutional story of each state evidently features a dizzying array of actors, the article places particular focus on the role of courts – especially supreme courts and international human rights courts – in helping or hindering positive transformation in each state.

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**KEYWORDS:** Mexico; Ireland; Revolution; Constitutionalism; Comparative constitutional law.

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## REVOLUÇÕES INACABADAS: PASSADO E FUTURO CONSTITUCIONAIS DA IRLANDA E DO MÉXICO

**RESUMO:** Em 2016 e 2017, dois estados aparentemente não relacionados celebraram os centenários das revoluções que definem suas nações. O México comemorou o centenário da Constituição de 1917, que deu expressão formal às demandas da Revolução Mexicana que começou em 1910. A Irlanda comemorou o ano de 1916, ano do Levante da Páscoa; uma rebelião contra o domínio do Império Britânico que levou à independência. Este artigo examina como as histórias constitucionais da Irlanda e do México no século passado se relacionam com duas "revoluções inacabadas", nas quais as esperanças e aspirações que originaram as revoluções em cada estado foram apenas parcialmente realizadas. Ao fazê-lo, o artigo reconhece o significativo progresso constitucional alcançado em cada estado, mas reconhece também os desafios enfrentados e as deficiências que persistem no cumprimento das aspirações de cada revolução e as crescentes ameaças do calor atual do clima internacional. Embora a história constitucional de cada estado evidentemente represente uma variedade impressionante de atores, o artigo enfatiza particularmente o papel dos tribunais - especialmente os tribunais supremos e os tribunais internacionais de direitos humanos - em ajudar ou dificultar a transformação positiva de cada país.

**PALAVRAS-CHAVE:** México; Irlanda; Revolução; Constitucionalismo; Direito constitucional comparado.

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## I. INTRODUCTION

In 2016 and 2017 two seemingly unrelated states celebrated centenaries of nation-defining revolutions. Mexico marked the centenary of the 1917 Constitution, which gave formal expression to the demands of the Mexican Revolution that began in 1910. Ireland commemorated 1916, the date of the Easter Rising; a rebellion against rule by the British Empire, which directly led to a war for independence from 1919 to 1921, a separate Irish state within the Empire and a written Constitution in 1922, civil war from 1922 to 1923 (contesting the validity of the new State), and fifteen years later, the 1937 Constitution, which remains in force today. This article examines the constitutional trajectories of both states over the past century, which have many connections and resonances.

Of course, from a distance it might appear that Mexico and Ireland have little in common. Ireland is a small unitary island state on the Western fringe of Europe with a population of five million, is a peripheral power in its region, and has a legal system belonging to the common law tradition. Mexico, five thousand miles away, is a large federal state in the heart of the Americas with a population of over one hundred and twenty million, is a major power in its region, and has a legal system belonging to the civil law tradition. On their faces, the Irish and Mexican constitutions also appear very different: Mexico's Political Constitution of 1917, with its 136 articles, is almost three times longer than Ireland's much shorter 1937 Constitution. Each text speaks to a different history, struggles, and lodestars: the Irish preamble, which has remained unchanged since 1937, makes reference to The Holy Trinity, Jesus Christ, and the "unremitting struggle to regain the rightful independence of our Nation" and the text contains anachronistic oddities such as references to the woman's "place in the home".<sup>3</sup> The opening provisions of the Mexican Constitution make reference to slavery and discrimination, and enshrine respect for human rights—the newer global religion—as the guiding light of the State, as well as recognising the nation as "multicultural, based originally on its indigenous peoples" (Article 2).

However, look more closely, and many meaningful interconnections and similarities between the Irish and Mexican constitutional trajectories come into focus. Both Mexico and Ireland have experienced colonisation by a foreign power, battles for independence, significant loss of territory, civil war, and have an enduringly complex relationship with powerful

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<sup>3</sup> Article 41.1.1° states: "[T]he State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved."

neighbours. Constitutional law and politics in both states have been shaped by long-running battles between liberalism and conservatism, and the Catholic Church has left a significant imprint on both society and governance, which endures today in a variety of guises. Of most relevance, for this article, the constitutions of both states were born from revolution.

This article examines how both Ireland's and Mexico's constitutional histories for the past century relate to two 'unfinished revolutions', in which the hopes and aspirations of the initial revolutions in each state have been only partially realised. In doing so, the article recognises the significant constitutional progress that has been achieved in each state, but also the challenges faced and remaining deficiencies in meeting the aspirations of each revolution, as well as growing threats in the current febrile international climate. Although the constitutional story of each state evidently features a dizzying array of actors, the chapter seeks to achieve some narrative clarity by placing particular focus on the role of courts—especially supreme courts and international human rights courts—in helping or hindering positive transformation in each state.<sup>4</sup> The text is also weighted toward discussion of Ireland, with frequent comparative references to Mexico.

The article is divided into three parts. The first part provides a necessarily brief comparative and contextual overview of the constitutional histories of Ireland and Mexico, to provide context for the discussion that follows, and to draw out links between the constitutional trajectories of the two states. The second part analyses the roles of the supreme courts in each state and regional human rights courts (the European Court of Human Rights and the Inter-American Court of Human Rights) as agents of transformation, both helping and hindering progress toward 'completing' the revolutions started in the early twentieth century. The third part briefly considers Ireland's and Mexico's constitutional futures, including emerging trends and enduring challenges, while the conclusion considers new threats emanating from each state's powerful neighbours.

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<sup>4</sup> The role of courts in governance is one of the author's central research preoccupations: For a treatment of constitutional courts and international human rights courts as 'democracy-builders' in post-authoritarian states see Daly (2017a).

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### II. COMPARATIVE OVERVIEW: INTERTWINED CONSTITUTIONAL HISTORIES

This section attempts to provide a brief comparative and contextual overview of the development of the Irish and Mexican constitutions. This overview is necessarily partial, and the aim is merely to provide context for the discussion that follows.

#### 1. Early Irish constitutional history in Ireland and the Spanish Empire

Irish constitutional history is often recounted as a relentless story of victimhood, in which the island of Ireland was dominated and colonised by the Normans (from Northern France) and English from the eleventh century onwards, and thereafter misruled and mistreated until the Irish gained a significant measure of independence in the 1920s. However, this dominant narrative hides much nuance. Taking a longer view, we see that until the twelfth century the Irish often played the role of coloniser or aggressor—indeed, Scotland gets its name from Irish invaders (Scotti), and English histories tell of the incursions of Irish tribes, and Vikings based in Ireland, from the fifth century to the end of the first millennium.<sup>5</sup> By the time the Normans arrived from Northern France in the twelfth century, Ireland had a sophisticated political structure and autochthonous legal system, the Brehon Laws, which provided a unifying system of values in a state where local governance was strong and the power of the High King of Ireland was more symbolic than political; a system of suzerainty rather than sovereignty over a unified political entity.

The arrival of the Normans in Ireland in 1169 marked the beginning of a long period of colonisation, which successively displaced the Brehon Laws and indigenous political structures and traditions. From the early sixteenth century onward, concerted efforts were made to bring the entire island under English control. Meanwhile, the subjugation of the Aztec Empire by Spanish forces under Hernán Cortés from 1519-21 was accompanied by decimation of the population through smallpox and famine, and ushered in three centuries of Spanish imperial rule.<sup>6</sup> In Ireland, a decisive defeat of Irish armies by the forces of Queen Elizabeth

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<sup>5</sup> See ch. 2, 'Alt Clud: Kingdom of the Rock (Fifth to Twelfth Centuries)' in Davies (2011).

<sup>6</sup> See e.g. 'Introduction' in Portilla (2006).

I in 1602 marked the end of the old Gaelic order and spurred the departure of much of Ireland's top-tier nobility, many of whom fled to France and Spain.

This exodus of nobles in 1607, known as 'the flight of the earls', is at the heart of Ireland's overlooked 'other' constitutional history; namely, the significant roles played by Irish nobles and their descendants in the governance of Spain and the Spanish Empire in the New World. Some rose as high as Prime Minister of Spain,<sup>7</sup> and as viceroys of different parts of the Empire—including the liberal freemason Juan O'Donjú, who was effectively last Viceroy of New Spain, a territory comprising modern-day Mexico, Central America, much of the Southern United States of America (US), Cuba, and the Dominican Republic.<sup>8</sup> We begin to see here that the direct links between Irish and Mexican constitutional history, albeit diffuse, run deep. Following armed struggle against Spanish misrule, Mexican independence was decreed by O'Donjú himself in 1821, alongside the Mexican conservative Agustín de Iturbide (proclaimed Emperor Augustine I of Mexico in 1822). The new Mexican Constitution of 1824 was strongly influenced by the Spanish Empire's 1812 Constitution produced by the Cortes at Cádiz—whose delegates had included two conservative Catholic priests of Irish descent.<sup>9</sup>

## 2. Union, repression, and rebellion in Ireland and Mexico

In 1800 the Crowns of Great Britain and Ireland were formally joined in a new political union. The Parliament of Ireland, which had first met in 1297, was dissolved and the entire island of Ireland came under the direct control of the British Parliament in London. British misrule of Ireland, both before and after this political union, included legal and political repression of the Catholic majority, the manipulation of judicial mechanisms to achieve political objectives (e.g. through the 'packing' of criminal juries in trials against Catholic and anti-British defendants) [QUINN, 2001, p. 199], an exploitative economic approach which benefited Britain's growing industrial economy while leaving Ireland an underdeveloped agrarian economy, and a starkly inadequate response to the devastating Great Famine of 1845-49, which reduced Ireland's population of eight million to under six million through death and emigration (MURCHADHA, 2011). Having had a population roughly

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<sup>7</sup> Ricardo Wall was appointed as the first foreign Prime Minister of Spain in 1754. See Fanning (2016) ch. 1.

