University College London

Judicial Review of Expropriation. The case of Mexico

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Declaration

I, Carlos Herrera Martin confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

The emergence of a more visible and powerful judiciary in Mexico in the last 20 years fits a pattern seen in new democracies all over the world. Democratization and judicialization in post-authoritarian regimes seem to converge, at times acting as mutually reinforcing processes. As part of the strengthening of the courts, the role of judicial review of administrative action has expanded considerably and it has given them a bigger role determining the boundaries of the relationship between citizens and the administration. This thesis looks at one instance of judicialization of administrative law using judicial review of expropriation in Mexico as a case study. Mexico has had some form of constitutional review since the nineteenth century, but its role has been largely ignored because Mexico's system of government for the most part of the twentieth century can be described as a dominant party system in which a single party governed for almost 70 years. The Mexican political system was somewhere in between a full authoritarian regime and a democracy. In this context, formal judicial independence was severely limited and it was assumed that the courts never challenged the executive branch and were completely subordinate. This research examines how the Supreme Court in Mexico decided cases in which owners challenged expropriation orders between 1917 and 2008 and it concludes that judicial review of administrative action in Mexico was stronger than what is generally presupposed and that this judicialization of administrative law is increasingly having some negative consequences.

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Chapter 1

Judicial Review of Expropriation: The Case of Mexico

1.1 Introduction

On February 23, 2010 the International Property Rights Index was presented in Mexico[1]. The aim of this index is to 'quantify the strength of property rights – both physical and intellectual – and to rank countries accordingly'.[2] Sadly for those with a competitive streak, Mexico dropped ten places in the ranking from 2009 to 2010. Mexico is now ranked number 72 among 115 countries. Even worse, since 2007 Mexico has dropped thirty places![3] On the other hand, on February 22, 2010 newspapers reported that a Circuit Court declared that an expropriation ordered by the Mexico City government to build a new underground line was invalid and, therefore, the land on which the new underground line was built had to be given back to its owners.[4] An investment of over three thousand million dollars that would benefit hundreds of thousands of inhabitants of Mexico City was put at risk because the judiciary considered that the Mexico City government had violated the constitutional right to private property of the owners of the land where the underground line was being built. This anecdote reflects more than the questionable methodology used by some organizations to measure property rights. It represents a paradox that is at the heart of the current widespread academic misunderstanding of judicial review of expropriation in Mexico as being weak. In this thesis I

[1] Dayne Meré, 'Falla protección de la propiedad', *Reforma*, Negocios (Ciudad de México, 24 February 2010).
[2] Property Rights Alliance, '2010 International Property Rights Index Executive Summary' (2010) 3.
[3] The property rights index is available at http://www.internationalpropertyrightsindex.org/ accessed 28 September 2011.
[4] Ilich Valdez, 'Pierde el Metro derecho de vía', *Reforma*, Ciudad y Metropoli (Ciudad de México, 22 February 2010).

explore the hypothesis that the power of the Mexican government to expropriate property for a public purpose has been limited by the judiciary.

1.2 The contested nature of expropriation

1.2.1 Expropriation examined

Expropriation is a term used widely in institutional economics to describe a threat from the government to property rights. There is a widespread consensus in institutional economics that there can be no economic development without secure property rights and that expropriation poses a great threat to private property.[5] In spite of this, it is hard to find a precise definition of expropriation in institutional economics literature. The term can be used to describe transfers of property, any type of regulation that affects property, and there is even some discussion as to whether taxes can be considered a form of expropriation.[6] This broad understanding of expropriation can also include actions of private parties, not only of the government.[7] The lax use of the term expropriation makes it more complicated to evaluate exactly what is meant by a strong system of property protection. This thesis uses a much more specific concept of expropriation to describe the legal power of the government to take private property without the owner's consent for a public purpose and involving paying compensation.[8] I use it exclusively in those cases in which the government acknowledges that it is using expropriation and therefore exclude discussion on regulatory takings. The regulation of the legal power of government to expropriate is closely linked to the

[5] Property Rights Alliance (n 2).
[6] Timothy Besley and Maitreesh Ghatak, 'Property Rights And Economic Development' in Dani Rodrik and Mark Rosenzweig (ed), *Handbook of Development Economics*, Chapter 68, Volume 5 (Elsevier, 2010) 4579.
[7] Claudia R Williamson and Carrie B Kerekes, 'Securing Private Property: Formal Versus Informal Institutions' (2011) 54 Journal of Law and Economics 537.
[8] The majority of expropriations are used to take land, but in some cases it can also be used to nationalize companies as was the case of oil expropriation.

development of property as a constitutionally protected right. Property—as a right—was originally developed as a form of protection against the state. In fact in many countries the power to expropriate is inextricably linked to the recognition of property as a constitutional right. In most countries in which property is protected by the constitution, there also exists a limitation on the power to take property.[9] This means that property can only be taken for a public purpose with due compensation. Property rights protect against arbitrary, uncompensated, confiscation of property by the state; expropriation is the procedure that must be followed when the government needs to take private property against the owner's will.

Expropriation is included in more than 80% of constitutions of the world.[10] Such provisions on expropriation include restrictions upon its use in 93% of the cases.[11] The majority of these restrictions on the use of expropriation can be placed in three categories: procedure, compensation, and public purpose. The regulation of expropriation procedure can vary considerably between different countries; there are differences in who can expropriate, what can be expropriated, or what procedure should be followed. The majority of constitutions include a compensation standard such as 'just' or 'fair' compensation.[12] The other restriction is that expropriation can only be undertaken for a public purpose, which is subject to considerable variations in the level of detail with which constitutions define this. The majority of constitutions include just a general requirement that expropriations need to be undertaken for a public interest with a minority detailing in the constitutional text the possible uses of expropriation.[13] Some constitutions include specific procedural requirements such as

[9] See 2.2.1 Expropriation in National Constitutions p 35.
[10] Constitutional Design Group, 'Protection From Expropriation' (Option Reports, 24 May 2008).
[11] ibid.
[12] ibid.
[13] ibid.

the requirement in the Argentinian Constitution that the expropriation decree must be approved by the national congress.

Even if there are considerable differences between specific regulations of expropriation in the constitutions of the world, the compensation and the public purpose requirement are shared by almost every country in which this instrument is used. These requirements must be fulfilled for the expropriation to be considered lawful and are even accepted in international law. These common requirements structure the analysis of different expropriation regimes in order to analyse which actions can be subject to review by the judiciary in different jurisdictions.

1.2.2 Judicial review of expropriation

The scope of judicial review of expropriation is limited to very narrow grounds in most legal systems. The judiciary recognizes wide executive and legislative discretion to define when there is a public purpose which justifies an expropriation and owners can often only challenge an expropriation when there are procedural violations or abuse of power.[14] Strong judicial review, in which the public purpose requirement is understood as a substantive limit on the government's power to expropriate, has been for the most part extremely rare in a comparative perspective.

Even countries such as India in which there has been a strong judicial review of expropriation closely linked with a discussion of property as a constitutional right, the courts have focused

[14]For examples see Chapters in the following books: Andreas F Lowenfeld, *Expropriation In The Americas; A Comparative Law Study* (Project on private property in the Americas, Dunellen 1971); Tom Allen, *The Right To Property In Commonwealth Constitutions* (Cambridge University Press 2000); Tsuyoshi Kotaka and David L Callies, *Taking Land: Compulsory Purchase And Regulation In Asian-Pacific Countries* (University of Hawai'i Press 2002).

on compensation issues.[15] However, the most obvious example of strong judicial review of expropriation is the United States.[16] As part of the tradition in which there has always been a tension between property rights and government intervention, no other country has developed such a complex and wide-ranging constitutional jurisprudence and academic literature on the judicial review of expropriation.

1.2.3 Judicial review and expropriation in Mexico

The number of countries which include a form of constitutional judicial review of legislation has increased from 25% in 1946 to 82% in 2006.[17] This trend is in part, the result of democratization processes in developing countries having accelerated in the last two decades. An essential part of the path towards constitutional democracy in most countries is the creation of an independent judiciary which amongst other things provides for judicial review to act as a protection against executive and legislative abuses of power. Judicial review is one of the pillars of the rule of law and therefore of a functioning democracy because it is the instrument most commonly used to enforce the rights included in new constitutions. This rise in the power of courts and in the importance of judicial review has been accompanied by a parallel and continuous growth in academic literature on comparative judicial politics, focusing on the role of courts and judicial review in new democracies.

Mexico has recently undergone such a process of democratization. The Institutional Revolutionary Party, the ruling party since 1929, lost the presidential elections for the first

[15] Allen (n 14) 43–54.

[16]For example: Bruce A Ackerman, *Private Property And The Constitution* (Yale University Press 1978); Richard A Epstein, *Takings: Private Property And The Power Of Eminent Domain* (Harvard University Press 1985); Carol Rose, *Property And Persuasion: Essays On The History, Theory, And Rhetoric Of Ownership* (Westview Press 1994); Gregory S Alexander, *Commodity And Propriety: Competing Visions Of Property In American Legal Thought, 1776-1970* (University of Chicago Press 1997).

[17] David S Law and Mila Versteeg, 'The Evolution And Ideology Of Global Constitutionalism' (2011) 99 California Law Review 1163, 1199.

time in 2000. As has been the case in many transitions from authoritarian regimes, the Supreme Court in Mexico assumed a more prominent role in the new political environment and its power increased considerably. The turning point for the transformation of the Mexican judiciary was the judicial reform of 1994 which reduced the Supreme Court from 26 to 11 members, and gave it extensive powers to resolve conflicts between different branches of government, strengthening considerably its role as a constitutional court.[18] Although contracted overall, the reform expanded the constitutional jurisdiction of the Supreme Court with the creation of two new instruments of constitutional control:

a) *Constitutional controversies* which are cases in which there is conflict between different levels of government, or different branches of government;
b) *Unconstitutionality actions* which are a form of abstract constitutional review by which certain authorized parties (a legislative minority, the Federal Attorney General and in certain cases political parties) can challenge the constitutionality of legislation before it comes into force.

These two new procedures were powerful instruments which transformed the Supreme Court into one of the most important actors in the new democratic systems because it became the ultimate arbitrator of constitutional conflicts between different political parties.

The increased importance and visibility of the federal judiciary in Mexico was accompanied by the quadrupling of their budget between 1995 and 2002.[19] This expansion of judicial

[18] *Decreto mediante el cual se declaran reformados los artículos 21, 55, 73, 76, 79, 89, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 111, 116, 122 y 123 de la Constitución Política de los Estados Unidos Mexicanos,* Published in the Official Federation Diary, 31 December 1994.
[19] Hector Fix-Fierro, 'Judicial Reform In Mexico: What Next?' in Erik Gilbert Jensen and Thomas Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press 2003) 258.

power has been reflected in a growth in general academic interest in the judiciary and in its role in the consolidation of democracy and the rule of law in Mexico.[20]

Expropriation has been at the centre of some of the most notorious cases heard by the Supreme Court between 2000 and 2006, but judicial review of expropriation is not a recent development in Mexico.[21] The Mexican judiciary has developed extensive precedents on this topic since at least 1918. Despite this long tradition and its importance, the specific issue of judicial review of expropriation has been insufficiently discussed in academic literature. This thesis addresses this lacuna.

1.3 Unanswered Questions

Surprisingly, the phenomenon of judicial review of expropriation has been of little interest to most of the legal academic profession in Mexico. Before the judicial reform of 1994 the Supreme Court, for the most part, avoided general declarations of unconstitutionality and did not discuss in their precedents constitutional concepts such as property or public purpose. Nevertheless, the Supreme Court strengthened its power to review every aspect of an

[20] Karina Ansolabehere, 'Legalistas, Legalistas Moderados Y Garantistas Moderados: Ideología Legal De Maestros, Jueces, Abogados, Ministerios Públicos Y Diputados' (2008) 70 Revista mexicana de sociología 331; Pilar Domingo, 'Judicial Independence: The Politics Of The Supreme Court In Mexico' (2000) 32 Journal of Latin American Studies 705; Jodi Finkel, 'Supreme Court Decisions On Electoral Rules After Mexico's 1994 Judicial Reform: An Empowered Court' (2003) 35 Journal of Latin American Studies 777; Jodi Finkel, 'Judicial Reform As Insurance Policy: Mexico In The 1990s' (2005) 47 Latin American Politics and Society 87; Fix-Fierro (n 19); Silvia Inclán Oseguera, 'Judicial Reform In Mexico: Political Insurance Or The Search For Political Legitimacy?' [2009] Political Research Quarterly 753; Sergio López Ayllón, *Las Transformaciones Del Sistema Jurídico Y Los Significados Sociales Del Derecho En México: La Encrucijada Entre Tradición Y Modernidad* (Universidad Nacional Autónoma de México 1997); Beatriz Magaloni, 'Authoritarianism, Democracy And The Supreme Court: Horizontal Exchange And The Rule Of Law In Mexico' [2003] Democratic Accountability in Latin America 266; Beatriz Magaloni and Guillermo Zepeda, 'Democratization, Judicial And Law Enforcement Institutions, And The Rule Of Law In Mexico' in Kevin J Middlebrook (ed), *Dilemmas of political change in Mexico* (Institute of Latin American Studies, University of London 2004); Julio Ríos-Figueroa, 'Fragmentation Of Power And The Emergence Of An Effective Judiciary In Mexico, 1994-2002' (2007) 49 Latin American Politics and Society 31; Arianna Sánchez and others, 'Legalist Versus Interpretativist' [2011] Courts in Latin America 187; Jeffrey K Staton, 'Judicial Policy Implementation In Mexico City And Mérida' (2004) 37 Comparative Politics 41; Jeffrey K Staton, *Judicial Power And Strategic Communication In Mexico* (Cambridge University Press 2010).

[21] These cases are analysed in: 5.3 *Pascual* Cooperative5.4 The Colima Case 7.4.1 The *ENAH* Case 7.4.2 The *Ramos Millan* Case 7.4.3 The Case of *Paraje de San Juan*.

expropriation order. The Court's lack of pronouncements on property as a constitutionally protected right contributed to the widespread perception within Mexican academic studies that the courts rarely decided against the government and that property rights were therefore weak. [22]

Another factor was that before 1994 the judiciary was poorly studied even by legal scholars who since 1970 rarely included Supreme Court precedent or decisions in constitutional law textbooks.[23] Legal education was outdated and law schools prepared their students poorly for legal practice.[24] Supreme Court precedents and decisions were only analysed and studied by practicing administrative lawyers who applied them to their cases and advice work. The reasons for this radical separation between legal academy and legal practice in public law are complex and not very well understood. Cossio-Diaz argues powerfully that this separation was the consequence of the influence of the authoritarian political regime on the academic understanding of the Mexican Constitution.[25] For the purpose of this thesis, it is sufficient to state that the decisions of the Supreme Court were largely ignored by legal scholars until fairly recently.

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[22] Carlos Elizondo Mayer-Serra, *La Importancia De Las Reglas. Gobierno Y Empresario Despues De La Nacionalización Bancaria.* (Fondo de Cultura Económica 2001); Isaac M Katz, 'La Constitución Y Los Derechos Privados De Propiedad' [2001] Cuestiones Constitucionales 27; Beatriz Magaloni, 'Enforcing The Autocratic Political Order And The Role Of Courts: The Case Of Mexico' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press Cambridge 2008).

[23] José Ramón Cossío-Díaz, *Cambio Social y Cambio Jurídico* (Primera Edicion, Instituto Tecnológico Autónomo de México 2001) 117.

[24] Héctor Fix-Fierro and Sergio López Ayllón, '"¡ Tan Cerca, Tan Lejos!": Estado De Derecho Y Cambio Jurídico En México (1970-1999).' [2000] Boletín Mexicano de Derecho Comparado 155, 228–32.

[25] José Ramón Cossío-Díaz, *Dogmática constitucional y régimen autoritario* (Distribuciones Fontamara 2000).

1.4 Methodological approach

This thesis is structured according to the key categories of the public purpose requirement and compensation because these provide important limits on the power of government to expropriate land or property. In cases in which the public purpose declared by the government to justify the expropriation was challenged the Supreme Court developed a substantive standard of review and, in response, the government had to produce strong evidence that the expropriation would fulfil a public purpose and that those properties affected by the expropriation order were indispensable to the planned project or development. Even if this evidence was presented, the courts also had the power to re-evaluate the evidence already considered by the administration.

When compensation has been challenged the Supreme Court has not developed a standard to calculate compensation such as just or fair value. Instead, deciding on a case by case basis, it has failed to develop a consistent criterion by which to calculate compensation. This lack of consistency has left the decision of how much to pay as compensation for expropriation in the hands of valuers and has produced a corresponding lack of legal certainty which has opened up the door to the scandalous compensation awards of the 2000s. These cases put the role of the federal judiciary in the political spotlight and led to a major confrontation between the Supreme Court and the national left-wing party.

To analyse these concepts I used a mixed-methods approach in which I combined systematic content analysis of judicial decisions with elite interviews, media content analysis and traditional legal analysis.

1.4.1 Research Design and Methodology

I adopt a socio-legal approach to provide an in-depth explanatory account of judicialization of administrative law in authoritarian regimes and new democracies. I decided to use an embedded single case design looking at Mexico as a typical example of a country which has undergone a recent democratization process after a long authoritarian regime.[26] Within this case study I employed a mixed-methods approach which 'can permit investigators to address more complicated research questions and collect a richer and stronger array of evidence'.[27] Mixed-methods research has become increasingly important in recent years, even being described as a third major research approach different from qualitative and quantitative paradigms.[28] Mixed-methods are useful to cross-validate individual findings and increase the explanatory power of the research project, therefore increasing the internal validity.[29] However, as has been pointed out by Wolf the use of this method has to be carefully evaluated to make sure quality standards of different methods involved are fulfilled; the different methods are correctly combined and there is coherence between the questions asked and the answers sought.[30] In this thesis different methods are used to address different aspects of the research project. In the following section I describe the different methods and sources of evidence employed and how they fit with the respective research questions.

[26] Robert K Yin, *Case Study Research: Design and Methods* (Fourth, SAGE Publications Inc 2008) 47–52.

[27] ibid 63.

[28] R Burke Johnson and others, 'Toward a Definition of Mixed Methods Research' (2007) 1 Journal of Mixed Methods Research 112, 112.

[29] ibid 123.

[30] Frieder Wolf, 'Enlightened Eclecticism or Hazardous Hotchpotch? Mixed Methods and Triangulation Strategies in Comparative Public Policy Research' (2010) 4 Journal of Mixed Methods Research 144, 147–55.

1.4.2 Systematic content analysis of judicial decisions

According to Hall and Wright systematic content analysis of judicial decisions is a methodology particularly useful 'in studies that debunk conventional legal wisdom'.[31] This method can be described as an instrument to explore in a more systematic way what the Supreme Court did and their reasoning. This method is ideally suited to answer the question of how the Supreme Court decided in cases in which expropriation orders were challenged and to test the hypothesis that the Court adopted a stronger standard of review than what has been traditionally described by legal doctrine. There are three components to this methodology:[32] selecting cases, coding cases and analysing cases.

In conducting this research I collected all the rulings made by the Supreme Court in which an expropriation order was challenged and created a dataset of 510 decisions. This information was obtained through a petition using the Freedom of Information Act by which I asked the Supreme Court for all their decisions on expropriation since 1917. The dataset included the complete population of cases in the sampling frame and therefore there were no risks of sampling bias in the construction of this dataset.

Having collected this set of Supreme Court decisions, I coded them, capturing the following information: 1. Case number; 2. Court composition, 3. Year in which the case was decided; 4. Type of legal challenge; 5. Outcome of the case; Confirms or overturns lower court decision; 6. Authority that conducted the expropriation; 7. Geographical identification; 8. Types of legal issue; 9. Basis of the decision; 10. Public purpose.