<sup>8</sup> Fanning (2016) ch. 13, 'The San Patricios'.

<sup>9</sup> Santiago Key Muñoz and Juan Bernardo O'Gavan. See Fanning (2016, p. 59).

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equivalent to that of England in 1800,<sup>10</sup> by 1900 Ireland's population had fallen to 3.2 million—a mere tenth of the rapidly growing population of England and Wales.<sup>11</sup> Half a world away, the United Mexican States was suffering the calamity of defeat in the Mexican-American War of 1846-48 (in which many Irish soldiers fought on both sides, including Mexico's famous *San Patricios* battalion), resulting in dramatic loss of some one-third of its territory.<sup>12</sup> As Peter Smith has observed, “[p]roximity to the United States produced a singularly complex and conflicted relationship with an expansive and land-hungry Colossus of the North” (SMITH, 2012, p. 77). In Ireland, successive attempts to achieve greater autonomy through re-establishment of a parliament in Dublin (‘Home Rule’) were frustrated, particularly by the postponement in 1914 of the Home Rule Act, which had been passed by the British Parliament, due to the outbreak of World War I (O'DAY, 1998). Despairing of political solutions, a band of revolutionaries in 1916—continuing a long tradition of intermittent Irish insurrections against foreign domination—staged a bloody revolution on Easter Monday in 1916. Their Proclamation of Independence envisaged an entirely different Ireland: one focused not just on independence from Britain, but on political freedom more generally, and on social justice in a State marred by mass poverty and extreme inequality. This reflected the identities of the rebels themselves, who comprised not just nationalists, but also socialists, radicals, and women concerned with equal rights for their gender at a time when women were making advances worldwide (for instance, by 1916 women had recently gained the right to vote in Argentina, a number of US states, and Scandinavian states including Denmark and Norway).<sup>13</sup> Declaring an Irish Republic, the rebels made their vision clear:

The Republic guarantees religious and civil liberty,  
equal rights and equal opportunities to all its citizens,

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<sup>10</sup> The Irish and English populations in 1800 were eight million and ten million respectively: see ch.14, ‘Éire: The Unconscionable Tempo of the Crown’s Retreat since 1916’ in Davies (2011, p.638).

<sup>11</sup> See Central Statistics Office, ‘Life in 1916 Ireland: Stories from Statistics’ at [www.cso.ie/en/releasesandpublications/ep/p-1916/1916irl/introduction](http://www.cso.ie/en/releasesandpublications/ep/p-1916/1916irl/introduction); and statistics from the 1901 Census of the United Kingdom at [www.visionofbritain.org.uk/census/SRC\\_P/4/EW1901GEN](http://www.visionofbritain.org.uk/census/SRC_P/4/EW1901GEN).

<sup>12</sup> The lost territory comprised almost all of present-day New Mexico, California, Utah, Nevada, and Arizona.

<sup>13</sup> For a searching analysis encompassing the radical elements of the 1916 Rising see Keohane (2014).

and declares its resolve to pursue the happiness and prosperity of the whole nation and of all its parts, cherishing all the children [people] of the nation equally and oblivious of the differences carefully fostered by an alien government, which have divided a minority from the majority in the past.<sup>14</sup>

The Mexican Constitution of 1917, adopted following the ousting of the dictator Porfirio Díaz after thirty years of repressive rule, gave voice to similar aspirations. Representing the victory of a 'Constitutional Army' composed of liberals, conservatives, and Catholic reformers, the text enshrined a clear separation of State powers, civil and political rights (including significant due process rights), and pioneered a new form of 'social constitutionalism', guaranteeing a raft of justiciable social and economic rights including the rights to free mandatory education, health and safety, and to strike and organise, and a limited scheme of land redistribution.<sup>15</sup>

### 3. A new constitutional story

The 1916 Rising set Ireland on an entirely new constitutional trajectory. Most importantly, it set the scene for the War of Independence in 1919-21, which led in 1922 to an international treaty establishing an Irish Free State within the British Empire, but only through the trauma of partitioning the island of Ireland into two separate political entities: the Irish Free State was formed from twenty-six of the thirty-two counties in the island; the remaining six counties in the north and northeast became the separate jurisdiction of Northern Ireland. Ireland, like Mexico a generation earlier, felt the territorial loss keenly.

That said, the new Irish Free State won significant victories. In crafting the Constitution of 1922 for the new state during the treaty negotiations, canny negotiators on the Irish side—chiefly Hugh Kennedy, who would later become the first Chief Justice of the State—secured maximal autonomy by pursuing the same dominion status for the Free State as Canada and by expressly inscribing in the new Constitution the "law, practice and constitutional usage" pertaining in Canada. As one scholar has observed:

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<sup>14</sup> The full text is available at <http://bit.ly/2br0nAZ>.

<sup>15</sup> For a comparative analysis, see Murray (2015, p. 487).

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The theoretically unfettered powers and prerogatives of the Crown found in other dominion constitutions were, through Kennedy's efforts, circumscribed at every turn by expressing or clearly implying the reality behind the Canadian Constitution. As he explained to the Provisional Government, "what we have done is to take the full length and breadth of the Canadian position in the widest terms". (TOWEY, 1977, p. 360)

However, despite the drafting taking place during a "global wave" (MURRAY, 2015, p. 492) of militancy among workers, pushing a new form of social constitutionalism in states such as Mexico and Weimar Germany, labour and agrarian movements in Ireland failed to achieve the enshrinement of social and economic rights in the 1922 Constitution. As Murray notes:

In the Irish Free State ...the ruling class' successful containment – militarily, politically and ideologically – of social movements' ideals and practices ensured more conservative constitutional forms predominated, emphasizing national identity and private property rights. (MURRAY, 2015, p. 487)

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The Constitution, like Mexico's 1821 Constitution, was also strongly influenced by its imperial predecessor—in many ways it reads as the workings of the unentrenched British Constitution reduced to written form, both in the structures of government (with president and Senate replacing the monarch and House of Lords) and the guarantee of a range of civil and political rights, including jury trial and the right to liberty.<sup>16</sup> However, building on the maximal autonomy won by Hugh Kennedy, Ireland's constitutional story for the subsequent quarter-century focused on the removal of the remaining elements of British sovereignty over Ireland, which included institutions such as the Governor-General. Landmarks in this process were the adoption of the 1937 Constitution and, eleven years later, the declaration of an independent republic and

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<sup>16</sup> In 1954 Kingsmill Moore J. of the Supreme Court opined: "The admitted reproduction in the Constitution of many of the features of the British Constitution is...attributable partially to a genuine appreciation of the inherent excellence of those features, partially to the fact that the Constitution had much of the nature of a compromise between British and Irish views." *In Re Irish Employers Mutual Insurance Association Limited* [1955] IR 176, 223–224.

Ireland's departure from the British Commonwealth of Nations through enactment of the Republic of Ireland Act 1948.<sup>17</sup>

The 1937 Constitution, still in force today, was a creature of its time, still rooted in the British tradition but also, like the 1922 Constitution, reflecting key elements of contemporary constitutional law in its enshrinement of a tripartite separation of State powers and provision of a list of fundamental rights, including the rights to freedom of expression, association, assembly, liberty, and equality before the law. Two highly significant departures from the British tradition of parliamentary supremacy and representative democracy would strongly shape future constitutional development: first, empowerment of the superior courts to invalidate legislation incompatible with the constitutional text, and second—in stark contrast to the onerous amendment processes in the US and Mexican federal systems, requiring significant consensus across Congress and the states—the drafters made a popular referendum the sole mechanism for amending the Constitution.<sup>18</sup>

#### 4. A new Ireland, a new repression

We see again some direct links between the Irish and Mexican constitutions when we look at the details of Ireland's constitutional history: for example, the drafters of the 1937 Constitution made reference to Article 12 of the Mexican Constitution when crafting provisions concerning the conferral of titles of nobility and other honours, by both the Free State and other states (KEOGH; McCARTHY, 2007, p. 146-147). However, the most meaningful similarities between the Irish and Mexican constitutional trajectories for much of the twentieth century lie in how so many of the hopes and aspirations of the initial revolutions in 1916 and 1917 remained stubbornly unrealised.

In Ireland, despite the benefit of a Constitution resting largely within the mainstream of contemporary constitutionalism, and the central trappings of a democratic state, the independent Irish State took a long march toward full freedom. A mixture of an autocratic political establishment, a communitarian rather than individualistic social structure, and the ongoing opposition of armed groups to the very existence of the State combined to close down open dissent and debate, and any tolerance of alternative views (BACIK, 2003). The contribution of

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<sup>17</sup> 'Ireland' and 'Éire' (in the Irish language) remain the official constitutional names of the State, while the 'Republic of Ireland' is the official description of the State.