[31] ibid 84.
[32] ibid 79.

I conducted a quantitative descriptive analysis and a systematic content analysis in those cases in which the legal issue decided was public purpose or compensation to document the strength of judicial review of expropriation in Mexico and explore the evolution of the Court's interpretation of the compensation and public purpose requirements.

1.4.3 Qualitative interviews and media analysis

Elite interviews can provide valuable insights in topics in which there is not much public information.[33] I conducted semi-structured open ended interviews using a nonprobabilistic snowball sampling approach which has been proposed for those cases in which 'the population of interest is not fully visible'.[34] I was interested in looking at how judicial review of expropriation was perceived by actors that were directly involved with the use of expropriation or by those who were in in charge of deciding the cases. The population of relevant actors that had experience using expropriation and dealing with cases in which expropriation orders were challenged was not easily identifiable.

After the first set of interviews I decided to concentrate on interviewing people belonging to two categories: former justices and Supreme Court clerks and actors working with the Federal Ministry of Transport building highways and who therefore needed to acquire land and use expropriation. I also conducted some interviews with government officials from the Mexico City Government who had been involved in several high profile cases in which expropriation orders were challenged and with valuators to understand more about compensation and about the economic impact of cases in which the judiciary quashed expropriation orders. I conducted twenty five interviews in person in two different research

[33] Beth L Leech, 'Interview Methods in Political Science' (2002) 35 PS: Political Science & Politics 663.

[34] Oisín Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling' (2007) 40 PS: Political Science & Politics 765, 770.

trips to Mexico between 2010 and 2013 with members of the federal judiciary, government officials, government contractors and private developers.[35] The interviews addressed two aspects of the research. Those that were conducted with Supreme Court officials were used to confirm the findings of the systematic content analysis and to acquire deeper insights into the rulings of the Mexican Supreme Court in expropriation cases. The interviews with government officials from the Federal Ministry of Transport, the Mexico City government and valuators explored how the threat of judicial review affected the decisions of government officials and private actors who would normally count on expropriation as an essential instrument in their toolkit, and more generally it looked at the impact of the standards of judicial review of expropriation developed by the Supreme Court.

1.4.4 Case studies and comparative analysis

In the case of comparative law analysis the United States and India were chosen using an outlier sampling framework as described by Teddlie and Yu.[36] These two jurisdictions were considered outliers because their courts adopted or have adopted a demanding standard of judicial review of expropriation and this has put them at the centre of political conflicts.

Finally I analyse five case studies which were chosen using a representative case sampling framework.[37] These five cases were chosen because they illustrate extremely well the Court's interpretation of the public purpose requirement and of the compensation requirement in expropriation cases. In these cases studies, I reviewed the written media's reaction to them and carried out a content analysis using a grounded theory framework; I conducted interviews

[35] The interview guides can be consulted in Appendix 1.

[36] Charles Teddlie and Fen Yu, 'Mixed Methods Sampling A Typology With Examples' (2007) 1 Journal of Mixed Methods Research 77, 81.

[37] Yin (n 26) 48.

with relevant actors and I analysed the ruling. With this mixed methods approach to empirical research I gained a more complete understanding of the impact of these cases.

1.4.5 Reliability, replicability and validity

This research addresses questions of reliability in respect to the strength of judicial review of expropriation in Mexico by looking not only at the number of cases won by owners, but at the content of the decisions and at the standards of review developed by the Court. This has been strengthened by elite interviews. The internal validity is provided by the use of several methods to collect and analyse evidence on the impact of judicial review of expropriation. The use of a mixed-methods approach and case study design means that the criteria to judge the external validity focuses more on 'how well the researcher generates theory out of the findings'.[38] This research does that by developing a better understanding of the role of courts in authoritarian regimes and of the impact of the judicialization of administrative law.

1.5 Overview of the thesis

In this chapter I present an introduction to the thesis, its organization, its main findings, and the theoretical framework. In the second chapter I explore the rules of expropriation in a comparative perspective to highlight the exceptional standards applied by the Mexican Supreme Court. First I explore constitutional expropriation clauses around the world and undertake a review of academic research on comparative expropriation to understand how judicial review of expropriation is exercised and how the standards have developed around the world. I then explore the rules on expropriation developed in international law which are related mostly to compensation. Next I analyse the jurisprudence of the European Court of

[38] Alan Bryman, *Social Research Methods* (Oxford University Press 2008) 57.

Human Rights on this topic. Finally I undertake a more in-depth examination of judicial review of expropriation in the United States. The concepts developed by American jurisprudence are extremely influential all over the world because many of them have been incorporated in international trade agreements and they have affected the development of comparative constitutional law. As part of this academic interest, the United States has been the subject of debate on the extent of judicial review of expropriation. In particular an influential school of thought calls for stronger property rights and a more robust judicial review of expropriation because it is considered that the current standards applied by the courts in the United States are too weak.[39] I use these debates to illuminate the strength of the standards of judicial review applied in Mexico. I argue that the strength of Mexico's judicial review of expropriation is consistent with the standards demanded by many libertarian academics in the United States.[40] This chapter demonstrates clearly how the Mexican experience feeds into a larger global conversation about the appropriate role of constitutional adjudication over property rights.

Chapter 3 offers a detailed study of the legal and constitutional framework of judicial review of expropriation in Mexico. I explore the history and the precise regulation of expropriation in Mexico and I highlight the lack of attention given to this topic by the legislative branch. Even if expropriation continued to be an important instrument for the government, the legal framework was not modified in sixty years. Apart from high-profile expropriations, such as the oil or the bank nationalizations, expropriation has not been widely studied. Judicial review has been a more popular topic and the literature addressing it has grown

[39] Richard A Epstein, 'The Necessary History Of Property And Liberty' (2003) 6 Chapman Law Review 1.
[40] Richard A Epstein, 'Not Deference, But Doctrine: The Eminent Domain Clause' (1982) 1982 Sup Ct Rev 351; William Epstein, 'The Public Purpose Limitation On The Power Of Eminent Domain: A Constitutional Liberty Under Attack' (1984) 4 Pace Law Review 231; Epstein, *Takings* (n 16); Epstein, 'The Necessary History of Property and Liberty' (n 29).

exponentially. I argue that there is a need for further empirical research on the role of judicial review before 1994. I contend that in some areas, especially in administrative law, the courts have developed doctrines that have limited the government, the clearest example being tax law.[41]

In the second section of this chapter I present the results of the analysis of all the decisions on judicial review made by the Mexican Supreme Court on expropriation between 1917 and 2007. I concentrate on general trends and findings. One of the most important findings is that the Supreme Court decided against the government in almost 50% of the cases. This can be interpreted as a serious limitation on the power of government to expropriate. I also examine the literature on courts in authoritarian regimes and on courts in Mexico to interpret the results of this overview within the framework of comparative constitutional law. The two basic ideas in this chapter are that the courts limited the government's power to expropriate historically and this has had a major direct, indirect and symbolic impact.

In chapter 4 I study how the concept of public purpose has been interpreted by the Mexican Supreme Court. I discuss the academic discussion on the requirement to give reasons in administrative law. I also undertake an in depth analysis of the Mexican Supreme Court rulings and existing precedents that deal with this subject and I conduct a systematic content analysis of its opinions. Arising from this, I argue that the Supreme Court gradually adopted a more formalistic interpretation of the public purpose requirement and transformed it into a giving reasons requirement which severely limited the capacity of the government to use expropriation. In this chapter I also explore the impact of judicial review through interviews

[41] Carlos Elizondo Mayer-Serra and Luis Manuel Pérez de Acha, 'Separación De Poderes Y Garantías Individuales: La Suprema Corte Y Los Derechos De Los Contribuyentes' [2006] Cuestiones constitucionales: revista mexicana de derecho constitucional 4; Carlos Elizondo Mayer-Serra, 'La Industria Del Amparo Fiscal' (2009) 16 Política y gobierno 349.

conducted with relevant actors. The impact is significant as it limits the capacity of the government to undertake projects in which expropriation is needed and it also increases the costs associated with these kinds of projects. The impact of these decisions is more evident in a democratic context because during the authoritarian regime the authorities could spend money without having to worry about accountability.

In Chapter 5 I undertake a detailed exploration of the two most important cases on public purpose heard by the Supreme Court in the last two decades. In the Pascual cooperative case the Mexico City Government decided to expropriate an area in which the most important workers' cooperative in Mexico had its plant.[42] In the Colima case the Colima State Legislature reformed the state expropriation law which permitted expropriation for economic development.[43] The minority in Congress decided to challenge this law before the Supreme Court on the grounds of unconstitutionality. In this case, the Court was asked if there was a limit to the discretion of the legislative branch to define public purpose. I examine these cases not only for their legal significance, but also to highlight the social and political context and the impact of the Court's activity beyond the legal system.

In this chapter I argue that the standards applied to judicial review of expropriation were exceptionally strong. The Court could review any aspect of the decision, even factual questions, and it demanded unequivocal proof that the property subject to expropriation was necessary and that it would fulfil a public purpose. I use comparative institutional analysis to highlight the limitations of the approach followed by the Supreme Court.

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[42] *Amparo en Revisión* 455/2004. *Pleno de la Suprema Corte de Justicia de la Nación*. Decided 17 November 2005.

[43] *Acción de Inconstitucionalidad*. 18/2004. *Pleno de la Suprema Corte de Justicia de la Nación*. Decided 24 November 2005.

In Chapter 6 I study how the Mexican Supreme Court dealt with cases in which compensation was challenged. I analyse the decisions in which the Supreme Court addressed this topic. The great discussion in the Mexican Supreme Court has centred upon the moment in which compensation had to be paid; tellingly, the only expropriation case in which the Supreme Court declared that a federal law was unconstitutional before the 1994 judicial reform was concerned with this issue because for the most part, the Court preferred to decide on a case by case basis to avoid confrontation with other branches of government. The discussion focused upon whether compensation had to be paid before property was taken or if it could be paid in yearly instalments. The Supreme Court originally decided that compensation had to be paid at the same time that property was taken and that a law that authorized the government to pay in instalments was unconstitutional. The Court never developed consistent standards to calculate compensation such as just compensation or adequate compensation.

In Chapter 7 I analyse the three most important cases that forced the Supreme Court to evaluate the way in which compensation was paid in expropriation cases. These involved expropriations carried out in 1968, 1984, and 1989 and in each case the Supreme Court was forced to bend the principle of *res judicata to* adjust the amount of compensation paid to the original land owners. I analyse the impact of these cases on public opinion using content analysis of op-ed pieces in national newspapers and I highlight the costs of the interpretation of the compensation requirement adopted by the Supreme Court.

In Chapter 8 I present the conclusions of this thesis.

1.6 Insights for Comparative Constitutional Law

Two main findings are presented in this thesis; first that the Supreme Court developed a strong standard of judicial review of expropriation since 1917; and second that this robust judicial review of expropriation had a major social, political and economic impact.

1.6.1 Strong judicial review

Judicial review of expropriation in Mexico was strong because through its decisions the Supreme Court gave the judiciary the legal authority to shape the law relating to expropriation, most significantly in terms of what could be expropriated and how much the government should pay as compensation when it expropriated land or property. The majority of cases decided by the Mexican Supreme Court since 1917 questioned whether the process had been followed, if the expropriation served a public purpose, and the way in which compensation was paid. This argument is supported by the evidence that the Supreme Court decided against the government in 50% of the cases that came before it and that their decisions expanded and consolidated their power to review expropriation orders. However, these rulings were passed in an authoritarian context and the Supreme Court could not expand its authority openly; instead the Supreme Court used legal technicalities to avoid a direct confrontation with the executive while strengthening its power of review.

The Supreme Court developed a concept of review that considered every aspect of an expropriation order as reviewable. The Supreme Court therefore conferred upon the judiciary more broadly the power to review not only the interpretation of the law made by the authorities, but also the basis of the decision to expropriate, the factors taken into consideration and the evaluation of these factors. The decisions and precedents developed by

the Supreme Court authorized the judiciary in general to substitute their own judgment for that of the authority in the context of expropriation cases.

The Supreme Court did not engage with grand conceptual discussion on expropriation and the limits of property, thus reducing the possibility of confrontation with the executive branch. When the courts invalidated an expropriation decree, they rarely made explicit that they were protecting property as a constitutional right. Instead, the Supreme Court developed, variously, a demanding review of all aspects of the expropriation procedure as applied by the executive, a case-by-case robust review of the justification presented by the government to support their expropriation orders and cultivated a wide discretion to decide how to calculate cases of compensation. The Court tended to frame cases of expropriation as administrative review cases and largely abstained from touching on constitutional issues.

The process by which a simple giving-reasons requirement is transformed into a substantive standard of review has been analysed by Martin Shapiro who cautions that this simple administrative requirement can be used by the courts to control closely the decisions made by the administration.[44] In the case of Mexico, the Supreme Court used the giving reasons requirement as part of a trend towards an increasingly formalist standard of judicial decision-making. The Mexican courts used formalism as an instrument to protect a limited rule of law in the face of an authoritarian regime, but the lack of clear interpretations in some areas of expropriation law such as public purpose, has led to constant litigation and legal uncertainty. By not engaging with the concept of property as a constitutional right, the judiciary could decide against the government in expropriation cases, whilst at the same time maintain their support for a progressive concept of property as a social function included in article 27 of the

[44] Martin M Shapiro, *Who Guards The Guardians?: Judicial Control Of Administration* (University of Georgia Press 1988); Martin Shapiro, 'The Giving Reasons Requirement' [1992] University of Chicago Legal Forum 179.

Mexican Constitution. The judiciary preferred to decide expropriation issues on a case-by-case basis, thereby maintaining its capacity to protect property without openly confronting the other branches of government.

1.6.2 Impact of judicial review

The existing literature on the impact of judicial review has focused on the possibility of achieving social reform through litigation. One of the most discussed studies is *The Hollow Hope,*[45] in which Rosenberg argues that the impact of judicial decisions on social reform has been largely overstated. This claim goes against commonly accepted understandings of the role of courts in the United States. To analyse the capacity of the court to initiate social reform Rosenberg identifies two types of impact:[46] *direct impact* is the change instigated directly by the decision and *indirect impact* is a change of public attitudes or an increase in support as a result of a ruling.[47] In his work on the symbolic importance of rights and legal mobilization Scheingold[48] emphasizes the importance of indirect effects of judicial review and the importance of their *symbolic value* to bring about social change.[49]

In this research I use direct and indirect impact to frame my analysis of the impact of judicial review of expropriation. Under the category of direct impact I consider the direct costs that the government has to pay when they lose an expropriation case and public works are stopped

[45] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change? Second Edition* (University of Chicago Press 2008).
[46] Malcolm M Feeley, 'Hollow Hopes, Flypaper, And Metaphors' (1992) 17 Law & Social Inquiry 745; Michael W McCann, 'Reform Litigation On Trial' (1992) 17 Law & Social Inquiry 715, 729; Rosenberg, *The Hollow Hope* (n 35) 109; Gerald N Rosenberg, 'Hollow Hopes And Other Aspirations: A Reply To Feeley And McCann' (1992) 17 Law & Social Inquiry 761; Mark Tushnet, 'Some Legacies Of "Brown V. Board Of Education"' (2004) 90 Virginia Law Review 1693.
[47] Rosenberg, *The Hollow Hope* (n 35) 45.
[48] Stuart A Scheingold, *The Politics Of Rights: Lawyers, Public Policy, And Political Change* (University of Michigan Press 2010).
[49] Helena Silverstein, 'The Symbolic Life Of Law: The Instrumental And The Constitutive In Scheingold's The Politics Of Rights' (2003) 16 International Journal for the Semiotics of Law 407, 413.

because of a ruling that declares invalid the expropriation order. The direct impact is identifiable in every case in which the courts rule against the government.

Under indirect impact I look at symbolic impact and effects on attitudes of government officials. The indirect impact is more subtle and it is harder to detect. In expropriation cases possible indirect effects could be: the growing reluctance of the government to use expropriation; the increase in the amount of compensation that the government is willing to pay; the delay of building infrastructure projects because the owners threaten to seek judicial review; the impact on the people who would have enjoyed the benefits of the project, for example a park, housing, or a road. Much of this impact has been identified in the work of Robert Kagan on the judicialization of administrative governance.[50] In his work he argues that strong judicial review of administrative governance in the United States has significant costs because it results in significant delays, more unpredictable outcomes and more costs, not only because of litigation, but also because the threat of judicial review forces authorities to spend more.[51]Finally the symbolic impact in this research is damage to the public image of the courts or of a relevant political actor. In particular it is possible to identify the damage done to the image of the courts as impartial actors.

The second main conclusion of this thesis is that this robust judicial review of expropriation had a major social, political and economic impact. I demonstrate that the courts decided against the government and developed strong standards of judicial review before the judicial reform of 1994.[52] Measuring the impact of judicial review of expropriation before 1994 systematically is challenging because there is little available data. There were two possible

[50] Robert A Kagan, *Adversarial Legalism: The American Way Of Law* (Harvard University Press 2003).
[51] ibid 195–200.
[52] See n 18.

remedies when a federal court decided against the government in expropriation cases.[53] The expropriations could be declared invalid and the courts then ordered the restitution of the expropriated property to its owners, or there could be a conflict over compensation and the court could increase the compensation that was awarded. When a federal court quashed an order on grounds that it did not comply with the public purpose requirement the remedy was to order the government to give the expropriated property back to its original owner. In compensation cases the remedy could be to increase compensation or in some cases the court could also order the government to give back the expropriated property to its original owners. The government never openly challenged a ruling, but instead they delayed compliance in those cases in which enforcing a ruling was problematic. The government in some cases tried to negotiate with the owners who had a ruling in their favour in order to arrive at a solution. In those cases in which a court ordered restitution, but for some reason this was difficult, the owners negotiated from a strong bargaining position and they could expect a discretionary compensation offer much larger than what they would have otherwise obtained.[54] The lack of accountability of government officials in an authoritarian regime allowed the administration to solve the problems posed by judicial review of expropriation using public funds with questionable justification.[55] The constitutional reform of 1994[56] strengthened the capacity of the federal judiciary to enforce its rulings because the Supreme Court could then order compensation to be paid in those cases in which a judgment could not be enforced. The nascent process of democratic accountability in the Mexican political system then reduced the capacity of the government to solve these cases outside formal legal channels.

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[53] Stephen Zamora and others, *Mexican Law* (Oxford University Press 2005) 272–73.

[54] For an example of this see the discussion on the expropriations after the 2985 earthquake in Chapter 3.

[55] For a discussion of how public funds were used by the dominant party to win elections in Mexico see: Kenneth F Greene, *Why Dominant Parties Lose: Mexico's Democratization In Comparative Perspective* (Cambridge University Press 2007).

[56] See n 18.

With the growth in the power of the judiciary after the 1994 reform, the government began to appreciate that it had to take into account the risk of litigation when it decided to use its powers of expropriation. An example of the perception among government officials that the use of expropriation was too risky was that during the administration of President Vicente Fox the federal government started requiring the written consent of the owners before taking an expropriation order to be signed by the President.[57] The most obvious impact of this strong judicial review has been economic because it increased the costs of undertaking public projects. Government officials have opted to pay more to owners to get their agreement because of the risk of losing a subsequent case. The lack of consistent criteria about how to calculate compensation increased dramatically the impact of judicial review because the government had no way of evaluating the possible costs of losing a case and there were wild variations between what different courts awarded as compensation. In some cases huge sums of money were awarded and the incidents had a major social and political impact.[58] The majority of these notorious cases were the result of expropriations undertaken before 1994 in which the courts had declared the expropriation invalid and ordered restitution, but by the time the cases were decided restitution was impossible because the land had been developed.

1.6.3 The Mexican Supreme Court and Comparative Constitutional Law

The above findings can be linked to three major themes woven throughout the thesis which are of general interest in comparative constitutional law.

[57] Carlos Herrera Martin, Interview with Fernando Portilla, 'Entrevista Con El Licenciado Fernando Portilla' (In person, 24 April 2007).

[58] **See Chapter 7.**

(i*) The role of courts and comparative institutional analysis*

The first theme is the debate between two competing narratives on the role of judges which has dominated much of the literature on judicial politics. One such narrative views judges as conservative instruments of powerful political stakeholders that use them to preserve the status quo,[59] while an opposing one sees them as the guardians of liberty and human rights against government abuses.[60] The difference between these two narratives is the role and the importance they give to the courts in their relationship with other branches of government. If the first narrative is accurate then this could be used to justify a more limited role for the courts and a wider deference to the legislative and executive branch. If the second narrative is accurate then an expansive role for the judiciary can be justified.

In this thesis I argue that neither of these two narratives adequately describes the role of the judiciary in Mexico and therefore are not a good starting point for understanding the relationship between different branches of government. I use comparative institutional analysis developed by Neil Komesar as a methodological perspective to appreciate better the role of courts in judicial review of expropriation decisions in Mexico. The approach developed by Komesar is especially powerful because of its clarity and applicability to the

[59] Robert A Dahl, 'Decision-Making In A Democracy: The Supreme Court As A National Policy-Maker' (1957) 6 J Pub L 279; Mark Tushnet, *Taking The Constitution Away From The Courts* (Princeton University Press 2000); Ran Hirschl, *Towards Juristocracy: The Origins And Consequences Of The New Constitutionalism* (Harvard University Press 2004); Larry D Kramer, *The People Themselves: Popular Constitutionalism And Judicial Review* (Oxford University Press 2004); Jeremy Waldron, 'The Core Of The Case Against Judicial Review' (2005) 115 Yale L J 1346.

[60] John Hart Ely, *Democracy And Distrust: A Theory Of Judicial Review* (Harvard University Press 1980); Epstein, *Takings* (n 16); Charles R Epp, *The Rights Revolution: Lawyers, Activists, And Supreme Courts In Comparative Perspective* (University of Chicago Press 1998); Ronald Dworkin, *Freedom's Law: The Moral Reading Of The American Constitution* (Oxford University Press 1999); TRS Allan, *The Sovereignty Of Law: Freedom, Constitution, And Common Law* (Oxford University Press 2013).

analysis of law and public policy. The central elements of this approach drawn from Komesar's work are the following, presented in the form of key propositions: [61]

1. *The choice of social goals tells nothing of the institution that should be used to accomplish them.* It is a common assumption that certain institutions are better suited to achieve certain goals. For example, that the market is better suited to achieve resource allocation efficiency and the government is better at achieving equality, but Komesar's framework challenges these assumptions and argues that deciding the institution better suited to achieve a specific goal is an open question which should be investigated. This leads to the next proposition.
2. *Institutional analysis needs to be comparative*. This means that it is not enough to identify a market failure, problems with a government regulation or point to structural limitations of the courts. It is necessary in each case to compare the merits and weakness of each institution. Komesar emphasizes that there are no perfect alternatives and therefore identifying problems with institutions is not enough to discard them. The most probable outcome is that when comparing institutions there will be no best outcome, just one least bad.
3. *To look at the different institutions it is necessary to develop a participation-centred approach which analyses institutions and its decisions in terms of three simple factors*: distribution of stakes, cost of participation and cost of organization. The identification and combination of these three basic factors is the basis for the evaluation of the performance of different institutions in different contexts.

[61] Neil K Komesar, *Imperfect Alternatives: Choosing Institutions In Law, Economics, And Public Policy* (University of Chicago Press 1997) 271–73.

In Komesar's model law is the product of an adjudicative process which depends on systemic forces which can be organized in a framework of supply and demand of rights.[62] The supply in his model is a function of the capacity of the judiciary which include the costs of information and access, as well as the limitations of scale and expertise.[63] The demand for judicial review is a function of the failure, or the perceived failure of other institutions to achieve satisfactory results.[64] The problem with judicial review is that its demand increases when other institutions start to malfunction which is normally when numbers and complexity increases, but at the same time increasing numbers and complexity strain the capacity of the adjudication process and diminishes the supply.[65] According to Komesar we face a scenario of increasing demand and decreasing supply of judicial review. In this scenario court decisions become a scarce resource which have to be allocated carefully. Confronted with this, comparative institutional analysis is the best tool to decide which institution should decide cases of expropriation and when the courts should decide such cases themselves.

In this research I draw upon Komesar's description of the role of the judiciary. According to his model the courts have very high participation costs as a consequence of the effort made to achieve and maintain judicial independence. The high participation and information costs, combined with unevenly distributed stakes, produces a litigation dynamic in which important, highly dispersed issues with low stakes per capita, are not adjudicated. Adjudication is more likely to occur when an issue involves high stakes per capita for a concentrated minority. The conclusion is that adjudication will tend to favour strong well-organized minorities such as

[62] Neil K Komesar, *Law's Limits: Rule Of Law And The Supply And Demand Of Rights* (Cambridge University Press 2001) 3.
[63] ibid 4.
[64] ibid.
[65] ibid 159–60.

property owners.[66] In unequal societies such as Mexico the risk of a strong judiciary, even if well-meaning, is that it will favour powerful minorities which will be in a better position to take advantage of legal mobilization. The consequences in the case of judicial review of expropriation can be similar to those which have been described in Brazil with the right of health. Recent studies have shown that a series of decisions by the Brazilian courts enforcing the right of health forced the Ministry of Health to provide drugs to almost 40,000 claimants. Problematically, most of the successful claimants had a higher income than average and the resources needed to provide them with treatment were taken from programs which would have benefitted lower-income citizens.[67]

(ii) Judicial politics and judicial review in Mexico

In Mexico the study of judicial politics has been dominated by strategic accounts that have analysed the relationship between political fragmentation and judicial power,[68] and on explaining the reasons behind the government's decision to empower the Supreme Court[69] in the judicial reform of 1994. Another important contribution to the understanding of the Mexican Supreme Court is the work done by Staton in which he refines a model of 'public enforcement mechanism for judicial power'[70]to explain the Court's behaviour. These studies have made a huge contribution to understanding the role of courts as arbiters in conflicts between different branches of government. But this approach has some limitations: whilst

[66] Komesar, *Law's Limits* (n 52) 35–51.
[67] Virgílio Afonso da Silva and Fernanda Vargas Terrazas, 'Claiming The Right To Health In Brazilian Courts: The Exclusion Of The Already Excluded?' (2011) 36 Law & Social Inquiry 825; Octavio Luiz Ferraz Motta, 'The Right To Health In The Courts Of Brazil: Worsening Health Inequities?' (2009) 11 Health and Human Rights 33; Octavio Luiz Ferraz, 'Brazil. Health Inequalities, Rights And Courts: The Social Impact Of The Judicialization Of Health' in Alicia Ely Yamin and Siri Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press 2011).
[68] Ríos-Figueroa (n 20); Camilo Saavedra-Herrera, 'Judicialisation And Democratisation In Mexico The Performance Of Supreme Court Towards Political Fragmentation' (PhD, London School of Economics and Political Science 2011).
[69] Finkel, 'Judicial Reform as Insurance Policy' (n 20); Inclán Oseguera (n 20); Magaloni, 'Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico' (n 20).
[70] Staton, *Judicial Power and Strategic Communication in Mexico* (n 20) 14.

working well in terms of analysing constitutional controversies and unconstitutionality actions, it tends to ignore traditional judicial review because the majority of the cases decided by the Supreme Court are difficult to place squarely along ideological lines. It is therefore difficult to consider whether their decisions reflect their political preferences. The only identifiable slant, at least in administrative law, is distrust in the capacity or the will of the administration to meet the requirements demanded by the relevant legislation to certify the legality of its acts. The strategic approach is insufficient to understand why the Mexican Supreme Court decided in expropriation cases the way it did. In this thesis I combine institutional and cultural accounts to explain the decisions of the Supreme Court in expropriation cases.

(iii) Judicial review of expropriation and courts in authoritarian regimes

Finally my findings are linked to the discussion of the role of courts in authoritarian regimes and new democratic transitions, on which there is a growing body of literature.[71] One of the key findings of this literature is that courts can play a role in authoritarian regimes and are not just pawns.[72] Ginsburg and Moustafa identify five functions of the courts in these regimes: '(1) establishing social control and sidelining political opponents, (2) bolstering a regime's claim to "legal" legitimacy, (3) strengthening administrative compliance within the state's

[71] Javier Couso and others (eds), *Cultures Of Legality Judicialization And Political Activism In Latin America* (Cambridge University Press 2010); Tom Ginsburg and Tamir Moustafa (eds), *Rule By Law: The Politics Of Courts In Authoritarian Regimes* (Cambridge University Press 2008); Tom Ginsburg, 'Courts And New Democracies: Recent Works' (2012) 37 Law & Social Inquiry 720; Andrew Harding and Penelope Nicholson (eds), *New Courts In Asia* (Routledge 2009); Gretchen Helmke and Julio Rios-Figueroa, *Courts In Latin America* (Cambridge University Press 2011); Lisa Hilbink, 'Agents Of Anti-Politics: Courts In Pinochet's Chile' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press Cambridge 2008); Jens Meierhenrich, *The Legacies Of Law: Long-Run Consequences Of Legal Development In South Africa, 1652-2000* (Cambridge University Press 2010); Tamir Moustafa, *The Struggle For Constitutional Power: Law, Politics, And Economic Development In Egypt* (Cambridge University Press 2007); Alexei Trochev, *Judging Russia: The Role Of The Constitutional Court In Russian Politics 1990-2006* (Cambridge University Press 2008).

[72] Tom Ginsburg and Tamir Moustafa, 'Introduction: The Function Of Courts In Authoritarian Politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by law: the politics of courts in authoritarian regimes* (Cambridge University Press Cambridge 2008) 1.

own bureaucratic machinery and solving coordination problems among competing factions within the regime, (4) facilitating trade and investment, and (5) implementing controversial policies so as to allow political distance from core elements of the regime.'[73]

In this research I explore how expropriation decisions played at least three of the roles described by Ginsburg and Moustafa. The decisions of the Supreme Court strengthened the government's claim to legal legitimacy, it served to control the government's bureaucracy, and it facilitated trade because it protected property rights. Understanding the role that the courts played under an authoritarian regime illuminates the continuities and discontinuities between the role of the judiciary working within an authoritarian regime and its place and role under a newly democratic political system.

In this thesis I argue that the Mexican judiciary tried to keep politics and adjudication separate as a distinct strategy to maintain their autonomy. I argue that apoliticism and formalism were used by the Mexican Supreme Court to protect individual rights. The Court avoided politics or even defending property as a constitutional right; instead, when it decided against the government, it did so on the basis of legal technicalities. Before 1994, legal apoliticism was adopted by the courts to defend their autonomy and legal formalism was employed to protect private citizens against government abuses.[74] The problem has been that in a democratic context this doctrine can have a chilling effect on the government's capacity to act because any mistake by the government can render their acts invalid.

[73] ibid 4; Ginsburg (n 62) 722; Moustafa (n 62).
[74] When I use the term legal formalism I mean the doctrine by which the court will declare invalid any act of the government that does not adhere strictly to all the legal formalities. For example the lack of a signature is enough to render invalid an expropriation decree.

1.7 Conclusion

In this introduction I have explained my hypothesis and outlined my key findings. I have outlined the structure of my thesis and how my findings link to a wider discussion on comparative constitutional law. My hypothesis is that the Mexican government has a limited power to expropriate because it is constrained by the judiciary. The Mexican Supreme Court had to develop standards of review of expropriation that constrained the government without openly confronting it because it was operating in an authoritarian political context until 1994. These standards of review reflect a strong distrust of the government, which in many cases was justified, but these limitations to the use of expropriation have had a strong economic and political impact which became even more evident after the transition from an authoritarian to a democratic political system. To support the argument that the Mexican Supreme Court developed an unusually strong standard of review, it is necessary to put the Mexican case in context. In the next Chapter I explore the regulation of expropriation and of judicial review of expropriation in a comparative perspective. I explore the limitations to the use of expropriation developed in human rights law and in international law and I consider in greater depth countries in which the courts have developed a strong interpretation of property as a constitutionally protected right to limit the use of expropriation by the government.

Chapter 2.

A Comparative Perspective on Expropriation

2.1 Introduction

In this chapter I focus on understanding how the public purpose requirement and the compensation requirement have been interpreted in different jurisdictions and in different legal systems. In the case of the public purpose requirement I argue that in most legal systems this requirement was not reviewable by jurisdictional bodies after the expropriation procedure had been settled. I explore the interpretation of compensation standards developed in other jurisdictions to act as a comparison with the Mexican judiciary's interpretation on this matter, the key feature of which is a lack of consistent standards for awarding compensation.

This chapter is divided into four sections: in the first section I analyse expropriation from a comparative perspective; secondly I examine the legal regime of expropriation in international law; thirdly I analyse the interpretation of property as a human right in conflicts over expropriation before the European Court of Human Rights; finally, I give an assessment of the expropriation discussion which has taken place in the United States. Academic discussion of judicial review of expropriation cases in this context is particularly relevant and provides a foundation for my claim that judicial review of expropriation cases in Mexico has involved a strong practice of intervention and review, notwithstanding that it is also typified by a lack of consistent standards for awarding compensation.

2.2 Comparative expropriation

Property as a right was originally developed as a protection against the state. In most countries with a written constitution this protection against government intervention consists of a limitation on the power to take property which can only be taken for a public purpose and with due compensation. Property rights protect against arbitrary, uncompensated, confiscation of property by the state by creating expropriation as an adequate procedure which must be followed when the government needs to take private property against the owner's will. Almost every country in the world recognizes that the government needs the power to take property against the will of the owners when there is a public purpose that justifies it. Even if there are substantive differences in the regulation and practice of expropriation among different jurisdictions, there are common themes which can serve as the basis to understanding the similarities and the differences between different expropriation regimes.

2.2.1 Expropriation in National Constitutions

In most countries with a written constitution expropriation is regulated in some form as part of the recognition of property as a constitutionally protected right. The regulation of expropriation varies widely among different jurisdictions and it is helpful to make a comparative analysis of the similarities and differences. The Comparative Constitutions Project has collected a dataset which includes characteristics of the constitutions of most independent countries since 1789.[1] This dataset has coded elements found in constitutions such as if there is a right to property, or if it explicitly mentions the right of the government to

[1] All the following information is taken from: Elkins, Zachary, Tom Ginsburg, and James Melton. 2014. "Characteristics of National Constitutions, Version 2.0." *Comparative Constitutions Project*. Last modified: April 18, 2014. Available at: http://www.comparativeconstitutionsproject.org.

expropriate. According to this dataset 84.8% of national constitutions provide a right to own property. However, even more constitutions expressly authorize government to undertake expropriations (expropriation is authorized in 90.2% of the constitutions of the world). This could be explained by the fact that in some constitutions property is protected by establishing expropriation. According to this data 73.5% of the constitutions include one form of compensation standard set out in the constitution and in those countries with constitutional judicial review it is reasonable to assume that the standard of compensation can be challenged if it does not meet the requirements established in the constitution.

Standards of compensation		**Frequency**	**Percent**	**Valid Percent**
	1. fair/just	79	47.6	47.6
	2. full	23	13.9	13.9
	3. appropriate	7	4.2	4.2
	4. adequate	13	7.8	7.8
	90. left explicitly to non-constitutional law	14	8.5	8.5
	96. other	15	9.0	9.0
	98. not specified	15	9.0	9.0
	Total	166	100.0	100.0

Table 1

Furthermore, a public purpose requirement is included in the majority of the constitutions with more or less specificity as can be seen in Table 2.

Public Purpose Mentioned in the Constitution	Number	Percentage
Exploitation of Natural Resources	4	2.06%
General Public Purpose	122	62.89%
Land Reform	8	4.12%
Left explicitly to non-constitutional law	17	8.76%
National Defence	17	8.76%
Natural Resource Preservation	6	3.09%
Not specified	6	3.09%
Public Works, Infrastructure	12	6.19%
Redistribution to other citizens	2	1.03%
Grand Total	194	100.00%

Table 2

The majority of the constitutions include just a general public purpose requirement, but a few include more specific provisions. National defence is the second most important public purpose, but it is clear that the majority of constitutions give the responsibility of defining public purpose to its legislative branches, thereby conferring considerable discretion.

2.2.2 The compensation requirement in a comparative perspective

The central debate about expropriation is how to determine how much compensation should be paid. This issue can be analysed at various levels. There are general discussions about what kind of compensation owners can expect, for example whether they should receive commercial value, fair price value, or fiscal value, or there can be a more technical discussion that centres upon the adequacy and choice of methods of valuation.

It is apparent that countries have converged towards a fair market value standard of compensation at least as a minimum.[2] However, there is a strand of literature that is very critical of the use of this standard. Studies of population resettlement have challenged the use of just compensation or fair market value as a standard for compensation, [3] to the extent that the concept of just compensation has been described as 'inflexible, imprecise and unjust'.[4] Such criticism is in many ways similar to the criticism made by critics of market value in the United States legal doctrine. However, even if the arguments are similar it is clear that the magnitude of the problem cannot be compared. In developing countries the use of expropriation has displaced as many as one hundred million people during the 1990s alone.[5] The scale of the problem merits a different response from governments. But, once again the main argument is that more money should be paid. The problem is how to structure a clear and transparent way of calculating this kind of compensations. There are two kinds of risks that can arise from this kind of approach. On one hand, this standard of compensation creates incentives for corruption because it is very difficult to establish an objective method to valuate intangible values. On the other hand, governments are faced by a huge increase in the cost of constructing infrastructure needed for development due to compensation costs that may be well beyond the reach of most third world countries.

These problems have stimulated a lively debate on the standard of compensation all over the world. For example in South Africa, faced with the need to undertake an ambitious program

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[2] Tom Allen, *The Right To Property In Commonwealth Constitutions* (Cambridge University Press 2000) 230.

[3] Michael M Cernea, 'The Risks And Reconstruction Model For Resettling Displaced Populations' (1997) 25 World Development 1569; Michael M Cernea, 'Why Economic Analysis Is Essential To Resettlement: A Sociologist's View' (1999) 34 Economic and Political Weekly 2149; Michael M Cernea and Chris McDowell, *Risks And Reconstruction: Experiences Of Resettlers And Refugees* (World Bank Publications 2000); Michael M Cernea, 'Risks, Safeguards And Reconstruction: A Model For Population Displacement And Resettlement' (2000) 35 Economic and Political Weekly 3659; Michael M Cernea, 'For A New Economics Of Resettlement: A Sociological Critique Of The Compensation Principle' (2003) 55 International Social Science Journal 37.

[4] Cernea and McDowell (n 3) 103.

[5] ibid 2.

of land reform, the Constitution provided that compensation should be just and equitable and that fair market value was just one factor amongst many others to be considered when paying compensation.[6] There are not many other examples in which the courts are given such a wide discretion to decide in each case what constitutes just compensation and take into account the specific circumstances of each case.[7]

It is possible to identify specific differences in compensation standards and regimes in each country, but mostly discussion remains at a technical level. Unusually, in Japan the issue of paying compensation for the loss of cultural values in the case of expropriation has been raised, but so far the Japanese judiciary has established that social and historic value cannot be calculated as part of a broader category of economic value and therefore cannot be the subject of a compensation award.[8]

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[6] Constitution of South Africa

SECTION 25. PROPERTY

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For purposes of this section-

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

[7] Gregory S Alexander, *The Global Debate Over Constitutional Property* (University of Chicago Press 2006) 69.