<sup>18</sup> See generally, Whyte e Hogan (2004). It may be noted that the Constitution permitted amendment by ordinary legislation for a three-year transitory period.

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women, socialists, and radicals to the Easter Rising was effaced, forgotten, or sanitised in mainstream histories and official narratives. In addition, unlike the avowedly secular Mexican Constitution of 1917, the 1937 Irish Constitution conferred a special status on the Catholic Church (while also recognising other faiths) and provided inadequate separation between Church and State (LEMAITRE, 2012). Although the Church contributed heavily to the new State by providing significant education and health services, its strong influence and frequent intervention in public life and governance ensured that many of the aspirations of the less conservative 1916 rebels for freedom and equality were not just blocked but aggressively countered.

Eamon de Valera, originally a 1916 rebel, exerted a long period of dominance from 1932 onwards. As leader of the Fianna Fáil ('Soldiers of Destiny') party, Taoiseach (Prime Minister), architect of the 1937 Constitution, and controller of the Irish Press newspaper, he ruled the State in close cooperation with the Catholic hierarchy. This had many different results, including alienation of the Protestant minority within the new State, alienation of the Protestant majority in the territory of Northern Ireland, an intolerance of views contrary to conservative Catholic orthodoxies, and a generally repressive approach to women's rights. The latter was most starkly seen in the establishment of a form of alternative detention, within Church laundries, of women viewed as having violated the Church's moral strictures concerning 'correct' social and sexual behaviour—without any form of trial, due process, or possibility of appeal. This system endured for decades (O'DONNELL, 2011). Political ecumenism—as seen in the appointment of a Protestant President of Ireland in 1938, Douglas Hyde—was, in part, a cover for a stultifying embrace of State and Church. This was evidenced, for instance, in the refusal of most Irish politicians to enter the Protestant St Patrick's Cathedral for President Hyde's state funeral in 1949, in adherence with Catholic doctrine, which marked such an act as a grave sin (FERRITER, 2017).

State censorship was rife and press freedom was considerably circumscribed. As a leading Irish historian has observed of Ireland in the early 1960s, regarding the deference expected of journalists toward Eamon de Valera (now President of Ireland):

The world of Irish journalism then was one in which if a reporter asked an embarrassing question his editor could be reprimanded. The idea that either question or

answer might ever appear in print was questionable (COOGAN, 1993, p. 681).

Overall, especially after the end of World War II, Ireland took longer than many of its Western European neighbours to achieve a more rights-based, individual-focused, open society that could tolerate explicit dissent, alternative visions of society, and minority ways of life. In addition, in startling contrast to the post-war 'economic miracle' enjoyed in much of Western Europe, the State suffered under enduringly poor economic conditions for most of the twentieth century, largely as a result of economic mismanagement and poor domestic government policy, rooted in de Valera's long resistance to shift from protectionist economic policies and a 1940s-style insistence on self-reliance rather than economic openness. Indeed, initial proposals for the enshrinement of economic and social rights in the 1937 Constitution (MURRAY, 2012), echoing calls for social justice in 1916, were significantly attenuated, and ultimately formulated in the text as non-justiciable 'directives of social policy' (Article 45) – although it is evidently far from proven that fully justiciable rights would have made any difference to macro-economic policy or success. Mass emigration continued as a *leitmotif* of Irish society throughout the twentieth century, echoing the Great Famine exodus and 'flight of the earls' of previous centuries, discussed above.

In fact, despite being one of the founding democracies of the Council of Europe in 1949,<sup>19</sup> and although certainly not a fully authoritarian state, historians such as Ronan Fanning have characterised de Valera as comparable to Portugal's Salazar or Spain's Franco in his development of a rigid Church-ridden state and maintenance of an iron grip on the levers of power (with only brief periods in opposition) [FANNING, 2015].

### **5. Toward freedom, peace, and prosperity: Ireland from 1973-present**

Having achieved a large degree of freedom from external domination in the 1920s, it took painstaking decades for the Irish people to modernise the State and to achieve 'internal' freedom from institutions such as the Church and a political system dominated by two conservative centre-right political parties (BACIK, 2004). As the next section recounts, litigation formed a central tool in the 'modernisation toolkit' of lawyers, politicians, campaigners, and other civil society actors. More broadly, the

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<sup>19</sup> Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. Germany and Iceland joined the following year.

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cultural influence of greater freedoms in the US and UK placed Irish society in stark relief, and Ireland's entry to the European Economic Community (now European Union; EU) alongside the UK in 1973 provided a strong ballast for modernisers and liberals—not least the Community's central focus on equal pay for men and women (an ideal which has still not been fully realised).

Ireland's constitutional development in the eighty years since 1937 has been characterised by a trio of long struggles: to diminish the Church's stranglehold on Irish society and governance; to build an inclusive society that embraces different minorities, ways of life, and points of view; and to achieve settlement of violent conflict in Northern Ireland and address the legacy of the island's partition in 1922. Significant advances have been made in each area. The Church's political status and power has been very significantly diminished, both formally (through constitutional amendment referendums removing the Church's special status in the 1970s, and introducing divorce and same-sex marriage in the 1990s and 2015, for example) and informally (through cultural rejection of core tenets of Catholic teaching on the use of contraceptives, extra-marital sex, and a collapse in Church attendance from almost 90 per cent. in the late 1980s to under 30 per cent. today) [IRISH CENTRAL, 2013].

The question of Northern Ireland, which suffered decades of violent conflict between its Catholic and Protestant communities from 1969 onward, was finally addressed in 1998 by the Good Friday Agreement, a bilateral international treaty between Ireland and the UK. This achieved a comprehensive (if enduringly fragile) peace settlement, including the establishment of a consociational governance structure in Northern Ireland requiring the Republican (predominantly Catholic) and Unionist (predominantly Protestant) communities to work together, a strong focus on equality and rights protection (through domestic law, all-Ireland mechanisms, EU law, and the European Convention on Human Rights), the removal of irredentist provisions in the 1937 Constitution laying claim to the territory of Northern Ireland, and their replacement by a constitutional recognition that Ireland can only unite and end partition through a majority 'yes' vote in referendums held in both Ireland and Northern Ireland.<sup>20</sup>

By the mid-1990s Ireland had started to experience strong and sustained economic growth, which lasted until the global financial crisis of 2007-2008, and which has picked up again since 2014. Economic growth reversed the trend of emigration, bringing an influx of

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<sup>20</sup> Articles 2 and 3 of the Constitution.

immigrants and new minority populations to a country that had long been ethnically and culturally homogeneous. Small minority communities of Protestants, Travellers (a traditionally nomadic people with similarities to the Roma), and Jews were now joined by immigrants from Africa, Central and Eastern Europe, Asia, and Latin America, with a Muslim minority of 50,000 in particular growing larger than the Traveller population of 30,000, and approximately one-quarter of the size of the Protestant population.<sup>21</sup> Ireland's overall population has climbed from the low of 3.2 million in 1900 to 4.7 million, but remains far lower than historic levels.<sup>22</sup>

## 6. Finding parallels with Mexico

We can again note some parallels between the development of the Irish constitutional order and governance in the past century and developments in Mexico. For instance, we can compare the long rule of de Valera's catch-all populist republican Fianna Fáil party as the 'natural' party of government with the strong hold held on Mexico's political life by the hegemonic Institutional Revolutionary Party (PRI) from 1917 until 2000, when the party lost its first federal presidential elections<sup>23</sup>—a phenomenon also seen in other states, such as India's Congress Party or Japan's Liberal Democratic Party (O'MALLEY, 2017). Despite a high per capita income compared to its neighbours, Mexico, like Ireland, has suffered economic privation and the pain of mass emigration, starting in the early twentieth century and gathering pace in the 1960s (SMITH, 2012, p. 79; DÉLANO, 2011). At the same time, in stark contrast to Ireland's slowly growing population, Mexico's population has grown almost tenfold since 1900, from 13.5 million to over one hundred and twenty million today (PARKER, 2004, p. 26).

However, as in Ireland, the 'safety valve' of emigration was not a panacea. Indeed, it was the debt crisis of the 1980s—along with other factors including social change and urbanisation—that ended the PRI's domination of the political space and paved the way for a more

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<sup>21</sup> Census 2016, 'Profile 7: Religion, Ethnicity and Irish Travellers' <http://www.cso.ie/en/media/csoie/census/documents/census2011profile7/Profile7EducationEthnicityandIrishTravellerEntiredoc.pdf>.

<sup>22</sup> See CSO statistical release, 23 August 2016, 'Population and Migration Estimates' [www.cso.ie/en/releasesandpublications/er/pme/populationandmigrationestimatesapril2016](http://www.cso.ie/en/releasesandpublications/er/pme/populationandmigrationestimatesapril2016).

<sup>23</sup> This was not the PRI's first electoral defeat. The party had previously lost its absolute majority in the Chamber of Deputies in 1997, and the PAN party had won gubernatorial and congressional elections in several states since 1989.

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competitive electoral system. This was accompanied by growing activism by civil society actors against serious human rights abuses and enduring inequality (SMITH, 2012, p. 79-80). In both states, the once-hegemonic parties, Fianna Fáil and the PRI, have had to forge new identities as opposition parties in a context where the disillusionment of the electorate has spurred striking changes in the political system.