[8] Tsuyoshi Kotaka, 'Japan's Land Use Law' in Tsuyoshi Kotaka and David L Callies (eds), *Taking Land : Compulsory Purchase and Regulation in Asian-Pacific Countries* (University of Hawai'i Press 2002).

In other countries debates have taken place about whether the standards applied to calculate compensation for expropriated land are too restrictive. In Singapore, for example, compensation was paid using retrospective market values, according to the date upon which the property was acquired (although apparently it is not paid higher than the market value in January of 1995[9]). A further criterion used in some countries is the value used for tax purposes. It is interesting to note that a variant of this formula has been proposed to solve the problem of paying compensation for subjective value in the United States.[10] In Thailand, there are significant complaints about the low levels of compensation paid in those cases in which calculations are based upon tax payable.[11] Finally, the Taiwanese practice of adopting the value used to pay property taxes as the basis for paying compensation[12] has been the subject of criticism in the light of empirical work by Chang which demonstrated that compensation awards in Taiwan in compulsory purchase cases since 2000 were below fair market value in two thirds of cases.[13] As a consequence, Chang uses the case of Taiwan to warn of the possible consequences of using the value of property used for taxation as the basis for compensation and criticizes some of the proposals put forward in the United States for this reason.[14]

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[9] William Ricquier M., 'Compulsory Purchase In Singapore' in Tsuyoshi Kotaka and David L Callies (eds), *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* (University of Hawai'i Press 2002) 273.

[10] Abraham Bell and Gideon Parchomovsky, 'Taking Compensation Private' (2006) 59 Stan L Rev 871, 891.

[11] Eathipol Srisawaluck, 'Land Planning Law System, Land Acquisition, And Compulsory Purchase: The Case Of Thailand' in Tsuyoshi Kotaka and David L Callies (eds), *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* (University of Hawai'i Press 2002) 339.

[12] Li-Fu Chen, 'The Land Use Zoning Control And The Land Expropriation System In Taiwan' in Tsuyoshi Kotaka and David L Callies (eds), *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* (University of Hawai'i Press 2002) 296.

[13] Yun chien Chang, 'Empire Building And Fiscal Illusion? An Empirical Study Of Government Official Behaviors In Takings' (2009) 6 Journal of Empirical Legal Studies 541, 580.

[14] Chang, 'Empire Building and Fiscal Illusion?' (n 13).

It is apparent that the definition of compensation is a widespread polemical, political, and complex issue, although in most countries technical questions appear to dominate the discussions, obscuring more normative questions about fairness and equitable distribution of resources. There are few countries in which the political and social dimensions of compensation are recognized. Even in the case of South Africa, which expressly recognizes the complexity of compensation by acknowledging all the factors that have to be taken into account in order to calculate, there is little academic literature on the broader issues of the subject.

2.2.3 The public purpose requirement in a comparative perspective

In most countries the courts 'have given the purpose requirement only a marginal role in controlling the power of the legislature.'[15] The public purpose requirement has been reviewed by courts in different jurisdictions and they have exercised different levels of scrutiny,[16] but, overall, there is no evidence of court rulings having a substantive impact on the government's power to use expropriation.

Even if judicial interpretation of the public purpose requirement apparently has no significant impact, this does not mean that the concept remains uncontested. In some countries the government's interpretation of the public purpose requirement has been challenged by political protests which have limited the power of government to carry out acts of expropriation of land. Both China and Vietnam have seen protests against land expropriation or land takings that involve expropriation that benefits a private interest.[17] Kim, for example,

[15] Allen, *The right to property in commonwealth constitutions* (n 2) 221.

[16] A general overview of different standards can be found in: AJ Van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Juta 1999).

[17] Annette Kim, 'Land Takings In The Private Interest: Comparisons Of Urban Land Development Controversies In The United States, China And Vietnam.' (2009) 11 Cityscape 19.

identifies the increasing level of conflict generated by expropriations in these countries which are perceived to benefit private entities.[18] The lack of a public purpose becomes a live political and social issue even if it cannot be discussed in the courts. As a consequence, these countries are forced to 'carefully craft the connection between economic growth and the public interest, emphasizing the need for new jobs and relief of the urban housing shortages.'[19] In the next section I continue to examine these issues in the context of the legal framework for expropriation of land in international law.

2.3 Expropriation in international law

Expropriation has been widely discussed in international public law in relation to the responsibilities of a state when it expropriates foreign-owned property. The traditional view was that expropriation could only be undertaken for a public purpose and compensation had to be paid promptly. However, the public purpose requirement never served as a limit to the use of expropriation in international law and there have been no rulings of international tribunals exclusively on this question.[20] As has been pointed out by Friedman when analysing the expropriation procedure: '[A]s to the motives, these are a matter of indifference to international law since the latter does not contain its own definition of public utility.'[21] Therefore, historically international law has been concerned mostly with developing standards of compensation and, more recently, with defining in which cases a government action can be considered as equivalent to expropriation; what has been termed indirect expropriation. In summary, the history of expropriation in international law can be divided in

[18] ibid 22.

[19] ibid 23.

[20] Burns H Weston, 'The Charter Of Economic Rights And Duties Of States And The Deprivation Of Foreign-Owned Wealth' (1981) 75 The American Journal of International Law 437, 440.

[21] Samy Friedman, *Expropriation In International Law* (Greenwood Press 1981) 141.

terms of the discussion before and after the rise of the Bilateral Investment Treaties (BIT). Prior to the BITs, the discussion focused on standards of compensation, although this discussion has for the most part become irrelevant in the face of the growth and the importance of BITs. Below, I provide an analysis of each phase.

2.3.1 Standards of compensation

A major development intervening in the debates about expropriation in international law was the adoption by the United States and other western countries of the Hull formula or rule. This was developed by the American Secretary of State Cordell Hull in a series of diplomatic exchanges with the Mexican government over expropriations carried out as part of the ambitious program of land reform undertaken by the post-revolutionary governments in Mexico.[22] According to the American government, the standard of compensation accepted in international law was that when private property was expropriated the owner had the right to receive payment of prompt, adequate and effective compensation.[23] This 'prompt, adequate and effective' standard became known as the Hull formula.[24]

The debate over standards of compensation would continue to dominate international law of expropriation for the next forty years. On the one side were those countries which defended the Hull formula as a valid rule of international law and therefore considered that when a country expropriated foreign-owned property it had to pay 'prompt, adequate and effective'[25]compensation, and that when this standard was not followed state responsibility was incurred. On the other hand there were countries that recognized that compensation had

[22] Tali Levy, 'NAFTA's Provision For Compensation In The Event Of Expropriation: A Reassessment Of The Prompt, Adequate And Effective Standard' (1995) 31 Stan J Int'l L 423, 425.

[23] Andreas F Lowenfeld, *International Economic Law* (Oxford University Press 2002) 476.

[24] Rudolf Dolzer, 'New Foundations Of The Law Of Expropriation Of Alien Property' (1981) 75 The American Journal of International Law 553, 558.

[25] Brice M Clagett and Daniel B Poneman, 'Treatment Of Economic Injury To Aliens In The Revised Restatement Of Foreign Relations Law, The' (1988) 22 Int'l L 35, 68.

to be paid, but considered that the standards of compensation could be defined by national law. This meant that compensation did not have to be 'prompt' and could be paid in instalments, as in the case of Mexico, or that it was valid to adjust the amount of compensation according to the context of the country and that in many cases it was legal to pay less than full market value for the expropriated land. The difference between these two approaches was that the Hull formula offered stronger protection to property rights because its application resulted in higher compensation values.

However, the discussion over standards of compensation has shifted considerably in the last twenty years and the Hull formula has lost its relevance as a key standard of compensation for expropriation in international law.

2.3.2 The Rise of the Bilateral Investment Treaties

The most important development in international law of expropriation in the last twenty years has been the explosion in the number of BITs and of arbitrations under them. In 2010 there were more than 2,750 BITs and this number continues to grow.[26] One of the results of these instruments is an expanding body of arbitral decisions which have had a significant impact on international law.[27] These decisions have shaped the legal regime of expropriation in international law because provisions on expropriation of foreign property are included in most BITs.[28]

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[26] Marc Jacob, 'Investments, Bilateral Treaties', Frauke Lachenmann (ed), *Max Planck Encyclopedia of Public International Law* (Frauke Lachenmann ed, Online, Oxford University Press 2011) s B.14.

[27] Andreas F Lowenfeld, 'Investment Agreements And International Law' (2003) 42 Colum J Transnat'l L 123; Steffen Hindelang, 'Bilateral Investment Treaties, Custom And A Healthy Investment Climate: The Question Of Whether BITs Influence Customary International Law Revisited' (2004) 5 J World Investment & Trade 789; Campbell McLachlan, 'Investment Treaties And General International Law' (2008) 57 International & Comparative Law Quarterly 361.

[28] Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers 1995) 97.

The majority of these legal instruments adopt the 'prompt, adequate and effective' standard for compensation and this has settled the discussion in international law on the standards of compensation.[29] But as BITs settled the discussion of standards of compensation,[30] they have also contributed significantly to the rise in the number of cases in which investors claimed that a government action was equivalent to an expropriation and should be compensated.[31]

In general terms, international tribunals have not produced a coherent interpretation of the meaning of indirect expropriation in international law[32] and some of these rulings have prompted very negative reactions because they limited the capacity of national governments to adopt regulations necessary for the public good.[33] The dispute settlement mechanism included in Chapter 11 of the North American Free Trade Agreement (NAFTA) has contributed significantly to the development of international law of indirect expropriation and to the growth of academic interest in this topic.[34] In the most notorious cases brought under NAFTA, investors claimed that certain environmental regulations constituted an indirect expropriation.[35] In fact, the claims brought under NAFTA were so controversial that they had a significant impact on the negotiations over the Organization of Economic Cooperation and

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[29] Ursula Kriebaum and August Reinisch, 'Property, Right To, International Protection', Frauke Lachenmann (ed), *Max Planck Encyclopedia of Public International Law* (Frauke Lachenmann ed, Online, 2009) para 29.

[30] Steven R Ratner, 'Regulatory Takings In Institutional Context: Beyond The Fear Of Fragmented International Law' (2008) 102 The American Journal of International Law 475, 478.

[31] Vaughan Lowe, 'Regulation Or Expropriation?' (2002) 55 Current Legal Problems 447, 447.

[32] L Yves Fortier and Stephen L Drymer, 'Indirect Expropriation In The Law Of International Investment: I Know It When I See It, Or Caveat Investor' (2004) 19 ICSID Review 293; Ratner (n 30) 478.

[33] Thomas Walde, 'Treaties And Regulatory Risk In Infrastructure Investment' (2000) 34 Journal of World Trade 1, 17; Vicki Been and Joel C Beauvais, 'The Global Fifth Amendment - NAFTA's Investment Protections And The Misguided Quest For An International Regulatory Takings Doctrine' (2003) 78 NYU L Rev 30, 132–35; Philippe Sands, *Lawless World: Making And Breaking Global Rules* (Penguin 2006) 133–41.

[34] Andrew Newcombe, 'The Boundaries Of Regulatory Expropriation In International Law' (2005) 20 ICSID Review 1, 1–2.

[35] *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award,

30 August 2000, 40 ILM 36.

Ethyl v. Canada was settled after a jurisdictional award (38 ILM 1347)

Methanex v. United States, Final Award 3 August 2005.

Development's proposed Multilateral Agreement on Investment in 1998.[36] Some authors have reacted to this situation by trying to develop a consistent doctrine of indirect expropriation in international law[37] whilst others have accepted that bright line rules are an impossible aspiration,[38] or are even undesirable.[39] This issue has not been settled and, as has been pointed out by Dolzer:

> [C]onsidering those new economic and developmental global directions from the vantage point of the takings issue and its practical relevance, it is not unreasonable to assume that the legal issues in the foreign investment context may, for the time being, be dominated by the definition of expropriation.[40]

Mexico has been a defendant in several cases brought under NAFTA's dispute settlement mechanism in which the plaintiffs asked for compensation arguing that certain regulations constituted indirect expropriations. However the doctrine of indirect expropriation developed in international tribunals has had very little impact in the Mexican legal system. The Mexican Supreme Court has not issued a ruling considering the issue of indirect expropriation.

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[36] Peter T Muchlinski, 'The Rise And Fall Of The Multilateral Agreement On Investment: Where Now?' (2000) 34 The International Lawyer 1033, 1046; Catherine Schittecatte, 'The Politics Of The MAI' (2000) 1 The Journal of World Investment & Trade 329, 342–43; Walde (n 33) 17; Rainer Geiger, 'Regulatory Expropriations In International Law: Lessons From Multilateral Agreement On Investment' (2002) 11 NYU Envtl LJ 94, 97; Sands (n 33) 138.

[37] Lowe (n 31); Newcombe (n 34); Sebastián López Escarcena, *Indirect Expropriation In International Law* (Edward Elgar Publishing 2014).

[38] Fortier and Drymer (n 32); Ratner (n 30).

[39] Been and Beauvais (n 33).

[40] Rudolf Dolzer, 'Indirect Expropriations: New Developments' (2002) 11 NYU Envtl LJ 64.

2.4 European Court of Human Rights and Expropriation

The European Court of Human Rights has an extensive jurisprudence on the right to property, as recognized in the First Protocol to the European Convention on Human Rights. The protocol provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Therefore national governments can only interfere with property if certain conditions are met. An expropriation has to be 'in the public interest, in accordance with national and international law, and proportionate with regard to the public purpose to be achieved.'[41] All of these requirements have been subject to interpretation by the European Court of Human Rights.

In *James* v. *United Kingdom*[42] the European Court of Human Rights accepted that national authorities enjoy a wide margin of appreciation to define what can be considered public interest. The European Court in its judgment declared: '[B]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the

[41] Kriebaum and Reinisch (n 29) s 4.41.

[42] *James v United Kingdom* (1986) 98 (Serie A) 36 (European Court of Human Rights).

international judge to appreciate what is 'in the public interest'.[43] The Court, finding that the margin of appreciation available to the legislature in implementing social and economic policies should be broad, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation.[44] This interpretation means that it was extremely difficult to challenge an expropriation on the grounds that it was not in the public interest.

In *Sporrong and Lönnroth* v. *Sweden*[45] the European Court developed a proportionality requirement for expropriation cases for the first time. In this case the Court ruled that it 'must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'[46] The 'fair balance' requirement was the basis for the Court's adoption of a compensation requirement which was not included in Protocol 1.[47] In *Sporrong* the Court declared that the fair balance was upset because, amongst other things, the petitioner could not claim compensation.[48] The Court made this connection more evident in *James* and in *Lithgow* v. *United Kingdom*,[49] declaring that 'the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1.'[50] In this case, therefore, the Court advanced a weak compensation requirement because full compensation

[43] ibid [46].
[44] ibid.
[45] *Sporrong and Lönnroth v Sweden* (1982) 5 Series A 35 (European Court of Human Rights).
[46] ibid [69].
[47] Tom Allen, 'Compensation For Property Under The European Convention On Human Rights' (2007) 28 Mich J Int'l L 287, 298.
[48] *Sporrong and Lönnroth v Sweden* (n 45) [73].
[49] *Lithgow v United Kingdom* (1986) 102 Series A 329 (European Court of Human Rights).
[50] *James v United Kingdom* (n 42) [54]; *Lithgow v United Kingdom* (n 49) [121].

was found not to be required. In summary, therefore, national authorities enjoy a wide margin of appreciation to determine adequate compensation,[51] but national authorities can only pay less than full market value in exceptional circumstances.[52]

The crucial question in the majority of the cases that have reached the European Court of Human Rights (as in other judicial settings) is if a fair balance was struck.[53] This means that the Court has implicitly developed a substantive body of jurisprudence on how to calculate compensation, and on how compensation can be used to achieve a fair balance.[54] In developing its doctrine in this area, the Court has acknowledged that compensation can be reduced when there is a sufficiently strong public interest to justify it.[55] On the public purpose requirement, therefore, the jurisprudence of the European Court of Human Rights offers national governments considerable scope to decide what actions can be considered in the public interest.

2.5 Judicial review of expropriation in India

One of the countries in which judicial review of expropriation has had a greater impact is India. The Indian Constitution gave its Supreme Court the power to strike down unconstitutional legislation,[56] and it included a right to property as a fundamental right.[57] The protection of property would become the major confrontation between the courts and the

[51] Andrew Legg, *The Margin Of Appreciation In International Human Rights Law: Deference And Proportionality* (Oxford University Press 2012) 149.

[52] Tom Allen, 'Liberalism, Social Democracy And The Value Of Property Under The European Convention On Human Rights' (2010) 59 International & Comparative Law Quarterly 1055, 1068.

[53] ibid 1078.

[54] Allen, 'Compensation for Property under the European Convention on Human Rights' (n 47).

[55] ibid 288–89.

[56] Brice Dickson, *Judicial Activism In Common Law Supreme Courts* (OUP Oxford 2007) 124.

[57] Granville Austin, *Working A Democratic Constitution: A History Of The Indian Experience* (Oxford University Press 2003) 77.

elected authorities for the next 28 years.[58] In particular after independence, the Indian National Government tried to undertake a land reform program expropriating land from absentee landlords whose property rights in many cases were the result of their support for British rule and therefore were very unpopular.[59] The most controversial aspect of these acts of expropriation was that compensation could not be paid at full market value.[60] Owners challenged these expropriations successfully on the grounds that they infringed their right to property because adequate compensation was not paid.[61] In *State of Bihar* v. *Kameshwar*[62] the Indian Supreme Court struck down a land reform statute on the grounds that compensation was not equal for all owners.[63]

The compensation requirement was at the heart of the discussion between the courts and the elected authorities for the next twenty years.[64] To limit the impact of the Supreme Court's decisions the Indian Parliament modified the Constitution several times, restricting their power to review cases in which the government used expropriation.[65] Each amendment was a response to a new ruling in which the Supreme Court used creative interpretations to overcome the limitations imposed by elected authorities.[66] Eventually, the Supreme Court lost the war against elected authorities and in 1978 a new constitutional amendment eliminated

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[58] Nick Robinson, 'Expanding Judiciaries: India And The Rise Of The Good Governance Court' (2009) 8 Wash U Global Stud L Rev 1, 29–30.

[59] Austin (n 57) 72–73.

[60] ibid 75–76; Tom Allen, 'Property As A Fundamental Right In India, Europe And South Africa' (2007) 15 Asia Pac L Rev 193, 196–97; Dickson (n 56) 126; R Rajesh Babu, 'Constitutional Right To Property In Changing Times: The Indian Experience' (2012) 6 Vienna J on Int'l Const L 213, 234–35.

[61] Austin (n 57) 78; Milan Dalal, 'India's New Constitutionalism: Two Cases That Have Reshaped Indian Law' (2008) 31 BC Int'l & Comp L Rev 257, 259; Robinson (n 58) 29.

[62] '*State Of Bihar V. Kameshwar Singh AIR*' (1952) 252 (note).

[63] Allen, 'Property as a Fundamental Right in India, Europe and South Africa' (n 60) 197.

[64] Alexander, *The Global Debate over Constitutional Property* (n 7) 49–56.

[65] Jaivir Singh, 'Separation Of Powers And The Erosion Of The "right To Property" In India' (2006) 17 Constit Polit Econ 303, 306–12.