That said, the contexts differ widely: Mexico's clear ideological divisions across left (PRD; Partido de la Revolución Democrática, Party of the Democratic Revolution), right (PAN; Partido Acción Nacional; Party of National Action), and centre (PRI) is quite unlike the ongoing dominance of centrist parties in Ireland (Fianna Fáil and Fine Gael), alongside the growing power of leftist nationalism (Sinn Féin) and fragmentation of electoral support across small leftist and socialist parties, and independents (PARKER, 2004, p. 84). With recovering poll numbers, getting increasingly close to the governing party (Fine Gael),<sup>24</sup> Fianna Fáil will hope to emulate the PRI's return to government (in 2012) at the next general election, scheduled for 2021. Moreover, and as discussed below, the party-political system in Mexico has undergone a profound transformation in recent years due to the founding of the MORENA (Movimiento de Regeneración Nacional) party by López Obrador, a central figure in the PRD.

More generally, in the same way that Ireland was a latecomer to the development of the more open and plural society found in many of its Western European neighbours, and did not suffer full authoritarian government like some European states, Mexico has been an outlier in its wider region.<sup>25</sup> As Giménez (2018, p. 155) puts it: Mexico's "pattern of constitutional change has been non-standard." It has not suffered military rule, like so many South American States, nor the full chaos of some smaller Central American states, such as Guatemala. Significant constitutional change has been achieved without, unlike many of its neighbours, adopting a new constitution. At the same time, Mexico has not enjoyed the fuller democratic freedoms of its neighbours to north, the US and Canada. Although one should take care in making comparisons, Mexico's journey toward a more complete democracy, like Ireland's, has been an incremental, step-by-step process, quite unlike more dramatic

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<sup>24</sup> See Irish Examiner (2018). The poll shows Fianna Fáil at 25 per cent. support and Fine Gael at 33 per cent.

<sup>25</sup> Although it is important not to exaggerate Mexican exceptionalism: see Smith (2012, p. 94).

shifts from authoritarian rule to democratic rule seen in states such as Spain, Brazil, or South Africa.

### III. SUPREME COURTS AND REGIONAL HUMAN RIGHTS COURTS: REVOLUTION AND RETICENCE

#### 1. Ireland, Mexico, and the “judicialisation of politics”

Both Ireland and Mexico have also had an idiosyncratic experience of one of the strongest global trends in constitutional law since 1945: the expansion of judicial power in governance, or ‘judicialisation of politics’,<sup>26</sup> which has seen an unprecedented transfer of the power to decide on fundamental political and social questions from elected representatives to courts.

First most clearly seen in the US and the astonishing rise of post-war West Germany (TATE; VALLINDER, 1995; COLLINGS, 2015), the phenomenon also appeared in 1970s India as the Supreme Court arrogated the power to assess the validity of constitutional amendments in its ‘basic structure’ doctrine to counter authoritarian excesses under Indira Gandhi’s rule. It spread worldwide during the ‘third wave of democratisation’, which began with Portugal’s Carnation Revolution against Salazar in 1974 and spread to Spain, Latin America, East Asia, post-Communist Europe, and Africa from the late 1970s to the 1990s.<sup>27</sup>

The period is also known as the ‘third wave’ of constitutional justice,<sup>28</sup> as constitutional courts gained in popularity among post-authoritarian democracies such as Hungary, South Africa and South Korea, while many other states such as Brazil and Taiwan saw the power of their supreme court expand. The period from the 1950s onward also witnessed the emergence and growing power of courts in the international sphere, including the European Economic Community’s Court of Justice, established in 1952, the European Court of Human Rights established in

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<sup>26</sup> See e.g. Tate e Vallinder (1995); Shapiro e Sweet (2002); e Hirschl (2004). See also Sturgess e Chubb (1988).

<sup>27</sup> See Chapter 2 ‘The rise and limits of constitutional courts as democracy-builders’ in Daly (2017a).

<sup>28</sup> The second wave of constitutional justice corresponds to the post-war second wave of democratisation, with the establishment of constitutional courts in Germany and Italy. The first wave of constitutional justice preceded the first wave of democratisation, dating to the establishment in 1920 of the constitutional courts of Austria and Czechoslovakia. See e.g. Biagi (2010, p. 03).

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1959, and the Inter-American Court of Human Rights established in 1979 (STURGESS; CHUBB, 1988).

### 2. The rise of judicial power in Ireland

Ireland has had a mixed experience of the 'judicialisation of politics'. The 1922 and 1937 constitutions marked a radical departure from the British insistence on the supremacy of Parliament by conferring the authority to the superior courts to set aside legislation deemed incompatible with the Constitution.<sup>29</sup> However, Irish judges initially made relatively little use of the power. For the first decades of the new State a 'British' judicial mentality persisted, which evinced caution regarding the exercise of judicial power, and a strong habit toward incrementalism rather than grand constitutional design.

For instance, in *The State (Ryan) v Lennon*<sup>30</sup> in 1934 the Supreme Court reluctantly upheld the validity of a wide-ranging constitutional amendment introducing draconian measures against armed subversives, which granted the State sweeping powers of arrest, detention, and military trial of defendants without the protection of established rules of evidence, on the basis of formalist arguments that the amendment had been adopted according to the correct constitutional procedure. The decision lies in stark contrast to the Indian Supreme Court's assertion of its 'basic structure' doctrine four decades later in its *Kesavananda* decision, in the face of the Prime Minister's attempt to severely curtail individual rights.<sup>31</sup>

That said, the Supreme Court was not an entirely supine creature. Chief Justice Hugh Kennedy issued a blistering dissent against the majority in the 1934 *Lennon* case. Decrying the permanence and expansive nature of the new measures, and the lack of adequate safeguards,<sup>32</sup> he insisted that they effected a radical alteration of the constitutional scheme, stating: "[i]n general it may be said that some of the provisions to which I have been referring are the antithesis of the rule of law, and are, within their scope, the rule of anarchy".<sup>33</sup> The Court's

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<sup>29</sup> The constitutionality of ordinary law could be challenged through concrete review, to the High Court at first instance and the Supreme Court on appeal, or by abstract review through the President's power to refer a Bill directly to the Supreme Court for a binding judgment on its constitutionality before signing it into law.

<sup>30</sup> [1935] 1 IR 170.

<sup>31</sup> *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

<sup>32</sup> See judgment of Kennedy CJ at p. 189ss.

<sup>33</sup> Kennedy CJ at p. 198.

majority did assert itself in the face of other threats to the constitutional order, such as its holding in the *Sinn Féin Funds* case<sup>34</sup> that it was impermissible for the legislature to enact a law to address a matter under consideration by the courts, thereby upholding the separation of powers and exerting a constraining influence on the elected branches of government.

A deep-seated deference gave way in the 1960s and 1970s to a more activist approach; a 'judicial revolution'. Chief Justice Cearbhall Ó Dálaigh and Justice Brian Walsh, both appointed in 1961 by a Prime Minister seeking a more active Court, formed a new axis of judicial energy, revitalising the Constitution through a more expansive reading of its text. The Ó Dálaigh Court was often inspired by US Supreme Court jurisprudence, which has continued to be one of the Court's main lodestars for decades (FASONE, 2013). In some ways Irish case-law was ahead of its time, epitomised in the Court's use of an 'unenumerated rights' doctrine in the 1960s to expand rights protection (which prefigured the full emergence of a similar doctrine in the US) [KEANE, 2004, p. 11]. In just over ten years, the Court addressed as many cases as it had dealt with in the twenty-four years from 1937 to 1961 (MAC CORMAIC, 2016, p. 78). As a recent account of the Court's history observes:

At the height of the expansionist era, in the mid-1960s, one ground-breaking judgment followed another as the court embarked on a drive to expand citizens' individual rights, enhance the protections for defendants in criminal law and rethink fundamental legal principles such as judicial review and the separation of powers. In the process the court became a more powerful institution, and exerted greater influence over the lives of citizens, than ever before (MAC CORMAIC, 2016).

### 3. The retreat of judicial power

Although significant judgments continued into the subsequent decades—such as the 1974 *de Búrca* decision invalidating anachronistic laws trammelling the possibility for women and individuals of lower socio-economic status to sit on criminal juries<sup>35</sup>—the zenith of the Supreme Court's influence gave way to a slow retreat, mirroring to some extent the

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<sup>34</sup> Buckley v Attorney General [1950] 1 IR 67.

<sup>35</sup> [1976] IR 38.

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retreat of the US Supreme Court from its expansionist tendencies during the Warren era (1953-1969).

The Supreme Court also failed in major aspects of its jurisprudence: its case-law on free speech, for instance, exacerbated the deficiencies of the badly-worded constitutional guarantee, and unlike other courts—including the highest courts of the US, Germany, and Canada—eschewed an expansive reading of the text that would breathe life into its operation and help counter the censorious tendencies of the Irish Establishment (DALY, 2009, p. 228).