[66] John Armour and Priya Lele, 'Law, Finance, And Politics: The Case Of India' (2009) 43 Law & Society Review 491, 512.

property as a fundamental right and in its place a small provision was added in section 12 of the Constitution which stated that property could only be taken with lawful authority.[67] The public purpose requirement was not interpreted as a substantive limitation by the Supreme Court even at the height of the war between the two branches of government. It has been pointed out that 'the issue of the presumed "public purpose" for which a taking is engineered, has by and large not been a part of the legal or constitutional discourse in India—even in the heyday of judicial questioning of the compensation issue in the early 1950s, courts have typically deferred to executive or legislative determination of the public purpose.'[68]

The impact of judicial review of cases of expropriation in India was evident even if the interpretation of the events can vary. The situation has been described as a confrontation between a conservative court which tried to protect property and limit the power of a progressive government attempting to transform the social and economic conditions in the country;[69] it has also been portrayed as an example of a court protecting property rights and thereby contributing to economic development.[70] In recent years the Indian Government has increasingly used expropriation of land in order to secure economic development. The weakness of standards of judicial review of such cases of expropriation is criticized because it can leave poor land owners powerless in the face of developers supported by the authorities.[71]

The Indian Supreme Court's interpretation of property as a fundamental right had a powerful impact when South Africa considered if property should be protected as a constitutional right

[67] Alexander, *The Global Debate over Constitutional Property* (n 7) 51; Allen, 'Property as a Fundamental Right in India, Europe and South Africa' (n 60) 202.

[68] Singh (n 65) 312.

[69] Madhav Khosla, 'Addressing Judicial Activism In The Indian Supreme Court: Towards An Evolved Debate' (2009) 32 Hastings Int'l & Comp L Rev 83, 68–69.

[70] Armour and Lele (n 66) 511.

[71] Priya S Gupta, 'The Peculiar Circumstances Of Eminent Domain In India' (2011) 49 Osgoode Hall LJ 445.

when drafting the new constitution.[72] Chaskalson argued against including property because there was a risk, as in the case of India, that the judiciary would lose public support and legitimacy by enforcing property rights and it could become an obstacle that prevented social reform.[73] In his response to this view, Murphy was also very critical of the Indian interpretation of the property clause which is termed 'Lochnerism',[74] and he agrees that 'the Indian experience of property rights in general did much harm to the institution of review itself',[75] but he considers that this was not a result of including property as a fundamental right in the constitution. He argues instead that property clauses can be interpreted differently and that the problem with Indian judicial interpretation was that it failed to develop a more balanced standard of review which was more deferential to the national government.

The position of the Supreme Court in India and the conflicts over land reform programs have many similarities with the case of Mexico which will be explained in the following chapter.[76] In both cases the courts initially restricted expropriation for land reform programs by interpreting that full compensation had to be paid. Both courts faced constitutional crisis as a result of their decisions and in both countries progressive national governments modified the Constitution to limit judicial review of expropriations ordered to pursue land reform. After their respective constitutional reforms their paths seem to diverge. The Mexican Supreme Court for the most part stayed clear of reviewing expropriations for land reform and avoided direct confrontation with the national government. The Indian Supreme Court apparently was more willing to confront its national government, at least until 1978.

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[72] Andries Johannes Van der Walt, *Property And Constitution* (2012) 4.

[73] Matthew Chaskalson, 'The Problem With Property: Thoughts On The Constitutional Protection Of Property In The United States And The Commonwealth' (1993) 9 S Afr J on Hum Rts 388.

[74] John Murphy, 'Property Rights And Judicial Restraint: A Reply To Chaskalson' (1994) 10 S Afr J on Hum Rts 385, 395.

[75] ibid.

[76] See Judicial review of expropriation in Mexico. Evolution and impact.

2.6 Eminent domain in the United States

Property as a constitutional right is one of the most important topics in American jurisprudence. As Waldron identifies '[I]n the United States, the protection given by the courts to property rights is much stronger than that given to most personal rights.'[77] One of the key components of the American understanding of property is as a protection against government intervention. Property is viewed as creating a space of freedom for the individual and one of the most important guarantees involved in this is that the government can only take property for public use with just compensation. The debate over the precise limits to the power of government to take property has generated an extensive case law and doctrine on the different elements of expropriation. Alexander finds two competing ideas of property in American legal history: the first is the idea of property as 'the legal and political sphere within which individuals are free to pursue their own private agendas and satisfy their own preferences, free from governmental coercion or other forms of external interference,'[78] or *property as commodity*, and second, is the idea of property as 'the material foundation for creating and maintaining the proper social order, the private basis for the public good',[79] or *property as propriety*. These two competing visions of property can be useful devices by which to understand different positions towards the use of eminent domain in legal debate taking place in the United States.

[77] Jeremy Waldron, 'What Is Private Property?' (1985) 5 Oxford Journal of Legal Studies 313, 323.

[78] Gregory S Alexander, *Commodity And Propriety : Competing Visions Of Property In American Legal Thought, 1776-1970* (University of Chicago Press 1997) I.

[79] ibid.

Over the last few decades a doctrine supporting very strong property rights has emerged in the United States.[80] As part of this property rights movement, extensive efforts have been made to limit the power of the government to use eminent domain by limiting the definition of public use or increasing the amount of compensation paid. Property rights supporters use mainly libertarian or economic arguments to support their case, but so far at least in the United States they have had a limited impact on actual decisions made by the courts. It is still a very important strand of American jurisprudence and the impact that it may still have should not be overlooked. To understand the impact it is useful to look at the reaction to the *Kelo*[81] decision. From a legal standpoint the Supreme Court only followed its long standing precedent in deciding this case, but it became one of its most criticized decisions in the last decade. There was a gulf between how the decision was perceived by the public and by the property rights jurisprudence and its actual, more limited, legal significance.

2.6.1 The public purpose requirement in the United States

The original interpretation of the public purpose requirement during the early twentieth century in the United States was that expropriation could only be used for projects which granted open access to the general public or in which property was transferred to public ownership.[82] This meant that expropriations to build railroads and other infrastructure were valid, even if property was transferred to a private party, because they were used by the general public.[83] This definition of public purpose was already a modification of a more restrictive understanding that considered that expropriation could only serve a public purpose

[80] Wayne V McIntosh and Laura J Hatcher (eds), *Property Rights And Neoliberalism: Cultural Demands And Legal Actions* (Ashgate Publishing, Ltd 2010) 1.

[81] *Kelo v New London* 545 US 469 (SC 2005).

[82] Lawrence Berger, 'Public Use Requirement In Eminent Domain' (1977) 57 Or L Rev 203, 208,209.

[83] ibid 209; Errol E Meidinger, 'The Public Uses Of Eminent Domain: History And Policy' (1980) 11 Envtl L 1, 24.

if the acquired property was transferred to public ownership. This even more restrictive interpretation was dominant in state courts in the last decade of the nineteen century.[84] After the 1920s courts gradually adopted an increasingly deferential interpretation of public purpose and accepted that the legislative and the executive branch had broad discretion to define it.[85] One of the issues that contributed to the adoption of a broader understanding of public purpose was the use of expropriation for urban redevelopment.[86]

In 1954, the Supreme Court had to rule on the constitutionality of expropriations for urban redevelopment programmes. In *Berman*,[87] the District of Columbia condemned a department store which formed part of a larger project of urban renewal in a blighted neighbourhood.[88] To execute the project the government was responsible for acquiring the land and the petitioner's department store fell inside the earmarked area. The claimant argued that the expropriation would not serve a public purpose because his store was not blighted and therefore the expropriation had no justification.[89] In an opinion written by Justice William Douglas the Supreme Court ruled in favour of the government and stated:

> If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be

[84] Wendell E Pritchett, 'The Public Menace Of Blight: Urban Renewal And The Private Uses Of Eminent Domain' (2003) 21 Yale L & Pol'y Rev 1, 11.
[85] ibid 13–14.
[86] ibid 15–18.
[87] *Berman v Parker* 348 US 26 (SC 1954).
[88] ibid 31.
[89] Pritchett (n 84).

> included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.
>
> The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

This ruling settled the legitimacy of expropriations for urban development which may benefit private owners and it confirmed the deference exercised by the courts when reviewing public purpose.[90] This interpretation of the public purpose requirement was confirmed by the Supreme Court in *Hawaii Housing Authority* v. *Midkiff*.[91] For a time it seemed like public use was an uncontroversial issue. As Rubenfeld wrote:

> [C]onstrued this way, the so-called "public-use requirement" is simply duplicative of the legitimate-state-interest test that every deprivation of property must satisfy under the Due Process and Equal Protection Clauses. As a result, commentators-particularly those with an anti-redistributionist bent have been proclaiming the demise of the public-use limitation or mocking it as "invisible" for more than forty years.[92]

This situation changed suddenly with the *Kelo*[93] case, a curious mixture of unremarkable legal importance with a disproportionate political impact. In *Kelo*,[94] the city of New London after years of economic stagnation and population decline decided to implement a plan to promote

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[90] William Epstein, 'The Public Purpose Limitation On The Power Of Eminent Domain: A Constitutional Liberty Under Attack' (1984) 4 Pace Law Review 231, 249; Gregory S Alexander, 'Eminent Domain And Secondary Rent-Seeking' (2005) 1 NYU JL & Liberty 958, 960; Abraham Bell and Gideon Parchomovsky, 'The Uselessness Of Public Use' (2006) 106 Columbia Law Review 1412, 1418–19; Amy Lavine, 'Urban Renewal And The Story Of Berman V. Parker' (2010) 42/43 Urb Law 423, 424.

[91] *Hawaii Housing Authority v Midkiff* 467 229 (SC 1984).

[92] Jed Rubenfeld, 'Usings' (1992) 102 Yale LJ 1077, 1079.

[93] *Kelo* (n 81).

[94] ibid.

economic revitalization in the city,[95] the city authorities decided to build a development that included a park, office space and some housing.[96] The city had the power to purchase or use eminent domain to acquire the property included in the plan. The petitioner, Susette Kelo, lived in the area with her husband and with 8 other petitioners she challenged the condemnation proceedings on the grounds that it did not comply with the public use requirement.[97]

Two questions were addressed by the Court. First, the court had to define if the legislative authority has violated property as a constitutional right by authorizing expropriation for the purpose of economic development and second, if the plan put forward by the city of New London is reasonable enough to justify the concrete expropriation. The majority ruled that it would not adopt a 'bright-line rule' as proposed by the petitioners,[98] and it declared that it had a limited scope of review in these cases. This position was consistent with its previous precedents and it confirmed that in these cases the legislature enjoyed substantial deference.[99] In his opinion Justice Stevens cited *Midkiff*[100] in which the Court stated: '[W]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings…are not to be carried out in the federal courts.'[101] The Court refused to adopt a heightened standard of review because it considered that this would be very problematic. Finally it declared that 'we also decline to second-guess

[95] ibid 473.
[96] '*Kelo V. New London*' (2005) 545 469, 474 (note).
[97] ibid 475.
[98] *Kelo* (n 81) 480.
[99] ibid.
[100] *Hawaii Housing Authority v Midkiff* (n 91).
[101] ibid 242.

the City's determinations as to what lands it needs to acquire in order to effectuate the project.'[102]

The reaction to the case was surprising to many constitutional scholars because, as Joseph Sax notes, the Supreme Court has reviewed approximately 12 eminent domain cases in which the public purpose requirement was challenged, and in all of them it has upheld the government's use of eminent domain.[103] Therefore the political controversy generated by the decision and the tough dissenting opinion written by the justices in the minority in the Supreme Court was unexpected.[104] In the event, the political and social impact of this case was impressive and it can be considered one of the most controversial cases decided by the Supreme Court of the United States in recent times.[105] A good measure of the response is that by July 2007 bills to restrict the use of eminent domain were passed in thirty five states and enacted in thirty four.[106]

The *Kelo* ruling was heavily criticized by libertarian academics in the United States who would like to see a heightened standard of review to achieve stronger protection of property rights.[107] It would be impossible to cover all the literature and all the different perspectives from which *Kelo* has been analysed, but it remains clear that this ruling was strongly

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[102] *Kelo* (n 81) 18.

[103] Joseph L Sax, 'Kelo: A Case Rightly Decided' (2005) 28 U Haw L Rev 372, 365.

[104] ibid; Daniel H Cole, 'Why Kelo Is Not Good News For Local Planners And Developers' (2005) 22 Georgia State University Law Review 803, 803.

[105] The case has even won a place in popular culture. It is disapprovingly mentioned by Lieutenant Horatio Caine in CSI Miami in the "Death Eminent" episode originally aired on October 16, 2006.

[106] Edward J Lopez and others, 'Pass A Law, Any Law, Fast! State Legislative Responses To The Kelo Backlash' (Working Paper 10 October 2007) 1.

[107] Kristi M Burkard, 'No More Government Theft Of Property - A Call To Return To A Heightened Standard Of Review After The United States Supreme Court Decision In Kelo V. City Of New London' (2005) 27 Hamline J Pub L & Pol'y 115; Richard A Epstein, 'Not Deference, But Doctrine: The Eminent Domain Clause' (1982) 1982 Sup Ct Rev 351; Richard A Epstein, 'The Necessary History Of Property And Liberty' (2003) 6 Chapman Law Review 1; Richard A Epstein, 'Public Use In A Post-Kelo World' (2008) 17 Supreme Court Economic Review; Katherine M McFarland, 'Privacy And Property: Two Sides Of The Same Coin: The Mandate For Stricter Scrutiny For Government Uses Of Eminent Domain' (2004) 14 BU Pub Int LJ 143.

denounced by those who support stronger property rights, and its political impact has been widespread and widely explored academically and in the media,[108] in particular in relation to its implications for planning law.[109] In spite of this, I would highlight that in general terms courts do not seem to have accepted an enlarged role for scrutinizing the public purpose requirement. Furthermore, the standards of legislative deference have not changed as a result of this judgement. In the next section I examine the legal framework and discussion of the compensation requirement in the United States.

2.6.2 Compensation requirement in the United States

According to Bell and Parchomovsky the compensation requirement has not been widely discussed in the academic literature on eminent domain in the United States.[110] Compensation has not been a significant element of constitutional scholarship as other concepts have, such as public use or regulatory takings. In *United States v. 50 Acres of Land*[111] and in *United States v. 564.54 Acres of Monroe and Pike County Land*[112] the Supreme Court confirmed that the standard of compensation 'is the market value of the property at the time of the taking.'[113] The precise meaning of fair market value and the different

[108] Lopez and others (n 106); Ilya Somin, 'Limits Of Backlash: Assessing The Political Response To Kelo, The' (2008) 93 Minn L Rev 2100; David Schultz, 'Courts Matter: The Supreme Court, Social Chang, And The Mobilization Of Property Rights Interests' in Wayne V McIntosh and Laura J Hatcher (eds), *Property Rights and Neoliberalism: Cultural Demands and Legal Actions* (Ashgate Publishing, Ltd 2010); William R Wilkerson, 'Kelo V. New London, The Institute For Justice, And The Idea Of Economic Development Takings' in Wayne V McIntosh and Laura J Hatcher (eds), *Property Rights and Neoliberalism: Cultural Demands and Legal Actions* (Ashgate Publishing, Ltd 2010).

[109] Cole (n 104); Carl J Franklin, 'A Quantitative Analysis Of The Public Administrator's Likely Use Of Eminent Domain After Kelo' (2011) 4 Review of Management Innovation & Creativity 10.

[110] Bell and Parchomovsky, 'Taking Compensation Private' (n 10) 872.

[111] *United States v 50 Acres of Land* 469 US 24 (SC 1984).

[112] *United States v 56454 Acres of Monroe and Pike County Land* 441 US 506 (SC 1979).

[113] *Olson v United States* 292 US 246, 255 (SC 1934).

interpretations of this concept are a discussion in which constitutional and property scholar rarely venture because this is considered as a technical discussion that takes place mainly among valuators.

(i) Justification for compensation

In the United States there has been a lively discussion about the justification of 'just compensation' in relation to regulatory takings. In the most well-known and most widely-cited article on this topic,[114] Michelman analyzes how to determine when a government action constitutes a compensable taking of property.[115] His analysis of compensation is incidental to the issue of developing a clear rule on regulatory takings, but there are two elements which constitute useful analytical frameworks to look at compensation in traditional expropriations. Michelman conceptualizes government action, including expropriation, as an instrument by which resources are reallocated and welfare redistributed. This redistribution 'can be partly cancelled, insofar as the values involved are convertible into dollars, by paying monetary compensation out of the social treasury.'[116] For example, if government expropriates land to build a new park this will increase the welfare of those living around the city, but owners of the expropriated land will suffer a loss of welfare. If fair compensation is paid then the owners will not lose significantly, but if less than this is paid, they will have to bear a disproportionate amount of the costs. The other element is his emphasis on fairness as the only test that can determine if compensation should be paid.[117]

[114] Frank I Michelman, 'Property, Utility, And Fairness: Comments On The Ethical Foundations Of Just Compensation Law' (1966) 80 Harv L Rev 1165.
[115] ibid 1167.
[116] ibid 1168.
[117] ibid 1171–72.

Considering the purpose of compensation and the test of fairness could be useful to justify using different standards to pay for compensation depending on the public purpose. For example, in cases in which people are displaced as a result of an expropriation for economic development a higher standard of compensation could be used than in those cases in which the expropriated land is used to build social housing.

A significant number of the authors that debate compensation apply an efficiency-based approach.[118] According to this justification if an expropriation serves a public purpose the government should pay compensation because expropriations should only be undertaken when benefits exceed the costs. Therefore fair compensation forces the government to take into account the real costs of its actions[119] and prevents the government from undertaking projects which are not efficient because their costs are higher than their benefits.[120] These efficiency-based justifications of compensation as a constitutional right have been criticized by Jed Rubenfeld who wrote: 'The common feature of these rights is that they stand against any ordinary cost-benefit calculus of social welfare. They bind in the teeth of a perfectly plausible state determination that society would be more efficient, wealthy, or even happy were the guarantee violated.'[121]

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[118] William F Baxter and Lillian R Altree, 'Legal Aspects Of Airport Noise' (1972) 15 Journal of Law and Economics 1; Louis De Alessi, 'Implications Of Property Rights For Government Investment Choices' (1969) 59 The American Economic Review 13; Richard A Epstein, *Takings: Private Property And The Power Of Eminent Domain* (Harvard University Press 1985); Fred G Esposto, 'The Political Economy Of Taking And Just Compensation' (1996) 89 Public Choice 267; Abraham Bell, 'Not Just Compensation' (2003) 13 J Contemp Legal Issues 29.

[119] Bell and Parchomovsky, 'Taking Compensation Private' (n 10) 882.

[120] Lawrence Blume and Daniel L Rubinfeld, 'Compensation For Takings: An Economic Analysis' (1984) 72 California Law Review 569, 620; Thomas W Merrill, 'Incomplete Compensation For Takings' (2002) 11 NYU Envtl LJ 110, 131; Christopher Serkin, 'The Meaning Of Value: Assessing Just Compensation For Regulatory Takings' (2004) 99 Nw U L Rev 677, 706.

[121] Rubenfeld (n 92) 1133.

(ii) Standards of compensation

There is a growing body of work which criticizes the use of fair market value as the prevalent standard to calculate compensation in eminent domain cases in the United States. The critics of fair market value argue that it does not adequately compensate owners for their loss because it does not take into account the subjective value which they place on their property. Harold Bigham criticizes fair market value because it fails 'to make whole those who are forced to give up their property.'[122] His main critique is that the fair market value standard does not allow 'compensation for consequential damages'[123] and that it does not take into account that 'land is often "worth" more to a particular landowner than it is to anyone else.'[124] This is one of the first articles in which using market value as a standard for compensation is criticized.