### 4. An enduring Catholic conservatism

In addition, later incarnations of the Supreme Court at times gave the impression that de Valera's quasi-theocratic State was alive and well. This is exemplified by the Court's refusal in the *Norris*<sup>36</sup> judgment of 1983 to invalidate nineteenth-century laws criminalising homosexual acts, in a challenge taken by a university lecturer and activist, David Norris. Almost a decade after de Valera had passed away, and over fifteen years since the decriminalisation of homosexual acts in Great Britain, Chief Justice Tom O'Higgins, refused to countenance any degree of legal freedom for gay men in Ireland.<sup>37</sup> Invoking "the Christian nature of our State" and dismissing relevant case-law of the European Court of Human Rights in a few short paragraphs, he stated his understanding as follows:

- (1) Homosexuality has always been condemned in Christian teaching as being morally wrong. It has equally been regarded by society for many centuries as an offence against nature and a very serious crime.
- (2) Exclusive homosexuality, whether the condition be congenital or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide.
- (3) The homosexually orientated can be importuned into a homosexual lifestyle which can become habitual.
- (4) Male homosexual conduct has resulted, in other countries, in the spread of all forms of venereal disease

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<sup>36</sup> *Norris v Attorney General* [1984] IR 36.

<sup>37</sup> It is worth noting here that homosexual acts between women were not covered by the laws in question.

and this has now become a significant public-health problem in England.

(5) Homosexual conduct can be inimical to marriage and is *per se* harmful to it as an institution.<sup>38</sup>

### 5. The transformative impact of the European Court of Human Rights

Faced with such judicial attitudes from the highest court in Ireland, David Norris took his case to the European Court of Human Rights in Strasbourg, France. That Court had already handed down some key decisions in cases against the Irish State, particularly the Court's insistence in *Airey v Ireland* that the right of access to justice guaranteed by Article 6 ECHR would require legal aid to be provided to impecunious litigants, even in civil cases under some circumstances.<sup>39</sup> However, it was the *Norris* case that firmly established the European Court's status as an agent of transformation and modernisation in Ireland. In its judgment in *Norris v Ireland*, issued in 1988, the Court, in line with earlier case-law finding application of the same law in Northern Ireland to constitute a violation of the European Convention on Human Rights (ECHR), found the State in violation of the right to respect for private and family life (Article 8 ECHR). At a time when the Supreme Court was retreating from its earlier activism, the judgment signalled that a new avenue had opened for 'revolutionary' judgments.

The judgment also tested the willingness of the State to comply with the intervention of an external judicial body. Although it dragged its feet for years, finally in 1993 a statute was passed to decriminalise homosexual acts between males. This landmark equality statute paved the way for greater freedom for gay men (and women), culminating in a Civil Partnership Act in 2009 and, in the first introduction of same-sex marriage by popular referendum in the world, a referendum on 22 May 2015 which amended the Constitution to permit the introduction of full civil marriage for same-sex couples. The European Court has also had a significant impact in other areas: protecting the right against self-incrimination in a criminal investigation;<sup>40</sup> the prohibition of unjustified

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<sup>38</sup> [1984] IR 36 at 63.

<sup>39</sup> *Airey v Ireland* (1979) 2 EHRR 305.

<sup>40</sup> *Heaney and McGuinness v Ireland* (2001) 33 EHRR 264.

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delays in criminal trials;<sup>41</sup> and the right to information on travelling abroad for an abortion.<sup>42</sup>

However, the State proved unwilling to comply with other domestic judgments that addressed crucial social and moral matters. In particular, the Supreme Court's 1992 judgment in the famous X case,<sup>43</sup> which recognised the right to an abortion if a pregnant woman's life (not health) is at risk due to the pregnancy, including the risk of suicide, placed an obligation on the State to enact a legislative framework governing abortion. Almost twenty years later, with no legislative framework in place—placing pregnant women, medical professionals, and whole families in an extremely invidious position—activists were once again forced to bring their claims before the European Court in Strasbourg.

In its 2010 judgment in *A, B, and C v Ireland*<sup>44</sup> the European Court found a violation of the Article 8 right to respect for private and family life in respect of one of the applicants, due to the State's failure to legislate on foot of the X case judgment. Finally in 2012—a full twenty years after the X case—the legislature passed the Protection of Life During Pregnancy Act 2013, establishing a framework for abortion where a pregnant woman's life is at risk from suicide. This restrictive law has been the subject of severe criticism, by both domestic campaigners and international organisations, such as the UN's Human Rights Committee, which has pushed calls for the holding of a new referendum on the issue, to address the highly unsatisfactory existing constitutional provisions (which are themselves the result of three previous contentious referendums) [LONDRAS, 2016]. As discussed below, a referendum to remove the central obstacle to liberalisation of abortion regulation was passed in May 2018.

### 6. Judicial deference at home

Compared to the European Court of Human Rights and other supreme courts and constitutional courts worldwide, the Irish Supreme Court has adopted a generally conservative approach to use of its ample powers in recent decades. Of course, overall the Court's retreat from assertive judicial power is not necessarily a bad thing, as discussed below. In addition, some criticisms of the Court, such as those bemoaning its

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<sup>41</sup> *McFarlane v Ireland* Application no. 31333/06 (10 September 2010).

<sup>42</sup> *Open Door and Well Woman v Ireland* Application no. 14234/88 (29 October 1992).

<sup>43</sup> *Attorney General v X* [1992] 1 IR 1.

<sup>44</sup> *A, B and C v Ireland* Application no. 25579/05 (16 December 2010).

refusal to render the directives of social policy justiciable, are unfair, given that the constitutional text is clear regarding this matter and given that the courts have long been under-resourced and overburdened, leaving them in no position to play an expansive role in crafting policy.<sup>45</sup>

That said, a rather slavish devotion to following US Supreme Court jurisprudence has, in some areas, led the Irish Supreme Court down a path of incrementally reducing rights protections painstakingly developed over decades. For instance, a recent judgment of the Court (by a bare four-three majority) in 2015 has further cut down previously wide protections against unconstitutionally obtained evidence by discarding a rule established in 1990 against the admissibility of any evidence obtained in breach of constitutional rights, whether knowingly or unknowingly. The move provoked strong dissents from three judges on the Court, decrying the decision's negative impact on individual liberties.<sup>46</sup>

In truth, since the 1970s the most interesting actor in the development of Irish constitutional democracy has been the people. The unusual system of the 1937 Constitution, which makes a popular referendum the sole avenue for amending the constitutional text, means that 'the People' in Ireland is not an abstract or theoretical repository of the sovereign power of the State, but an actor with real constitutional agency. The frequency of constitutional referendums has increased considerably since the 1990s, and amendments passed by popular vote have removed the provisions according a special status to the Catholic Church, introduced divorce, and abolished the death penalty.

### 7. Mexico: From judicial quiescence to judicial power

Compared to its Irish counterpart, the Mexican Supreme Court's<sup>47</sup> emergence as an independent entity capable of promoting democratic values and protecting human rights took place over a much longer period. As Mónica Castillejos-Aragón has observed, until 2000 the ruling PRI party recognised a separation of powers in theory, but through a combination of constitutional reforms reduced the powers of both Congress and the Supreme Court to constrain the powers of the president and protect fundamental rights (CASTILLEJOS-ARAGÓN, 2013, p. 138).

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<sup>45</sup> See e.g. the concluding chapter in Murray (2016).

<sup>46</sup> Director of Public Prosecutions v J.C. [2015] IESC 31. See in particular the dissent by Judge Adrian Hardiman.

<sup>47</sup> Although the official name of the Court is *Suprema Corte de Justicia de la Nación*, the term 'Supreme Court' is used in this article.

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The political climate insisted on a sharp separation between the judicial and political spheres, and a long history of viewing the Constitution as merely a political programme rather than a 'higher law' (MACGREGOR; SÁNCHEZ, 2013, p. 302) blunted the impact of the 1917 Constitution's text. Overall, as Ávila notes:

During the *Partido Revolucionario Institucional* (PRI) [Institutional Revolutionary Party] regime, the [Supreme Court] was part of the authoritarian tradition in the exercise of power, far removed from protecting human rights and limited from doing so by its very institutional design (ÁVILA, 2011, p. 241).

A key institutional obstacle was that, unlike the *erga omnes* effect of Supreme Court decisions in Ireland, judgments of the Mexican Supreme Court under *amparo* proceedings to vindicate fundamental rights had merely *inter partes* effects, diminishing the Court's capacity to effect far-reaching transformation, even within the legal arena. Certain potentially significant powers of the Court, such as its power to order the establishment of commissions of enquiry, were rarely used and had little concrete effect (CASTILLEJOS-ARAGÓN, 2013, p. 139). Thus, while the Ó Dálaigh Supreme Court in Ireland was forging a more assertive and expansive constitutional jurisprudence in the 1960s, despite the innovative text of the 1917 Constitution the Mexican Supreme Court remained a peripheral actor in Mexican governance. While the Court assisted in the development of the presidential system under the 1917 Constitution, it adopted a deferential posture in the face of presidential power (CASTILLEJOS-ARAGÓN, 2013, p. 139).

Ávila asserts that it was not until 2007 – ninety years after adoption of the 1917 Constitution – that the Supreme Court began to assume a more active role, especially regarding the protection of human rights (CASTILLEJOS-ARAGÓN, 2013, p. 139). Castillejos-Aragón has summarised this extraordinary transformation as follows:

the Court has come to be viewed not merely as a forum to settle disputes but as an instrument of societal change. It has issued decisions that were unthinkable during the authoritarian rule, and engaged in unprecedented constitutional interpretation of women's rights, indigenous rights, decriminalization of abortion, transgender rights, HIV rights, labor rights, and health

rights; freedom of expression, freedom of press, and freedom of privacy rights, the right to information, same-sex marriages, DNA rights, children's rights, property rights, and freedom of association, among many others (CASTILLEJOS-ARAGÓN, 2013, p. 139).

In sum, the Supreme Court, having long been an after-thought in Mexican society and governance, has become “an arena for political contestation”, “an instrument of societal change” (CASTILLEJOS-ARAGÓN, 2013), and a “true constitutional court” with the power to invalidate unconstitutional laws (with a supermajority of eight of the eleven justices) [VARGAS, 1996, p. 336]. It is a transformation even more dramatic than that of the Irish Supreme Court fifty years ago. Unlike in Ireland, where the Prime Minister made his wish for a US-style active Supreme Court when appointing Chief Justice Ó Dálaigh and Judge Walsh, in Mexico three inter-related structural and institutional developments have spurred the Supreme Court's ‘awakening’: a raft of fundamental constitutional reforms in 1994, which restructured the judiciary and rendered it more capable of independent judgments; the advent of a competitive electoral system in 2000 when the PRI lost its first elections; and progressive judicial leadership (CASTILLEJOS-ARAGÓN, 2013, p. 140).

That said, scholars such as Francisca Pou Giménez, while welcoming the Supreme Court's awakening, have urged that its activity should be assessed stringently according to criteria applied to courts in mature democratic systems; in particular, the capacity of the Court to provide fully reasoned decisions and to speak with a clear institutional voice. For Giménez, these are key weaknesses of the Court which, over the middle- and long-term, will operate to undermine the legitimacy of its increased centrality as a governance actor (GIMÉNEZ, 2017, p. 117-146).

### **8. The increasing influence of the Inter-American Court of Human Rights**

In Mexico, as in Ireland and much of the world, constitutionalism has developed an international dimension. In particular, both states have accepted the jurisdiction of a regional human rights court with the power to adjudicate on key social, political, and moral questions—wrapped, of course, in the language of human rights.

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Unlike Ireland's early submission to the jurisdiction of the European Court of Human Rights shortly after its establishment, in 1959, Mexico did not accede to the jurisdiction of the Inter-American Court of Human Rights until 1998—two decades after the Court's establishment, and ten years after the Court's first merits judgment, in *Velásquez-Rodríguez v Honduras*, in which the Court found Honduras in violation of the American Convention on Human Rights due to the lack of effective domestic remedies for forced disappearances and suggesting (but not ordering) measures to address these shortcomings.<sup>48</sup> Mexico's foot-dragging in this regard was not unusual among the larger powers in the Americas: Brazil also did not join until 1998, and the US and Canada have declined to submit to the Court. Indeed, the only exception among large states in the Americas is Argentina, which accepted the Court's jurisdiction in 1984, shortly after the military junta, in power since 1976, had collapsed.

However, despite this late start, the Inter-American Court has issued a number of notable judgments in cases against Mexico. Spatial constraints preclude a full discussion of these, but the subject-matter of a key strain of judgments, addressing human rights abuses by the military, shows a stark contrast to the kind of social and moral issues which have been raised in applications against Ireland to the European Court of Human Rights. A central judgment is that in *Radilla Pacheco v Mexico*,<sup>49</sup> in which the Inter-American Court found the military responsible for the forced disappearance of Rosendo Radilla Pacheco, a musician and political activist from Guerrero state, in 1974 and that the government had failed to investigate the crime adequately. The Court ordered wide-ranging reparations, including reform of the legislative framework concerning military jurisdiction to preclude the hearing of human rights abuse claims against soldiers in military courts. The judgment directly countervailed constitutional jurisprudence of the Supreme Court, which had previously ruled that the relevant provision of the Code of Military Justice (Art. 57) was not incompatible with the federal Constitution of Mexico, despite its stark incompatibility with Art. 13 of the Constitution, which strictly limits the jurisdiction of military courts to "crimes and faults against military discipline". As is the case with many other Latin American states, Mexico has only partially complied with the judgment, and shows a resistance to complying with orders to investigate and prosecute human rights abuses (GONZÁLEZ-SALZBERG, 2017).

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<sup>48</sup> (Ser. C) No.4 (29 July 1988).

<sup>49</sup> (Ser. C) No. 209 (23 November 2009).

Still, the Supreme Court has evinced a significant openness to Inter-American jurisprudence, lying somewhere between the highly open stance of the Argentine Supreme Court (which was a regional leader in recognising Inter-American jurisprudence as a standard for interpreting domestic law<sup>50</sup>) and the Brazilian Supreme Court (which generally ignores Inter-American case-law) [DALY, 2017a]. As Carlos Ayala has recently observed, the Mexican Supreme Court has upheld the binding nature of judgments issued by the Inter-American Court for all state authorities, but solely in cases to which Mexico has been the respondent (AYALA, 2016). The Supreme Court (as well as other courts including the Electoral Court) has also made notable references to the decisions of the Inter-American Court in its judgments, increasingly using it as an interpretive guide. In 2010, in a case linked to the *Radilla Pacheco* judgment,<sup>51</sup> the Court took a step further by establishing a doctrine recognising Inter-American case-law as an ‘instructive criterion’ for all judges in Mexico, including cases in which Mexico was not the respondent State (AYALA, 2016, p. 316). That said, more recent case-law has confused matters by holding that national constitutional provisions may impede the application of Inter-American norms (CORON, 2014, p. 173).

In Ireland, the failure of the Supreme Court to enunciate a clear overarching doctrine concerning the status of European Court case-law has led to a significant (even excessive) impact of the ECHR in some areas (e.g. freedom of expression) [DALY, 2009, p. 250-254] but a generally muted impact in other areas. Overall, as one Irish scholar has noted, the Supreme Court has evinced “a degree of antipathy” to the European Convention and the European Court of Human Rights, which has led to a restrictive approach to interpretation of the law enacted in 2003 to amplify the effect of the Convention and Court in domestic law.<sup>52</sup>

Although it is undeniable that courts have played a significant role in the constitutional development of both states, in Mexico, as in Ireland, to centre on the role of courts in the development of Mexican democracy and meeting the ideals of the revolutionaries of 1917 is perhaps to look in

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<sup>50</sup> That said, the *Fontevecchia* ruling issued in February 2017 by the Argentine Supreme Court appears to mark a significant departure from its traditionally strong internationalist approach. National Supreme Court of Justice, *Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso ‘Fontevecchia y D’Amico vs. Argentina’ por la Corte Interamericana de Derechos Humanos*, February 14, 2017.

<sup>51</sup> Engrose et al. 912/2010 (several files), Supreme Court of Justice of the Nation, Mexico (Judgment of 14 July 2011).

<sup>52</sup> The European Convention on Human Rights Act 2003. See B Roche, ‘European Court of Human Rights underused in Irish law – lecturer’ *Irish Times* 28 January 2015.

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the wrong place. As Smith (2012, p. 81) asserts, Mexico's democratisation process "focused almost exclusively on the electoral arena". In many ways, like Ireland's democratic journey, it has not been a judicialised process, but rather a "voted" process.

### IV. THE CONSTITUTIONAL FUTURES OF IRELAND AND MEXICO

The previous sections have attempted to capture the broad outlines of constitutional development in both Ireland and Mexico to date. However, what are the possible futures of each Constitution? This section briefly considers this question through analysis of four dimensions: emerging trends, enduring problems, new threats in a shifting international environment, and diverging trajectories of political and constitutional governance. Given that the analysis is based to some extent on conjecture, it is not intended to present a definitive or comprehensive picture, but rather, to spark reflection on where we are and where we are going, in both states.

#### 1. Emerging constitutional trends in Ireland and Mexico

A number of constitutional trends have emerged in Ireland and Mexico in recent years, which warrant some comment, and which resonate in new ways with the revolutions of the 1910s and revolutionary demands in previous centuries.

This section focuses on one of the strongest trends, which is the attempt to craft a more deliberative system that can meaningfully incorporate a greater degree of popular engagement. Perhaps Ireland's proudest constitutional achievement is the development of the constitutional amendment process through popular referendums in a way that has been, on balance, positive. This mechanism has not only allowed for an incremental modernisation of the Constitution and an enhancement of rights protection and equality, but has also provided the basis for a society-wide discussion of pressing constitutional, social, and moral issues, and a sounder basis for reform than an excessive reliance on top-down court-led reform. It has also led to a sophisticated use of constitutional and political language by those seeking reform, which does not fall into the trap of reducing all discussion to human rights.

A good example is the same-sex marriage referendum of 2015, which was preceded by a year-long campaign by the 'yes' and 'no' sides. The

victory of 'yes' campaigners—who won a 62% majority in favour of the amendment—may be argued to have rested as much on their framing of the issue as relating to basic fairness and community solidarity, and not just an argument based on individual autonomy and equality. In practical terms, the 'yes' campaign also urged individuals to take the initiative: in particular, noting the higher support for same-sex marriage among younger people, it urged them to initiate conversations on the topic with their parents and grandparents. In this way, the 'yes' campaign spoke both to the more communitarian instincts of Irish society, as well as the liberal tendencies of a significant swathe of the electorate.