Durham's criticism of fair market value and subsequent proposal is more moderate. He considers that as it stands, compensation does not force the government to internalize all the costs associated with expropriation and he suggests that the following costs should be included when calculating compensation: 'replacement of the land and improvements taken; relocation, including moving costs, and the termination and startup costs of utilities and other services; lost current business revenue; lost business goodwill or value;'[125]

All of these authors can be considered the first wave of critics of fair market value as a standard of compensation. In the last ten years there has been an explosion in the literature that considers fair market value as an inadequate standard of compensation, much of it in

[122] W Harold Bigham, 'Fair Market Value, Just Compensation And The Constitution: A Critical View' (1970) 24 Vand L Rev 63, 65.

[123] ibid 67.

[124] ibid 69.

[125] James Geoffrey Durham, 'Efficient Just Compensation As A Limit On Eminent Domain' (1984) 69 Minn L Rev 1277, 1305.

response to *Kelo*.[126] The common theme of this new approach is that market value is insufficient and that just compensation should be understood to include the subjective value that the owner places on her property.[127] A statement that reflects the starting position of most of these authors is the following: 'It is a truism that fair market value-the usual benchmark for "just compensation"-does not compensate landowners completely.'[128] Their position is that the subjective premium that every owner places in their property should be compensated and their standard of compensation is called economic value or full compensation.

One argument is that not paying full compensation is unfair because it forces owners to carry a burden that in fairness should be distributed among the whole public. Most of these authors, however, do not provide much in the way of justification for this position. It is almost considered axiomatic that owners should not be forced to make a sacrifice for the common good, even if this sacrifice is only the subjective value they place on their property which 'is neither observable nor readily ascertainable by third parties; only the aggrieved property owners know the true value of their property.'[129] Other authors claim that if the government is not forced to pay full compensation they will undertake inefficient projects and

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[126] *Kelo* (n 81).

[127] See, for example, Ann E Gergen, 'Why Fair Market Value Fails As Just Compensation' (1993) 14 Hamline J Pub L & Pol'y 181; Esposto, 'The Political Economy of Taking and Just Compensation' (n 118); Fred G Esposto, 'Takings, Litigation, And Just Compensation' (1998) 26 Atlantic Economic Journal 397; Bell (n 118); Lee Anne Fennell, 'Taking Eminent Domain Apart' (2004) 2004 Mich St L Rev 957; Nathan Burdsal, 'Just Compensation And The Seller's Paradox' (2005) 20 BYU J Pub L 79; Lucas J Asper, 'The Fair Market Value Method Of Property Valuation In Eminent Domain: Just Compensation Or Just Barely Compensating' (2006) 58 S C L Rev 489; Bell and Parchomovsky, 'Taking Compensation Private' (n 10); Marisa Fegan, 'Just Compensation Standards And Eminent Domain Injustices: An Underexamined Connection And Opportunity For Reform' (2006) 6 Conn Pub Int LJ 269; James J Jr Kelly, 'We Shall Not Be Moved: Urban Communities, Eminent Domain And The Socioeconomics Of Just Compensation' (2006) 80 St John's L Rev 923; Brett Talley, 'Restraining Eminent Domain Through Just Compensation: Kelo V. City Of New London' (2006) 29 Harv JL & Pub Pol'y 759; Dale Orthner, 'Toward A More Just Compensation In Eminent Domain' (2007) 38 McGeorge L Rev 429; Daphna Lewinsohn- Zamir, 'Identifying Intense Preferences' (2008) 94 Cornell L Rev 1391; Gideon Kanner, 'Fairness And Equity, Or Judicial Bait-And-Switch - It's Time To Reform The Law Of Just Compensation' (2011) 4 Alb Gov't L Rev 38; Yun-chien Chang, 'Economic Value Or Fair Market Value: What Form Of Takings Compensation Is Efficient?' (2012) 20 Supreme Court Economic Review 35.

[128] Fennell (n 127) 962.

[129] Bell and Parchomovsky, 'Taking Compensation Private' (n 10) 874.

government will have incentives to acquire more land than it needs. The basis of this claim is the concept of 'fiscal illusion', a theory which suggests that the government has a tendency to ignore all social costs that have no direct impact on the government budget.[130] Therefore, critics argue that as the market value standard does not force the government to pay for all the social and personal costs involved in the projects, the government will simply ignore them and undertake projects in which the costs are greater than the benefits involved. The proposals to compensate for non-market value losses,[131] or for 'demoralization costs', would make the government's power to use eminent domain essentially meaningless.[132]

These proposals to develop a new more property-friendly standard of just compensation have gain renewed support since the United States Supreme Court decided the *Kelo*[133] case. Commentators have argued that since *Kelo* can be interpreted as the demise of the public use requirement as a meaningful protection to property, it is necessary to strengthen the just compensation requirement established in the Constitution.[134] There have been suggestions that a new approach to the protection of property is necessary and that just compensation offers an opportunity to 'increase fairness and efficiency'[135] in the use of eminent domain. This would be achieved with a new, higher standard of compensation that would inhibit inefficient takings[136]and limit the use of eminent domain for economic development.

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[130] Bell (n 118) 32; Blume and Rubinfeld (n 120) 573.

[131] Jeffrey T Powell, 'The Psychological Cost Of Eminent Domain Takings And Just Compensation' (2006) 30 Law & Psychol Rev 215, 215.

[132] Bell and Parchomovsky, 'Taking Compensation Private' (n 10) 903–04.

[133] *Kelo* (n 81).

[134] Bell and Parchomovsky, 'Taking Compensation Private' (n 10); Burdsal (n 127); Fegan (n 127); Kanner (n 127); Orthner (n 127); Talley (n 127).

[135] Fegan (n 127) 270.

[136] Talley (n 127) 768.

Some of the post-Kelo literature concentrates on proposing heightened compensation in cases where expropriation is used for economic development;[137]others propose the use of new standards of compensation in cases where there are subjective attachments, for example forcing the government to pay more in cases where it expropriates a home,[138]and finally there are others that just take the Kelo case as an opportunity to bring attention to the fact that fair market value is an unfair standard of compensation and that a different standard that increases the amount that governments have to pay is necessary.[139] There also have been a few authors who question the prevalent dogma and try to examine how compensation works in real eminent domain cases. For example, Garnett challenges the assumption that owners are undercompensated using evidence from expropriations undertaken in Chicago for highway construction and in Indiana for economic development.[140] He argues convincingly that the issue of compensation is part of a very complex process with different stake holders and that the outcome varies greatly, depending on the political power, subjective attachment and community spirit in each specific case, as well as importance of the project and support from developers. This complex relationship in which both sides are trying to maximize their utility defines the amount of compensation paid. Garnett argues that it is not enough to just assume that fair market value is an insufficient standard of compensation without looking at how it operates in concrete cases.[141]

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[137] Clayton P Gillette, 'Kelo And The Local Political Process' (2005) 34 Hofstra L Rev 13; James E Krier and Christopher Serkin, 'Public Ruses' (2004) 2004 Mich St L Rev 860; Amnon Lehavi and Amir N Licht, 'Eminent Domain, Inc.' (2007) 107 Colum L Rev 1704; Michael Heller and Rick Hills, 'Land Assembly Districts' (2007) 121 Harv L Rev 1465.

[138] John Fee, 'Eminent Domain And The Sanctity Of Home' (2005) 81 Notre Dame L Rev 783; Powell (n 131).

[139] Bell and Parchomovsky, 'Taking Compensation Private' (n 10); Burdsal (n 127); Fegan (n 127); Fennell (n 127); Kanner (n 127); Orthner (n 127); Mark Seidenfeld, 'In Search Of Robin Hood: Suggested Legislative Responses To Kelo' (2007) 23 J Land Use & Envtl L 305; Talley (n 127).

[140] Nicole Stelle Garnett, 'The Neglected Political Economy Of Eminent Domain' (2006) 105 Michigan Law Review 101.

[141] ibid 149–50.

Another approach that diverges from the orthodox criticism of fair market value is research by Chang[142] who developed one of the first systematic analyses of compensation awards in eminent domain cases using data from actual compensation settlements in cases of expropriations undertaken in the state of New York between 1990 and 2002. Chang compares this data from actual settlements with results from hedonic regression models which calculate the 'fair market' value of those same properties.[143] Chang concludes that owners are almost equally likely to be undercompensated as they are to be overcompensated.[144] He does the same systematic analysis for court-adjudicated compensation and using the same technique he concludes that 'condemnees were usually overcompensated by the court.'[145] This empirical analysis is especially valuable because it challenges the assumption that owners are under-compensated, an assumption that has become the starting point for most of the discussion on compensation. An important limitation of his approach however, is identified by critics of fair market value who do not agree that owners are over-compensated because they consider that compensation should include subjective valuations of their property. Chang, in contrast, considers that the only problem is that a better, more sensitive, method of appraisal needs to be found capable of capturing a broader range of values, and, therefore, such discussions tend to centre upon more technical issues focused in developing assessment techniques.

[142] Yun-chien Chang, 'Economic Value Or Fair Market Value: What Form Of Takings Compensation Is Efficient?' [2009] Supreme Court Economic Review, Vol 20, 2012; Chang, 'Empire Building and Fiscal Illusion?' (n 13); Yun‐chien Chang, 'An Empirical Study Of Compensation Paid In Eminent Domain Settlements: New York City, 1990–2002' (2010) 39 The Journal of Legal Studies 201; Yun‐chien Chang, 'An Empirical Study Of Court‐Adjudicated Takings Compensation In New York City: 1990–2003' (2011) 8 Journal of Empirical Legal Studies 384.

[143] Chang, 'An Empirical Study of Compensation Paid in Eminent Domain Settlements' (n 142).

[144] ibid 239.

[145] Chang, 'An Empirical Study of Court‐Adjudicated Takings Compensation in New York City' (n 142) 409.

2.7 Conclusions

In this chapter I have explored expropriation and judicial review of expropriation in a comparative perspective. In the first section I looked at expropriation provisions in national constitutions and corroborated its widespread importance. Expropriation provisions were included in 90% of constitutions in the world. These constitutional provisions follow a similar pattern and they require that expropriations be ordered for a public purpose paying compensation. According to the existing literature on comparative expropriation, the majority of countries grant the legislature and the administrative branch broad discretion to decide what can be considered as public purpose. In some countries such as China and Vietnam cases in which the public purpose of expropriations was questionable because they benefitted private parties, precipitated social unrest, but they were not challenged in the courts. The compensation requirement has been more widely discussed. There is a strong current vindicating the legitimacy of using different methods to calculate compensation depending on the specific circumstance of the owners. For example, studies of population resettlement argue that more compensation should be given in those cases in which expropriations result in the displacement of entire communities.

When there is agreement between the owner and government that an expropriation has taken place, the grounds of review seem limited to calculating adequate compensation, but the most challenging issue in comparative expropriation is when there is a disagreement on whether an expropriation has actually taken place or not. The line that separates legitimate regulation from expropriation, what is known as regulatory takings or indirect expropriation, is one that is drawn mostly by the courts and therefore it has concentrated the attention of recent literature on judicial review of expropriation in a comparative perspective.

In specific jurisdictions the panorama is not substantially different. In international law the discussion has always been centred on how to calculate compensation and in the last twenty years as a result of the rise of the BITs, the focus has changed to determining what is the line that separates legitimate regulation from a government taking that has to be compensated. Different decisions in international tribunals have not been able to fully clarify this issue. Mexico has been an important actor in these developments as a member of NAFTA. The Mexican government was a defendant in one of the first cases in which an international tribunal, constituted under the dispute settlement mechanism established in NAFTA, found that a government regulation constituted an indirect expropriation that affected the plaintiff who therefore was entitled to receive compensation. However, these developments in international law have had very little impact on the Mexican legal system. The Mexican Supreme Court has not issued any major rulings on regulatory takings.

The jurisprudence of the European Court of Human Rights offers an interesting contrast to the rulings of the Mexican Supreme Court. The European Court considers if a fair balance has been struck in order to decide if compensation should be awarded and how it should be calculated, but it does not question the power of the government to determine if the expropriation was necessary. This approach to judicial review of expropriation is consistent with what has been described in other jurisdictions and highlights the exceptionality of the Mexican case.

Judicial review of the compensation requirement was extremely strong in India and it lead to a major constitutional crisis which weakened their Supreme Court. It is illustrative to see how the path of both courts diverged, at least on their approach to judicial review of expropriation. The Mexican Supreme Court abandoned any substantive discussion of the meaning of

compensation or of its purpose and it opted to avoid developing a substantive doctrine of compensation.

The United States has one of the strongest traditions of judicial review and of strong property rights. Judicial review of administrative action in the United States played a major role in policymaking and policy implementation.[146] These attributes point to the strength of judicial review of expropriation in the United States, but even in this jurisdiction, the courts still accepted that the executive and the legislative branch had broad discretion to determine the definition of public purpose. The contrast between the interpretation of the public purpose requirement in the United States and in Mexico is one more element that points to the strength of the standard of judicial review of expropriation adopted by the Mexican Supreme Court. The compensation requirement has not been interpreted recently by the American Supreme Court, but there is a strong academic debate over the role of compensation and what is the fair balance between government and owners. In the next chapter I explore judicial review of expropriation in Mexico.

[146] Martin Shapiro, 'The Giving Reasons Requirement' [1992] University of Chicago Legal Forum 179; Robert A Kagan, *Adversarial Legalism: The American Way Of Law* (Harvard University Press 2003).

Chapter 3.

Judicial review of expropriation in Mexico. Evolution and impact

3.1 Introduction

There is a widespread assumption among academics and commentators that in the Mexican legal system judicial review of expropriation was weak, but this view is not supported by the evidence presented in this Chapter. In the first section of this Chapter I examine the legal and constitutional framework of expropriation and judicial review in Mexico as well as its historical evolution. In the second section I present the results of a systematic analysis of all the rulings on expropriation made by the Supreme Court between 1917 and 2008. The most important finding is that the Mexican Supreme Court ruled against the government more than 50% of the time. In the third section I present the results of the interviews I conducted to explore the impact of judicial review of expropriation. Finally I introduce the academic discussion on courts in authoritarian regimes and I analyse how my findings fit with the existing literature.

3.2 Expropriation in the Mexican Constitution

The 1917 Constitution was the most visible product of the Mexican Revolution; consequently the most important aspects of the configuration of Article 27 are linked closely with the social context that created the conditions for the uprising. This Article recognized property as a constitutionally protected right and, at the same time, it outlined an ambitious program of land redistribution which required the extensive use of expropriation. Article 27 of the Mexican Constitution is a good reflection of the various factions which intervened in the

Mexican Revolution and contributed to the content of the Mexican Constitution and of the compromises therein.

3.2.1 History of Article 27

The Mexican Revolution of 1910 started as a rebellion to overthrow the government of Porfirio Díaz who had been in power for 34 years, but it was soon transformed into a social revolution.[1] The Porfirian regime had achieved considerable economic progress during its 34 years in power and for the first time since Mexico became independent in 1821 the country had enjoyed a prolonged period of peace.[2] During his time in power, Porfirio Díaz respected legal formalities and organized regular elections. In 1908 Porfirio Díaz gave a famous interview to James Creelman, an American journalist writing for Pearson's Magazine, in which he declared that Mexico was now ready for democracy and that he would welcome an opposition party in the coming elections of 1910.[3] This interview stirred unprecedented political activity among Mexican middle and upper classes that culminated in the presidential candidature of Francisco I. Madero, a rich landowner from the north, for the 1910 presidential elections. In the face of a serious and unprecedented challenge the Diaz regime eventually decided to jail Madero just before the elections, but Madero managed to escape and called for a national uprising on 20 November 1910.[4]

The many groups that participated in the initial uprising were seeking different and sometimes contradictory objectives and the only thing that brought them together was their opposition to the Porfirian regime. From the start of the rebellion it displayed 'kaleidoscopic

[1] Lorenzo Meyer, 'La Revolución Mexicana Y Sus Elecciones Presidenciales: Una Interpretación (1911-1940)' [1982] Historia Mexicana 143, 147.

[2] Roger D Hansen, *The Politics Of Mexican Development* (Johns Hopkins Press 1971) 13–23.

[3] Charles C Cumberland, *Madero y la revolución mexicana* (Siglo XXI 1977) 59–60.

[4] ibid 145–47.

variations; often it seemed less a revolution than a multitude of disparate revolts, some endowed with national aspirations, many purely provincial, but all reflecting local conditions and concerns.'[5] In fact Díaz was defeated in less than a year and Madero was elected President in 1911, but the disagreements between different groups could not be solved and the country gradually descended into a civil war that would last more than ten years.[6] Knight argues that it is more accurate to understand the Mexican Revolution not as a fight between old regime and revolutionaries but as a fight between four contenders: old regime, reformist liberals, popular movements and 'the ultimate national synthesis, Carrancismo/Constitutionalism'.[7] One of the most profound impacts of the Mexican Revolution was its agrarian reform which altered radically the pattern of land ownership and the economic and social structure of rural Mexico.[8] Article 27 of the Mexican Constitution was the legal basis and the embodiment of the commitment of the new revolutionary Mexican State to the program of land reform. It was one of those articles of the constitution that have quasi-mythical status as the concrete representation of the Mexican Revolution.[9] The Article

[5] Alan Knight, *The Mexican Revolution. Porfirians, Liberals And Peasants* (Cambridge University Press 1986) vol 1, 2.

[6] ibid 309.

[7] Alan Knight, 'The Mexican Revolution: Bourgeois? Nationalist? Or Just A "Great Rebellion"?' (1985) 4 Bulletin of Latin American Research 1, 9.

[8] Frank Tannenbaum, 'Land Reform In Mexico' (1930) 150 Annals of the American Academy of Political and Social Science 238, 238; Ernest Gruening, 'The Land Question In Mexico' (1930) 20 The American Economic Review 49, 49; Frank Tannenbaum, *Mexico: The Struggle For Peace And Bread* (First Edition, Alfred A Knopf 1950) 145–50; Moisés Navarro González, 'Tenencia de la tierra y población agrícola (1877-1960)' (1969) 19 Historia Mexicana 62, 69–70; Victor Niemeyer Eberhardt, *Revolution At Querétaro: The Mexican Constitutional Convention Of 1916-1917* (Latin American monographs / University of Texas at Austin. Institute of Latin American Studies, Institute of Latin American Studies 1974) vol 33; Alan Knight, 'Land And Society In Revolutionary Mexico: The Destruction Of The Great Haciendas' (1991) 7 Mexican Studies / Estudios Mexicanos 73, 103; Linda B Hall, *Alvaro Obregon: Power And Revolution In Mexico, 1911-1920* (Texas A&M University Press 2000) 180.

[9] Alan Knight, 'The Myth of the Mexican Revolution' (2010) 209 Past and Present 223, 269.

is considered to be 'the nucleus of the social pact of the post-revolutionary era,'[10] and one of the 'most celebrated innovations'[11] included in the 1917 Constitution.

Several legal, economic and social trends contributed to the concentration of agricultural land in a few hands which generated demand for this ambitious program of land reform. From a legal perspective the most important developments were the enactment of the Lerdo Act in 1856 and the Vacant Land Act of 1883 which formed part of the package of economic and political reform inspired by liberal ideology.[12] The Lerdo Act provided that land owned by the Catholic Church or communally held by villages would be handed over to its current occupiers or if it was vacant, land would be auctioned by the federal government in order to foster economic growth and promote the creation of a society of property owners who would eventually become the backbone of a Mexican Liberal Republic.[13] The Vacant Land Act of 1883 granted private companies the power to survey land in specific regions to delimit the boundaries of land owned by the Federal Government. The agreement was that the companies would be granted one third of the surveyed lands and the rest would be sold by the government.[14]

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[10] Antonio Azuela, 'Property In The Post-Post-Revolution: Notes On The Crisis Of The Constitutional Idea Of Property In Contemporary Mexico' (2010) 89 Tex L Rev 1915, 1915.