Ireland's long experiment with direct democracy as a tool for a deliberative democracy has been enhanced by further constitutional experimentation in recent years, particularly through the establishment of two successive deliberative bodies to discuss and analyse selected constitutional reform issues. The first body, the Constitutional Convention, was established in June 2012 to propose recommendations regarding a variety of constitutional and social issues. The body grouped together sixty-six randomly selected citizens, thirty-three politicians nominated by their political parties (including a number of politicians from Northern Ireland), and a chairperson. The body's recommendations, produced after over a year of sittings, set out no less than thirty-eight policy proposals and directly led to a number of referendums, including the 2015 referendum on same-sex marriage.

A successor body, the Citizens' Assembly, comprising a judge as chairperson and ninety-nine randomly selected citizens, met for one year (2016-2017) and is seen as pivotal to the reform of Ireland's restrictive constitutional provisions concerning abortion regulation, by pushing the political class and parliament to address the matter, and showing strong support for the liberalisation of abortion regulation which matched public opinion polls on the issue—although many scholars have noted that the Assembly's impact has been overstated.<sup>53</sup> Thus, we see how constitutional reform in Ireland is now a very broad-based system. A combination of domestic campaigning, litigation, and European Court action has placed the issue centre-stage in a climate where Ireland's political classes were generally unwilling to address it or even discuss it. Whether this model could be successful elsewhere, or can only work in a

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<sup>53</sup> See, in particular, an online Symposium on the IACL-AIDC Blog (official blog of the International Association of Constitutional Law): 'The Citizens' Assembly in Ireland: A Successful Experiment in Deliberative Democracy?' 19 November 2018-19 December 2018.

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state of Ireland's size and history, is a question that cannot be addressed here.

In Mexico, moves to enhance deliberative democracy have also been taken, but in line with the growing power of the Supreme Court, have been developed within the judicial arena. This is seen, for instance, in the Supreme Court's use of 'public audiences' (*audiencias públicas*), in order to hear a wider array of voices when deciding on particularly complex or contentious issues. In a notable parallel of the current Citizen's Assembly in Ireland, for instance, the Court used the public audience mechanism to achieve a more 'dialogic' approach in deciding on the controversial decriminalisation of abortion in Mexico City in 2008, in line with the principles of participatory democracy and judicial transparency.<sup>54</sup>

In line with a global struggle to connect the everyday workings of constitutional law with citizens' lives, the supreme courts in both countries have also embraced, to different extents, the broadcast of court hearings. The Mexican Supreme Court (like its Brazilian counterpart) broadcasts its hearings on television and online (GIMÉNEZ, 2017). In Ireland, where the courts long resisted the broadcasting of court hearings, the first broadcasts, of two Supreme Court hearings, were made in October 2017 in an effort to 'demystify' the courts (O'DELL, 2017).

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### 2. Enduring problems

That said, both Ireland and Mexico evidently remain far from perfect. In Ireland, conservative Catholicism and its legacy remains a significant factor in Irish public life and governance, seen in the continued control of the Church over many schools and hospitals, and highly restrictive laws on the adoption of children with married parents and on abortion. The long-running failure of Ireland's political system to grapple with the issue of abortion reflected not only the disproportionate power of ultra-conservative Catholic groups in the State, but also the inertia and timidity of the Irish political classes. This has been complicated by an influx of foreign money seeking to influence the outcome of the national conversation, on both the conservative and liberal side, which became particularly apparent during the same-sex marriage referendum and current society-wide discussion of abortion reform (MCDONALD, 2015); O'BRIEN, 2015). There is the real risk that democratic deliberation in Ireland—truly reflecting the will of the people—is liable to become

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<sup>54</sup> See e.g. *Constitucionalidad de la ley sobre aborto en la Ciudad de México* (Grupo de Información en Reproducción Elegida, A.C., 2009) 30–31.

distorted as a result of excessive and increasing foreign intervention, seeing Ireland as one battleground of global 'culture wars'. There is also a real threat of 'capture' of the process by sectoral interests, as seen in US states such as California, for example.

Other problems also continue to bedevil the State and to cut across the justice and equality enjoyed by the people of Ireland. Irish society has, overall, integrated its new minorities well and overtly racist and xenophobic political parties have not gained any traction, in stark contrast to Ireland's neighbours.<sup>55</sup> However, the Traveller minority – a traditionally nomadic group that is somewhat similar to the Roma in other states – is widely reviled and overt distaste for that community can often be a 'blind spot' among even ardent supporters of equality and human rights. Ireland's unjust treatment and lengthy processing of asylum seekers is also a dark stain on our character: clear proposals have been made to improve the situation, but have not been fully taken up by the acting government.<sup>56</sup> In an overheating economy, access to housing has become a State-wide crisis, with increasing numbers of families pushed into homelessness by rising rental prices and the utter failure of successive governments to increase the housing stock to meet this most basic of human needs.<sup>57</sup> These are just some of the problems facing some of the most vulnerable individuals and communities in the State.

Ireland's attitude to free speech also remains a black spot on our constitutional order and society. The welcome victory in the same-sex marriage referendum has a dark side, insofar as a common tendency to decry opponents of same-sex marriage as a uniform raft of bigots reflects a continuing tendency toward 'group think' and rigid moral orthodoxies – tolerance having replaced Catholic doctrine as the new orthodoxy. Whether we like the outcome or not is irrelevant; what matters is that we truly respect the right of others to express contrary views, and to ensure an open sphere for public democratic deliberation. A blasphemy law enacted in 2010, which is an international embarrassment and which has

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<sup>55</sup> Parties including the Immigration Control Platform and National Party have had little success compared to the success of the UK Independence Party (UKIP), the Front National in France, the Party for Freedom in the Netherlands, or the Alternative for Germany (AfD).

<sup>56</sup> See e.g. criticism by Amnesty International of the failure to implement the McMahon Report of June 2015: 'Amnesty International calls on incoming government to prioritise human rights in foreign and domestic policy' 12 May 2016 [www.amnesty.ie/amnesty-international-calls-incoming-government-prioritise-human-rights-foreign-domestic-policy](http://www.amnesty.ie/amnesty-international-calls-incoming-government-prioritise-human-rights-foreign-domestic-policy).

<sup>57</sup> 'The number of homeless people in Ireland has reached a record high' *The Journal* 21 February 2016.

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provided succour to authoritarian regimes worldwide, was finally removed in October 2018 through a referendum to remove the reference to blasphemy in the Constitution (which was the basis for enacting the law in the first place).<sup>58</sup> However, this narrow approach fails to tackle the deficient free speech guarantee itself in Article 40.6.1(i) of the Constitution, which has long been used as a scapegoat for the State and society's censorious tendencies (DALY, 2009).

This reflects a wider refusal by successive governments to conduct root-and-branch systemic reform. For example, despite a consensus since the economic crash of 2008 that Ireland's political system requires significant reform, instead we see the current government tinkering at the margins and focusing on peripheral issues, such as the recent (defeated) constitutional referendums aimed at abolishing the Senate and reducing the age for presidential candidates from thirty-five to twenty-one. With the Senate and President having very limited powers, it is clearly more urgent to address the Executive and Dáil (house of deputies), especially given that the Dáil no longer exerts any significant check on government action.<sup>59</sup>

The view that the Constitution is past its sell-by date has become a common refrain in Ireland, but as one Irish historian has observed: "no one has yet shown a de Valera-like will, or ability, to replace it" (COOGAN, 1993). However, there is value in retaining a venerable Constitution which, though widely criticised, has a central place in Irish life. Rather than a constitutional revolution focused solely on promulgating a new constitutional text, what Ireland in 2017 needs is two-fold: first, a coherent package of reforms put to the Irish people, which addresses the anachronisms and deficiencies of the text and pursues real political reform; and second, a cultural revolution that sees Ireland shed its tolerance of impunity, of censorship, and of mediocre government. Only through these combined efforts can we seek to chart a clearer way forward to the just and equal society imagined by the revolutionaries of 1916.

The urgency of this task is underscored by the fact that corruption and impunity remain stubbornly enduring features of Irish public life, and the fact that speaking out against it can be dangerous. In February 2017,

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<sup>58</sup> Government Legislation Programme Spring/Summer 2017 p.17.

<sup>59</sup> See e.g. a speech by former Minister, Attorney General, and Tánaiste (Deputy Prime Minister) Michael McDowell at the 2016 MacGill Summer School, an annual policy event, entitled 'The Crisis in Democratic Accountability'. Available at [www.macgillsummerschool.com/the-crisis-in-democratic-accountability](http://www.macgillsummerschool.com/the-crisis-in-democratic-accountability).

shocking revelations emerged, suggesting that actors within the police force had ‘gone rogue’, acting more like the police force of an authoritarian police State than the police service of a mature democracy. A whistle-blower within the police force who sought to address abuses of power and decisions not to prosecute powerful societal figures for criminal offences was the subject of an apparently high-level smear campaign labelling him as a paedophile, with the seeming collusion of actors within the State child protection agency (O’TOOLE, 2017). The Prime Minister’s inept handling of the crisis led to plans for his resignation by late March. In the midst of this morass, the identities of the main State actors involved reflects just how much Ireland has changed since de Valera’s time: a male Prime Minister, a female police commissioner, a female Minister for Justice, a lesbian Minister for Children, and the replacement of the sitting Prime Minister by Ireland’s first openly gay Prime Minister (who also happens to be of mixed Irish-Indian parentage).