[11] Alan Knight, *The Mexican Revolution. Counter-Revolution And Reconstruction* (Cambridge University Press 1986) vol 2, 470.

[12] Moisés Gonzalez Navarro, 'Indio Y Propiedad En Oaxaca' (1958) 8 Historia Mexicana 175, 178; Donald J Fraser, 'La Política De Desamortización En Las Comunidades Indígenas, 1856-1872' (1972) 21 Historia Mexicana 615, 652; Robert H Holden, *Mexico And The Survey Of Public Lands: The Management Of Modernization, 1876-1911* (Northern Illinois University Press 1994); Emilio H Kouri, 'Interpreting The Expropriation Of Indian Pueblo Lands In Porfirian Mexico: The Unexamined Legacies Of Andres Molina Enriquez' (2002) 82 Hispanic American Historical Review 69, 74.

[13] Stephen H Haber and others, *The Politics Of Property Rights. Political Instability, Credible Commitments, And Economic Growth In Mexico, 1876-1929* (Cambridge University Press 2003) 293.

[14] Robert H Holden, 'Los Terrenos Baldíos y la Usurpación de Tierras: Mitos y Realidades (1876-1911)' in Enrique Semo (ed), *La Tierra y el Poder, 1800-1910*, vol 2 (Historia de la Cuestión Agraria Mexicana, Siglo XXI 1988) 269; Haber and others (n 13) 292.

It was not until Porfirio Díaz came to power in 1876 that partition of commonly held land was undertaken on a massive scale.[15] The process of land concentration became one of the most important sources of dissatisfaction with the government among the rural population who saw a powerful elite appropriating massive agricultural holdings and taking full advantage of the new legislation.[16]

Two very important books identified the agrarian problem as a major threat to Mexico's stability even before 1910. The first, *Legislación y jurisprudencia sobre terrenos baldíos*[17], was written by Wistano Luis Orozco and published in 1895. Orozco identified for the first time how large landholders were taking advantage of the laws by which communal landholdings were transformed into freehold plots and he warned that this was having a serious and deleterious social and economic impact on poor peasants all over the country.[18] The second, and most influential, book on this topic was *Los Grandes Problemas Nacionales*,[19] published in 1909, by Andres Molina Enríquez. Enríquez was familiar with Orozco's work, and shared a similar diagnostic of the agrarian problem in Mexico. In his view the liberal reform which broke communal landholdings was a terrible mistake which led to the accumulation of land in the hands of a small group of powerful landowners.[20] This diagnostic was very similar to that of Orozco, but instead of a program of land reform in

[15] John Coatsworth, 'Railroads, Landholding, And Agrarian Protest In The Early Porfiriato' (1974) 54 The Hispanic American Historical Review 48, 50; George McCutchen McBride, *The Land Systems Of Mexico* (Second Edition, Octagon Books 1971) 133–36; Eyler Simpson, *The Ejido: Mexico's Way Out* (1st Edition., Chapel Hill, The University of North Carolina press 1937); Frank Tannenbaum, *The Mexican Agrarian Revolution* (The Brookings Institution 1930).

[16] Esperanza Fujigaki Cruz, 'Las Rebeliones Campesinas en el Porfiriato 1876-1910' in Enrique Semo (ed), *La Tierra y el Poder, 1800-1910*, vol 2 (Historia de la Cuestión Agraria Mexicana, Siglo XXI 1988) 194–96; Friedrich Katz, *The Life And Times Of Pancho Villa* (Stanford University Press 1998) 18; John Womack, *Zapata And The Mexican Revolution* (Alfred A Knopf 1969) 45.

[17] Wistano Luis Orozco, *Legislación Y Jurisprudencia Sobre Terrenos Baldíos* (Ediciones El Caballito 1975).

[18] Kouri (n 12) 88–89.

[19] Andres Molina Enríquez, *Los grandes problemas nacionales* (Ediciones Era 1981).

[20] Kouri (n 12) 103–04.

which land would be distributed among small landholders, he argued that it was necessary to reconstitute communal landholdings and to give them legal protection.[21]

Enríquez's work had a great influence on the resulting Article 27 of the 1917 Constitution, not least because he was commissioned by the Constitutional Assembly to write the first draft.[22] Article 27 bears the imprint of his ideas in several aspects. First it accepted the diagnostic that the liberal reform espoused by the 1857 Constitution was a mistake because villagers who held land communally were not prepared to deal with individual freehold property. As a result land should be distributed to villages not to individuals and rights to transfer land should be restricted.[23] But apart from its agrarian reform program, Article 27 also included property as a constitutional right, and provisions on expropriation, and rules over ownership of natural resources.

3.2.2 Organization of Article 27 of the Mexican Constitution

Article 27, as has already been pointed out, is extremely complex and performs several different normative functions. It can be divided in approximately six parts. The first part recognized property as a constitutionally protected right, guaranteeing that it cannot be taken without compensation and only in cases where there is a public purpose. The second part gave the Mexican government the power to regulate the use of property to achieve a more equitable wealth distribution. This provided the constitutional basis to pass legislation that limits property rights such as environmental or planning legislation and which in the United

[21] ibid 104.
[22] Knight, *The Mexican Revolution* (n 11) 475.
[23] Kouri (n 12) 108–10.

States is defined as the 'police power'.[24] The third section defined rules over ownership of natural resources, for example it limits property rights over mineral resources and over water. The fourth section contained rules over who could become an owner of land; it limited the possibility of foreigners owning land unless they renounce the protection of their governments and it prohibited religious organizations and for profit corporations from acquiring agricultural land.[25] The fifth section established general rules for expropriation, for example who can expropriate, who can define what is the public purpose and the standard that should be used to pay compensation in expropriation cases. Finally the sixth section of Article 27, as it was passed in 1917, created the general rules for a program of land redistribution. Originally the Constitution gave the states the responsibility to undertake their own programs of land reform, but in subsequent amendments the Constitution transferred this power to the federal government.

3.2.3 Article 27 and Agrarian Reform

Article 27 provides the basis for a traditional system of private property similar to those found in most countries of the civil law tradition. Property in Mexico can be regulated by both state and federal governments and the applicable law to a plot of land is that of the state in which it is located. Article 27, as part of an ambitious program of land reform, also defined the framework for a particular type of property which in Mexico has been called social property.[26] Social property includes *ejido* and communal property and the legal regimes

[24] '*Pennsylvania Coal Co. V. Mahon*' (1922) 260 US 393 (note); '*Village Of Euclid V. Ambler Realty Co.*' (1926) 272 US 365 (note); See also: Joseph L Sax, 'Takings And The Police Power' [1964] Yale Law Journal 36; William B Stoebuck, 'Police Power, Takings, And Due Process' (1980) 37 Wash & Lee L Rev 1057; Philip A Talmadge, 'Myth Of Property Absolutism And Modern Government: The Interaction Of Police Power And Property Rights, The' (2000) 75 Wash L Rev 857.

[25] This was modified in 1992. Decreto por el que se reforma el artículo 27 de la Constitución Política de los Estados Unidos Mexicano. Published in the Official Federation Diary 6 January 1992.

[26] Ignacio Burgoa, *Derecho Constitucional Mexicano* (Porrúa Hermanos 2005) 300.

governing both are very similar so for the purpose of this chapter I make no distinction between them. In short, *ejido* is a type of communal property intended for agricultural use.

The concept of *ejido* adopted by the framers of the 1917 Constitution was very different to its current understanding. *Ejido* was a Spanish term that referred to common lands outside villages where livestock was taken to graze.[27] *Ejidos* were transplanted to Mexico during Spanish colonial rule as part of the new towns created or recognized by the Spanish crown in its new possessions.[28] This Mexican *ejido:*

> [C]ontained the pound for stray cattle as well as the public threshing floors and places where the villagers might winnow their grain in the open air. It contained the public rubbish heap and the village slaughter pen. Upon it the farmer might unload the crops brought in from the fields or might keep his hive of bees. Parts otherwise unoccupied served for playgrounds and loafing places. No building might be constructed upon this land, nor might it be cultivated.[29]

According to McBride the Spanish version of the *ejido* was adapted in the case of indigenous villages to include agricultural plots for townsfolk.[30] The use of *ejido* land for agriculture in Indian villages marks a radical departure from the original Spanish institution.

After Mexican independence the legal status of *ejido* land was constantly questioned. It was not clear if *ejido* land had to be distributed in accordance with the liberal reform laws that seek to distribute church and commonly owned property enacted in Mexico during the

[27] Robert J Knowlton and Lucrecia Orensanz, 'El Ejido Mexicano En El Siglo XIX' (1998) 48 Historia Mexicana 71, 77.
[28] McBride (n 15) 107.
[29] ibid 106.
[30] ibid 124.

nineteen century or if this type of land was exempt.[31] As mentioned in the previous section, this was settled during the government of Porfirio Díaz who pursued an active policy of breaking up *ejidos*.[32]

When the 1917 Constitution was enacted *ejido* was viewed as a transitional legal form which would eventually disappear and land would be transferred to its occupiers as traditional property. Tannenbaum wrote that this institution was necessary

> to establish such security for an individual who has never enjoyed private ownership, whose habits of personal direction are limited, whose provision for tomorrow is notoriously childlike, and whose immediate economic needs are pressing is a matter of great difficulty. [33]

This view reflects the dominant ideas behind Article 27 and help to explain why it was originally considered as a temporary institution. Until 1934 agrarian reform was within the jurisdiction of state governments and they had broad discretion to enact agrarian reform programs in their territory.

Over the next seventeen years approaches to agrarian reform varied widely between different state governments. In 1934 the basis for the legal regime of *ejido* as a permanent institution was added to the Mexican Constitution as one of the first measures of the government of President Lazaro Cardenas.[34] The first new element was that jurisdiction of agrarian reform was transferred to the Federal Government. The second element, which can be interpreted as evidence of the impact of judicial review of expropriation, was that it denied judicial review

[31] Knowlton and Orensanz (n 27) 83.

[32] ibid 92.

[33] Tannenbaum, *The Mexican Agrarian Revolution* (n 15) 257.

[34] *Decreto que reforma el artículo 27 de la Constitución Política de los Estados Unidos Mexicanos.* Published in the Official Federation Diary 10 January 1934.

to those affected by expropriations for land redistribution.[35] There were other amendments, but the basic tenets of this type of property remained stable for the next sixty years. *Ejido* is 'a corporate body that receives a governmental allotment of rural land'[36] and the members of the corporate body which are known as *ejidatario*s have the right to exploit individual plots. The *ejidatario*s' rights can be described as usufruct and until 1992 they could not rent or sell their usufruct rights.[37] They could only pass their rights to their heirs, but the rights were indivisible.[38]

In 1992 the most radical transformation to *ejido* regime since 1934 took place. This reform ended land redistribution officially[39], it created a legal mechanism that allowed the conversion of *ejido* into private property and it allowed *ejidatario*s to sell and rent their usufruct rights over their plot of land.[40] In fact illegal sales of *ejido* land to create low income urban settlements had been taking place since the 1950s.[41] Despite expectations that the reform would lead to a widespread privatisation of *ejido* property[42] almost twenty years after the reform more than 50% of the country is still subject to this regime.[43] The federal

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[35] TM James, 'Law And Revolution In Mexico: A Constitutional History Of Mexico's *Amparo* Court And Revolutionary Social Reform, 1861--1934' (Doctor of Philosophy, University of Chicago 2006) 150.

[36] Robert C Ellickson, 'Property In Land' (1993) 102 Yale LJ 1315, 1379.

[37] ibid; Ann Varley, 'Urbanization And Agrarian Law: The Case Of Mexico City' (1985) 4 Bulletin of Latin American Research 1, 2.

[38] Monique Nuitjen and David Lorenzo, 'Moving Borders And Invisible Boundaries: A Force Field Approach To Property Relations In The Commons Of A Mexican *Ejido*' in Franz Von Benda-Beckmann and others (eds), *Changing Properties of Property* (First paperback, Berghahn Books 2009) 221.

[39] *Decreto que reforma el artículo 27 de la Constitución Política de los Estados Unidos Mexicanos.* Published in the Official Federation Diary 6 January 1992.

[40] Gareth A Jones and Peter M Ward, 'Privatizing The Commons: Reforming The Ejido And Urban Development In Mexico' (1998) 22 International Journal of Urban and Regional Research 76, 77–78; Nuitjen and Lorenzo (n 38) 221.

[41] Antonio Azuela and Emilio Duhau, 'Tenure Regularization, Private Property And Public Order In Mexico' in Edesio Fernandes and Ann Varley (eds), *Illegal Cities: Law and Urban Change in Developing Countries* (Zed Books Ltd 1998); Varley, 'Urbanization and Agrarian Law' (n 37); Ann Varley, 'The Political Uses Of Illegality: Evidence From Urban Mexico' in Edesio Fernandes and Ann Varley (eds), *Illegal Cities: Law and Urban Change in Developing Countries* (Zed Books Ltd 1998).

[42] Jones and Ward (n 40) 77.

[43] INEGI, 'Censo Agropecuario 2007, IX Censo Ejidal' (INEGI 2009).

government has exclusive jurisdiction over this type of property and therefore expropriation of *ejido* land can only be undertaken by federal authorities. Until the reform of 1992 there were some differences between the rules applicable to expropriations in *ejido* land and those on private property. In the case of *ejido* the authorities had to grant the *ejidatario*s previous hearing and compensation was calculated differently, but these two differences disappeared after 1992.

3.2.4 Constitutional framework of expropriation

The 1917 Constitution included detailed provisions on expropriation. First it stipulated that property could only be taken for a public purpose and with compensation. It also states that State and Federal statutes will determine what can be considered public purpose and that the state or federal administrations will order expropriations when it is falls within the categories defined by the legislature.

Article 27 also defines the standard that should be used to pay compensation. It determines that compensation should be paid using as a standard its fiscal value as registered in cadastral or revenue offices. This value was to be taken as accepted by the owner tacitly because taxes were paid on the property. To the price an extra 10% was supposed to be added as compensation. In theory, the owner could only challenge this assessment in the courts and ask for a professional valuation if they had made recent improvements. Here is a transcription of section VII, second paragraph of Article 27:[44]

> The amount fixed as compensation for the expropriated property shall be based on the sum at which the said property shall be valued for fiscal purposes in the cadastral or

[44] HN Branch and LS Rowe, 'The Mexican Constitution Of 1917 Compared With The Constitution Of 1857' (1917) 71 Annals of the American Academy of Political and Social Science i, 21–22.

> revenue offices, whether this value be that manifested by the owner or merely impliedly accepted by reason of the payment of his taxes on such a basis, to which there shall be added ten per cent. The increased value which the property in question may have acquired through improvements made subsequent to the date of the fixing of the fiscal value shall be the only matter subject to expert opinion and to judicial determination. The same procedure shall be observed in respect to objects whose value is not recorded in the revenue offices.

It appears that the Article states that judicial review of expropriation can only be sought when the claimant argues that there was an increase of value after the fiscal value was fixed, but this apparent limitation was not identified and it was never even discussed by the courts. These constitutional provisions provided the basis for a model of federal and state legislation that was broadly similar. In the next section I will analyse this model as it was enacted in federal expropriation law.

3.3 Legal framework of expropriation

The Federal Expropriation Law was enacted in 1936 and even though it has been reformed three times in the last four years, it has kept the same structure.[45] According to the statute of purpose presented with the bill the statute would strengthen the power of the government to use expropriation because it accepted a broader concept of the public purpose requirement.[46] When the bill was debated and voted in the Chamber of Deputies there was an almost unanimous support, but there was a disagreement over the constitutionality of expropriating

[45] *Ley Federal de Expropiación.* Published in the Official Federation Diary November 25, 1936. Last reformed 27 January 2012. The last 3 reforms were published in the Official Federation Diary on 27 January 2012; 16 January 2012; 5 June 2009.

[46] 'Diario De Los Debates De La Cámara De Diputados Del Congreso De Los Estados Unidos Mexicanos' (22 September 1936).

movable goods. The only deputy that argued that the bill was unconstitutional was Roque Estrada who in 1940 would become a Supreme Court Justice.[47] The majority dismissed his arguments and while some deputies engaged with the constitutional and legal argument, others considered that social justice was more important than legal technicalities. For example Deputy Tito Ortega declared: 'Assuming without admitting that the Expropriation Law is unconstitutional, we have to put the collective over the individual interest and vote for this bill.'[48] Another deputy, Manuel Rivera Zorrilla, declared: 'History shows that when private property does not fulfil its social function, expropriation becomes inevitable; we just need to consider if we prefer to do it in accordance with the law, even if it is questionable from a constitutional perspective, or through a violent revolution'.[49]

The barely disguised disdain for legal aspects of expropriation shown by both deputies is indicative of the lack of attention to legal formalities shown by the federal and state governments in many expropriation orders. The model set up in this statute to undertake expropriations had three elements: The first was a broad catalogue of actions that were considered public purpose, for example building schools, hospitals, roads; the second element was the procedure through which expropriation was executed; and the third element was how compensations should be paid.

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[47] Héctor Fix-Zamudio and José Ramón Cossío Díaz, *El Poder Judicial En El Ordenamiento Mexicano* (Fondo De Cultura Economica USA 1996) s Apéndice Cuadro A1.

[48] Intervención del Diputado Tito Ortega. "Ley Federal de Expropiación". Diario de los Debates de la Cámara de Diputados del Congreso de los Estados Unidos Mexicanos. Legislatura XXXVI Año III Período Ordinario Número de Diario 12 (3 November 1936). Available from: http://cronica.diputados.gob.mx/DDebates/36/3er/Ord/19361103.html.

[49] Intervención del Diputado Manuel Rivera Zorrilla. "Ley Federal de Expropiación". Diario de los Debates de la Cámara de Diputados del Congreso de los Estados Unidos Mexicanos. Legislatura XXXVI Año III Período Ordinario Número de Diario 12 (3 November 1936). Available from: http://cronica.diputados.gob.mx/DDebates/36/3er/Ord/19361103.html.

Before June 2009 the model of expropriation in Mexico was the following: [50] the process started with the publication of an expropriation order that in the case of the federal government could only be made by the President. This expropriation order included the declaration of public necessity and it should also contain the documents that proved the existence of public interest (technical studies, plans, projects and such) and a list of the properties that were going to be acquired using the powers of expropriation. One of the major weaknesses was that the Federal Law of Expropriation did not define the standard of proof or the procedure that the administration had to follow to demonstrate the existence of a public purpose in individual cases. This lack of concern from the legislative branch for the formalities of the legal process, which were evident from the moment the bill was debated and voted, contributed to the bipolar character of expropriation in Mexico. It seemed to move between two extremes: on the one hand it could seem arbitrary and with no limits and on the other, it could seem weak, subject to judicial rulings which were incoherent and sometimes contradictory, and, therefore, seriously ineffective as a policy instrument.

The legal procedure to expropriate was not clearly defined by the law and this led to expropriation orders being challenged according to all the Justices interviewed for this project.[51] The major procedural element which was not present in the law was the right to a prior hearing. The expropriation order was notified and executed on the same act and there was no consultation with those affected by the decision. This was constantly challenged as

[50] In 2009 there was a major reform: *Decreto por el que se reforman los artículos 2o, 3o, 4o, 5o, 6o, 7o, 8o, 20 y 20 bis y se adicionan un primer párrafo, recorriéndose los demás párrafos, y una fracción III Bis al artículo 1o todos de la Ley de Expropiación*. Published in the Official Federation Diary 5 June 2009.