Mexico, of course, faces its own pressing challenges, including persistent and severe human rights abuses, corruption, the power of drug traffickers, violence perpetrated by both State and non-State actors, and serious environmental challenges. The constitutional response to governance challenges has been an endless round of constitutional amendments: over 500 since 1917. In a similar manner to Ireland, there may be a sense that the Constitution is unequal to today’s challenges. As Giménez observes, although reforms and developments in the past decade have enhanced the democratic and rights-based nature of the constitutional system:

[W]hether the Mexican constitution will finally become the vessel of a more fulfilling democratic life in the decades to come —or whether citizens, as in the Jeffersonian image, will conclude that they have outgrown their constitutional coat—is something that remains to be seen (GIMÉNEZ, 2018, p. 187).

Other subtler trends echo developments in Ireland: in particular, the enduring secular tradition has come under pressure from the growing political power of the rightist PAN party, which has a strong Catholic faction, and the development of a ‘Catholic constitutionalism’ through which opposition to abortion and same-sex marriage is re-framed in the language of constitutional law (LEMAITRE, 2012). It is a phenomenon influenced by the development of ‘Catholic constitutionalism’ in the US,

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and which is now also found in other states such as Brazil and Colombia (LEMAITRE, 2012).

Yet, as Smith observes, outside analysis of Mexico can be relentlessly negative and often fails to note very positive progress. Regarding the much more glowing international view of Brazil in 2013 (which would be different today since the impeachment of President Rousseff and an ongoing democratic crisis since 2016), Smith stated:

Mexico ranks evenly with Brazil on its level of democracy...and it leads Brazil on a number of key dimensions: per capita income, per capita growth, income distribution, human development, strength of political parties, representation of women, popular support for democracy, and societal confidence in private enterprise, the government, and especially the legislature. Mexico is not as grandiose as Brazil, and it has not captured international imagination to nearly the same extent, but in many respects the country has been performing as well as or even better than the giant of South America. (SMITH, 2012, p. 95)

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### 3. Wider threats in a changing international climate

In recent years, and since 2016 in particular, both Mexico and Ireland have also faced wider threats emanating from their powerful neighbours, and other neighbouring states. In Ireland, the UK's plan to withdraw from the European Union—so-called 'Brexit'—not only presents one of the greatest economic threats the State has ever faced (GUIDER, 2016) but also threatens the fragile peace in Northern Ireland, based on the painstakingly crafted Good Friday Agreement of 1998 (LOCK; DALY, 2017). The Conservative government under Prime Minister Theresa May appears to act in ignorance of central constitutional principles set down over twenty years ago, including the Good Friday Agreement, and generally operates with little consideration for (and often little knowledge of) its neighbour to the West.

Brexit also reopens the possibility of further challenges, such as growing calls for a United Ireland, and another referendum on Scottish independence, both of which would see governance across the British Isles change dramatically, and hold unforeseen consequences and risks. These concerns are compounded by repeated plans (but so far shelved

multiple times) by the British government to withdraw the UK from the European Convention on Human Rights, which threatens to collapse the entire system, by sparking departures by other states, such as Russia and Azerbaijan (LOCK; DALY, 2017, p. 60). At the very least, it has made it easier for states such as Turkey to withdraw funding and threaten to leave the system. The collapse of the system would remove one of Ireland's most significant external constitutional controls, which has had a clear positive impact over the decades.

Wider additional threats include the very survival of the EU itself, not solely due to the growing pressure of the euro crisis, migrant crisis and Brexit, but more importantly, due to the emergence of a number of illiberal democracies in its midst; Hungary and Poland have both suffered serious democratic backsliding in recent years, to the extent that the EU's foundational (and constitutional) identity as a community of democratic states is now in question (DALY, 2017b). As indices such as the Timbro Authoritarian Populism Index reveal, illiberal, nativist, and xenophobic parties continue to grow their support across Europe, including the *Alternativ für Deutschland* (AfD) in Germany and the Sweden Democrats. Marine Le Pen of the Front National may have lost the 2017 presidential elections but gained 34 per cent. of the vote; an unprecedented level of support.

For Mexico, the arrival of President Trump and his nativist, xenophobic, and racist platforms and policies presents an array of serious threats. His (far-fetched) plans to build a wall along the US-Mexico border, plans to withdraw the US from the North American Free Trade Agreement (NAFTA), and deport undocumented immigrants have soured bilateral relations that, not so long ago, appeared to be improving year on year, have complicated efforts to achieve fairness and justice for the millions of Mexicans living in the US, and could seriously affect Mexico's economy. The longstanding negative features of the US-Mexican bilateral relationship – described by Renata Keller (2016) as “antagonism, exploitation, and unilateralism” – have returned and intensified.

#### **4. Diverging trajectories? Potentially radical reform in Mexico versus cautious incrementalism in Ireland**

For all the resonances that can be discerned between the constitutional development of Ireland and Mexico, it appears that the political and constitutional paths of these states have begun to diverge markedly. In particular, the results of recent elections mark quite different reactions to

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the challenges facing each state, and may lead to highly different modes of governance in each state in the coming years.

The major development in Mexico is the success of the MORENA party in the elections of 1 July 2018, which encompassed 3,400 positions, from local councillors, to parliament members, a number of governorships, and the federal presidency. The left-wing candidate Andrés Manuel López Obrador, who established MORENA, won with 53.19% of the vote, receiving almost 18 million more votes than the second-placed candidate, Ricardo Anaya of the right-wing/rightist PAN Party, who garnered 22 per cent. of the vote. The result has been a political earthquake, displacing the traditionally strongest parties, who registered their worst ever results: the PRI candidate José Antonio Meade received a meagre 16 per cent. support, which is a striking result for the revolutionary party that governed Mexico for 71 years, until 2000 (BOHON, 2018a).

Obrador's platform – with slogans such as “Abrazos, no balazos” (“hugs, not bullets”) – spoke of hope and an aim to change the internal security strategy of successive governments to deploy the army in a war-like struggle against drug cartels, which has claimed 200,000 lives in the past 12 years. However, the sweeping victory enjoyed by Obrador and MORENA has raised concerns among constitutionalists of an excessive concentration of power in an already hyper-presidential system. As Ramón Bohon put it, due to his electoral mandate and potential ability to control key Supreme Court appointments and push constitutional amendments, Obrador is in an unusually strong position to pursue radical reform: “From now on, at least for the next three years, Obrador has the Mexican Constitution in his hands, with the Supreme Court the only check on his authority”:<sup>60</sup>

Obrador, as a result of his recent triumph, wields a level of power equalling (and perhaps even surpassing) the presidents of Mexico during the height of the era of the PRI, when it dominated the political system. Obrador is in practice an almost omnipotent individual that could shape his regime into not only a populist regime, but an authoritarian government with the other branches at his disposal if he so wishes.

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<sup>60</sup> R Bohon, ‘Part II: Mexican Democracy: A Divergent Road’ IACL-AIDC Blog, 3 August 2018.

Mexico is now at a crossroads: our democracy can evolve into a true democracy in which the people are the true beneficiaries of public institutions, or can return to the last third of the twentieth century when government was controlled by a few individuals. Paradoxically, such evolution in Mexico's democracy depends on one man. People's hopes are high (BOHON, 2018b).

In Ireland, challenges such as economic repair after the financial crisis of 2007-8 and its aftermath, the risks posed by Brexit, and fragmentation in the electoral arena, have produced a form of holding pattern. A minority government is supported by the largest opposition party in a 'supply and confidence' agreement, with a focus on stability and achieving incremental improvements in policy and constitutional reform.

In December 2018 the main opposition party leader justified his decision not to push for a general election in 2019, before the slated date of 2021, on the basis that the Brexit challenges require stability and a need to avoid the "political chaos" unfolding within the Westminster government (RYAN, 2018). That said, the implications of constitutional reform such as the abortion referendum suggest that a narrative of incrementalism and continuity obscures radical and tectonic shifts in the constitutional system, which may be magnified by practical issues such as intensifying dissatisfaction with the cost of living and the ongoing housing crisis, and which may spur another round of constitutional reform.

## V. CONCLUSION: WHO OWNS OUR CONSTITUTIONAL FUTURES?

This article, by comparing the 'unfinished revolutions' in Ireland and Mexico, has attempted to draw out commonalities in the constitutional trajectories of both states, as well as exploring key differences. It is obvious that these are two very different polities, but the comparison highlights many resonances and interconnections between Irish and Mexican constitutional development in the past century, which merit examination. While the constitutional pasts of each state have been sketched – in a rather impressionistic manner – the question remains as to who owns our constitutional futures. If the start of this article underlined that external powers have played a central part in the shaping of Irish and Mexican constitutional development, the travails of recent years have underlined, once again, that despite our long histories of

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freeing ourselves from foreign domination, and attempting to achieve freedom from our own home-grown threats, the one thing neither Ireland nor Mexico can change is geography. For good and ill, our destinies remain bound to our neighbours. This does not mean that we are without agency. Both constitutional systems have succeeded, to some extent, in crafting and developing tailored solutions to their specific constitutional challenges, while also drawing on international and transnational norms to spur positive progress. Ultimately, our constitutional futures, even when highly influenced by external forces, are ours to imagine and to create.

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