[51] Carlos Herrera Martin, Interview with Mariano Azuela, 'Entrevista con el Ministro Mariano Azuela' (In person, 13 March 2013); Carlos Herrera Martin, Interview with Juan Díaz Romero, 'Entrevista Con El Ministro Juan Diaz Romero' (In person, 12 March 2013); Carlos Herrera Martin, Interview with Guillermo Ortiz Mayagoitia, 'Entrevista con el Ministro Guillermo Ortiz Mayagoitia' (In person, 11 March 2013); Carlos Herrera Martin, Interview with Ulises Schmill, 'Entrevista con el Ministro Ulises Schmill' (In person, 4 March 2013).

unconstitutional but the judiciary upheld the constitutionality of the procedure until 2004. It modified its criteria in 2004 and it took Federal Congress five more years to incorporate the right to a prior hearing in the Federal Expropriation Law.[52] According to the interview with Justice Ortiz Mayagoitia, recognizing the right to a prior hearing in expropriation orders has contributed significantly to reducing the number of conflicts because the authorities were forced to make a better justification of their expropriation decree knowing that it would be scrutinized and questioned by the affected owners before it was published.[53]

An important amendment to the federal expropriation law was passed on the fifth of June of 2009.[54] The reform had two main, but contrasting, objectives. First, it tried to make expropriation for infrastructure projects easier by adding a specific clause in the catalogue of reasons of public purpose that states that the construction of infrastructure justifies expropriation. Second, it gave the owners affected by an expropriation procedure the chance to challenge the order before it is undertaken, thus trying to avoid problems further on.

3.4 Judicial review in Mexico

Judicial review, and specifically constitutional judicial review, has a long tradition in Mexico. In this section I will outline and evaluate specifically one legal instrument which has been described as 'the most important procedural device in the Mexican legal system'.[55] *Amparo* is a special suit in which a private person demands the protection of the federal judiciary against the actions of public authorities which have violated their individual rights. The actions

[52] *Decreto por el que se reforman los artículos 2o, 3o, 4o, 5o, 6o, 7o, 8o, 20 y 20 bis y se adicionan un primer párrafo, recorriéndose los demás párrafos, y una fracción III Bis al artículo 1o todos de la Ley de Expropiación*. Published in the Official Federation Diary 5 June 2009.

[53] Ortiz Mayagoitia interview (n 51).

[54] *Ley Federal de Expropiación.* Article 20. As Originally Published in the Official Federation Diary November 25, 1936. Last reformed January 27, 2012.

[55] Hector Fix-Zamudio, 'A Brief Introduction To The Mexican Writ Of *Amparo*' (1979) 9 Cal W Int'l LJ 306, 306; Bruce Zagaris, '*Amparo* Process In Mexico, The' (1998) 6 US-Mex LJ 61, 61.

which can be challenged can range from a simple administrative act to the passing of a federal law by the national congress. *Amparo* can be best understood as several legal institutions under a single name, but performing diverse functions. It started as an instrument to protect liberties inspired by the writ of habeas corpus[56] and it still is the most commonly used procedure to protect constitutional rights from any act performed by a public authority that may infringe them.[57] It also serves to challenge federal and state laws and regulations,[58] and as a form of cassation or certiorari which allows the federal judiciary to review judgments made by civil, criminal, administrative, labour and agrarian courts of all jurisdictions.[59] *Amparo* is also widely used to challenge acts of federal, state or local administrations and this is known as administrative *amparo*.[60]

An important limitation of *amparo* as a form of constitutional control was that when the courts ruled that a statute or administrative rule was unconstitutional this only had effects for the plaintiffs. The 1917 Constitution stated that in *amparo* suits: 'the rulings shall only protect the individuals that were presented with the claim without making a general declaration about the statute that authorized it'.[61] This limitation is known as the Otero Formula, after its creator Mariano Otero, and it has been an essential element of *amparo* since its inception in the nineteenth century.[62] The courts could declare that statutes were

[56] Fix-Zamudio, 'A Brief Introduction to the Mexican Writ of Amparo' (n 55) 348; Richard D Baker, *Judicial Review In Mexico: A Study Of The Amparo Suit* (Latin American monographs / University of Texas at Austin. Institute of Latin American Studies, Published for the Institute of Latin American studies by the University of Texas P 1971) xiii.

[57] Carl E Schwarz, 'Rights And Remedies In The Federal District Courts Of Mexico And The United States' (1977) 4 Hastings Const LQ 67, 71–72.

[58] Baker (n 56) 267; Fix-Zamudio, 'A Brief Introduction to the Mexican Writ of Amparo' (n 55) 348.

[59] Fix-Zamudio, 'A Brief Introduction to the Mexican Writ of Amparo' (n 55) 324; Zagaris (n 55) 64.

[60] Fix-Zamudio, 'A Brief Introduction to the Mexican Writ of Amparo' (n 55) 325.

[61] Constitución Política de los Estados Unidos Mexicano. Article 107 Section I. As originally published in the Official Federation Diary 5 February 1917.

[62] Helen L Clagett, 'Mexican Suit Of Amparo' (1944) 33 Geo L J 418, 421–22; Lucio Cabrera and William Cecil Headrick, 'Notes On Judicial Review In Mexico And The United States' (1963) 5 Inter-Am L Rev 253,

unconstitutional in their rulings, but this declaration only protected the plaintiffs. The unconstitutional statute or rule could not be enforced against the plaintiffs, but it was not abrogated. When the Supreme Court ruled that a statute was unconstitutional this would normally be considered as persuasive precedent and inferior courts would follow it, but any individual who wanted to benefit from this had to initiate an *amparo* suit and obtain a judgment.[63]

The basis for *amparo* is established in Articles 103 and 107 of the Mexican Constitution which define the jurisdiction of the federal courts and the most important characteristics of the procedure and is mostly concerned with *amparo* as cassation. The *amparo* suit has grown exponentially since the 1917 Constitution was enacted and has been transformed into an instrument which could be used to challenge 'the entire range of legal norms in the nation',[64] a consequence of the broad interpretation of the due process requirement in the Constitution.[65]

The jurisdiction of federal courts over *amparo* cases is established in section I of Article 103 which states:

> Article 103. The federal courts shall decide all controversies that arise:
>
> I. From laws or acts of the authorities that violate individual guarantees; [66]

The Supreme Court expanded the scope of *amparo* interpreting the concept of authorities to include 'all those persons who, de jure or de facto, dispose of public power and who are

255; Fix-Zamudio, 'A Brief Introduction to the Mexican Writ of Amparo' (n 55) 313; Héctor Fix-Zamudio, *Ensayos sobre el derecho de amparo* (Porrúa 2003) 26; Stephen Zamora and others, *Mexican Law* (Oxford University Press 2005) 262.

[63] Baker (n 56) 270.

[64] Fix-Zamudio, 'A Brief Introduction to the Mexican Writ of Amparo' (n 55) 315.

[65] Baker (n 56) 268; Zamora and others (n 62) 258.

[66] *Constitución Política de los Estados Unidos Mexicano.* Article 103 Section I. Published in the Official Federation Diary February 5, 1917. Last reformed 26 February, 2013.

materially enabled thereby to exercise public acts'.[67] This interpretation means that an *amparo* suit can be brought against almost any government act.

Federal courts can only intervene if there has been a violation of individual rights. Two individual guarantees have contributed the most to this expansion. Article 14 of the Mexican Constitution states that 'no person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and according to laws issued prior to the act.' Article 16 on the other hand states that 'no one shall be molested in his person, family, domicile, papers, or possessions except on the authority of a written order issued by the competent authority stating the legal basis and justification for the actions taken.' The generous interpretation of these two articles allowed the federal judiciary to expand the scope of *amparo* beyond strictly constitutional questions and transform it 'from an extraordinary defence of civil liberties into the foundation for a general system of judicial review'.[68] The federal judiciary's interpretation of Article 14 and 16 requires: the legal power to order an act that has an effect on the legal sphere of an individual has to be expressly authorized by a statute; second, if there is power then the authority that executes the act needs to have jurisdiction and third, that all the relevant considerations are taken into account by the authority.[69] Administrative acts such as imposing a fine, denying a construction permit or ordering an expropriation can be the subject of an *amparo* suit. Administrative *amparo* has been the most important instrument used to challenge expropriation decrees.

[67] Baker (n 56) 208.

[68] ibid 124.

[69] It would appear that articles 14 and 16 only offer procedural protection, but the judiciary used these articles to exercise a form of proportionality review that enabled the courts to assume substantive jurisdiction to control constitutionality and legality.

There is a doctrinal distinction in *amparo* review in Mexico between constitutionality and legality.[70] A review falls under the constitutionality head when the claimant recognizes that the decision that is being challenged was authorized by a relevant statute, it was made by an authority which had jurisdiction, and all the relevant considerations had been taken into account, but the claimant argues that the authorizing statute is unconstitutional because it violates an individual right. A review falls under the legality head if the decision is challenged on the grounds that it was not authorized by a relevant statute, or it was made by an authority that had no jurisdiction, or irrelevant considerations were taken into account to reach the decision. This second head of review would not strictly fall within the scope of *amparo* cases, but with the adoption of the generous interpretation of Articles 14 and 16 of the Constitution described in the previous paragraph the federal judiciary has found a justification to expand its jurisdiction. An administrative decision that is made taking into account irrelevant considerations may not constitute a direct violation of an individual right, but because Articles 14 and 16 state that all administrative decisions have to be lawful and take into account relevant considerations, then the decision is an indirect violation of these articles.[71]

This distinction is essential to understand the rules that govern the type of cases that are heard by the Supreme Court. The jurisdiction of the Supreme Court is set in article 107 section VIII of the Mexican Constitution. Until 1987 the Supreme Court had very little discretion to decide which cases to hear.[72] After collegiate circuit courts were created in 1951 the Supreme

[70] Cabrera and Headrick (n 62) 259–63; José de Jesús Gudiño Pelayo, *Introducción al amparo mexicano* (Editorial Limusa 2002) 75–76.

[71] Cabrera and Headrick (n 62) 259–63.

[72] *Decreto por el que se adicionan la fracción XXIX-H al artículo 73, la fracción I-B al artículo 104 y un párrafo final a la fracción V del artículo 107; se reforma el artículo 94, los párrafos primero y segundo del artículo 97, el artículo 101, el inciso a) de la fracción III, el primer párrafo, y el inciso b) de la fracción V y las fracciones VI, VIII y XI del artículo 107; se derogan los párrafos segundo, tercero y cuarto de la fracción I del*

Court only heard cases which sought review of statutes on constitutionality grounds or in which federal authorities were parties.[73] All other cases which sought review on legality grounds were decided by collegiate circuit courts. Another amendment in 1967 added to the jurisdiction of the Supreme Court cases in which *ejidos* were parties.[74] In 1987 a reform established that the Supreme Court had exclusive jurisdiction for appeals in which the constitutionality of statutes or general administrative rules was challenged, but it also had the discretion to review cases on legality grounds when the Court considered that they were particularly important.[75]

3.4.1 Organization of federal judiciary

The federal judiciary is composed of 391 district courts, 95 unitary circuit courts, and 246 collegiate circuit courts.[76] Petitions for *amparo* suit are filed in district courts and its rulings can be appealed to a collegiate circuit court or in some cases to the Supreme Court. The Supreme Court was the final court of appeal until 1951, when collegiate circuit courts were created to reduce the workload of the Supreme Court.[77] With this reform the Supreme Court

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artículo 104 y el segundo párrafo de la fracción IX del artículo 107 de la Constitución Política de los Estados Unidos Mexicanos. Published in the Official Federation Diary, 10 August 1987.

[73] *Decreto que reforman los artículos 73, fracción VI, base cuarta, párrafo último; 94, 97, párrafo primero, 98 y 107 de la Constitución General de la República*. Published in the Official Federation Diary 19 February 1951.

[74] *Decreto que reforma y adiciona los artículos 94, 98, 100, 102, 104 fracción I, 105 y 107 fracciones II párrafo final, III, IV, V, VI, VIII, XIII y XIV, de la Constitución Política de los Estados Unidos Mexicanos.* Published in the Official Federation Diary, 25 October 1967.

[75] *Decreto por el que se adicionan la fracción XXIX-H al artículo 73, la fracción I-B al artículo 104 y un párrafo final a la fracción V del artículo 107; se reforma el artículo 94, los párrafos primero y segundo del artículo 97, el artículo 101, el inciso a) de la fracción III, el primer párrafo, y el inciso b) de la fracción V y las fracciones VI, VIII y XI del artículo 107; se derogan los párrafos segundo, tercero y cuarto de la fracción I del artículo 104 y el segundo párrafo de la fracción IX del artículo 107 de la Constitución Política de los Estados Unidos Mexicanos*. Published in the Official Federation Diary, 10 August 1987.

[76] Consejo de la Judicatura Federal, 'Dirección General De Estadística Judicial' (16 April 2014) <http://www.dgepj.cjf.gob.mx/organosjurisdiccionales/numeroorganos/numorganoscir.asp> accessed 11 May 2014.

[77] *Decreto que reforman los artículos 73, fracción VI, base cuarta, párrafo último; 94, 97, párrafo primero, 98 y 107 de la Constitución General de la República*. Published in the Official Federation Diary 19 February 1951. See: Fix-Zamudio and Cossío Díaz (n 47) 156–57; Héctor Fix-Zamudio, *Ensayos sobre el derecho de amparo* (Porrúa 2003) 453–55.

was no longer the final court of appeal for all cases in Mexico as it had been the case in previous years and jurisdiction was transferred to the collegiate circuit courts in all of those cases in which the constitutionality of statutes was not challenged or in which the federal authorities were not involved.[78] This was part of a wider trend of constitutional reform which was trying to transform the Supreme Court into a constitutional court that would only review cases in which the constitutionality of statutes was challenged.[79]

Collegiate circuit courts consist of three judges or magistrates who hear all cases en banc.[80] The country is divided in 32 judicial circuits which roughly correspond to the 31 states and the Federal District. In the majority of circuits there is more than one collegiate court and different courts can have exclusive subject-matter jurisdiction. Collegiate circuit courts have grown exponentially going from 5 to 246 in 60 years.[81] The growing importance of collegiate circuit courts can be seen in table 3.[82]

	2010	**2011**	**2012**
Total number of cases decided by the Federal Judiciary	858,917	881,998	963,085
Total number of cases decided by Collegiate Circuit Courts	305,844	328,992	360,840
Percentage of total number decided by Collegiate Circuit Courts	35.60%	37.30%	37.46%

Table 3

[78] Ignacio Burgoa, El juicio de *amparo* (21st edn, Porrúa 1984) 850–57.

[79] Fix-Zamudio, *Ensayos sobre el derecho de amparo* (n 62) 464–65.

[80] Hector Fix-Zamudio, 'A Brief Introduction to the Mexican Writ of Amparo' (1979) 9 Cal W Int'l LJ 306, 334; Stephen Zamora and others, *Mexican Law* (Oxford University Press 2005) 194.

[81] Fix-Zamudio (n 301) 455.

[82]Consejo de la Judicatura Federal, 'Dirección General De Estadística Judicial' (16 April 2014) <http://www.dgepj.cjf.gob.mx/organosjurisdiccionales/numeroorganos/numorganoscir.asp> accessed 11 May 2014.

Until 1994 judges in circuit courts were appointed by the Supreme Court and they were granted life tenure after a four year probationary period.[83] After the 1994 reform the responsibility of appointing judges to circuit courts was transferred to the newly formed Federal Judiciary Council which has opted for a model in which district and collegiate judges are appointed following a civil service model called 'judicial career' in which the majority of candidates have no work experience outside of the federal judiciary.[84] This model is not very different from what the federal judiciary had been doing before the 1994 constitutional amendment.

Between 1951 and 1982 the appointment of judges of collegiate circuit courts was completely controlled by the Supreme Court using an appointment tradition which has been termed 'tutorial'.[85] In this tradition Supreme Court Justices were able to establish a strong personal relationship with their law clerks, who spent between six and seven years working at the Court, and were groomed to become judges. According to Cossío law clerks 'did not only carry out their official tasks; they were trained to analyse cases and write opinions, understand precedents and statutory interpretation and understand the philosophy of the Judiciary.'[86] This meant that even if collegiate circuit courts had more power, the Supreme Court was still extremely influential because future judges learned from them and they owed them their appointments. After 1982, the growth of the federal judiciary rendered this model obsolete because new judges were needed constantly and there was not enough time to allow

[83] Fix-Zamudio and Cossío Díaz (n 301) 157.

[84] José Ramón Cossío Díaz, *Jurisdicción federal y carrera judicial en México* (Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México 1996) 70.

[85] ibid 52.

[86] ibid 60.

law clerks to be groomed. This new model which Cossío has called 'cooperative' transformed the appointments into a quota system in which each Justice of the Supreme Court had a number of judges she or he could appoint. There was a tacit understanding that other members of the Court would give their vote in exchange for the same thing.[87]

This model of appointments limited new ideas because judges were trained to follow tradition. The majority of new judges came from the same professional background and even if this method strengthened independence of the courts from other branches of government it limited innovation. Even if lower courts were relatively protected from other branches of government they had very little autonomy to decide differently from the Supreme Court.[88] The Supreme Court was able to maintain its role as the head of the federal judiciary in spite of reducing the number of cases it heard.

3.4.2 Appointment and removal of Supreme Court Justices

The appointments in the Supreme Court were controlled completely by the executive branch between 1917 and 1994. The 1917 Constitution established an appointment method in which the federal executive had no intervention. Supreme Court Justices were elected by an absolute majority of the National Congress from a list put forward by state legislatures.[89] This procedure was modified in 1928 to give the President the power to nominate the Supreme Court Justices which had to be confirmed by the Senate.[90] This selection procedure remained

[87] ibid 63.

[88] ibid 61; Hector Fix-Fierro, 'Poder Judicial' in María del Refugio González and Sergio López Ayllón (eds), *Transiciones y Diseños Institucionales* (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas 1999) 193.

[89] Pilar Domingo, 'Judicial Independence: The Politics of the Supreme Court in Mexico' (2000) 32 Journal of Latin American Studies 705, 711.

[90] *Ley que reforman los artículos 73, 74, 76, 79, 89, 94, 96, 97, 98, 99, 100 y 111 de la Constitución Política de la República*. Published in the Official Federation Diary 20 August 1928.

unchanged until the judicial reform of 1994. After 1994 the President presents a list of three candidates to the Senate who has to choose one with two thirds of the votes.[91]

Even if on paper the appointment procedure and the rules on tenure did not look very different from rules in other developed democracies, the political context allowed the executive branch to control the appointment of Justices of the Supreme Court as has been pointed by several scholars.[92] In their work these authors highlight that the control exerted by the executive on the career paths is enough evidence of the lack of judicial independence. Magaloni finds that the average length of tenure for a Supreme Court Justice was ten years and that 38 per cent had a previous judicial career.[93] Magaloni and Domingo found that approximately 20 per cent of justices that left the Court went on to occupy significant political positions and therefore Magaloni concludes: 'The Supreme Court was thus subservient to the president because most justices tended to follow partisan careers before or after leaving the Court, creating strong incentives to please the leader of the party, namely the president, as a means to further their political ambitions.'[94]

However as Fix-Fierro has pointed out that around 50 per cent of justices appointed between 1944 and 1994 had a judicial career and he argues that there was an unspoken agreement that half of the justices were appointed from those that had a judicial career.[95] He reaches different conclusions after looking at the appointments in the Supreme Court highlighting that 40 per

[91] *Decreto mediante el cual se declaran reformados los artículos 21, 55, 73, 76, 79, 89, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 111, 116, 122 y 123 de la Constitución Política de los Estados Unidos Mexicanos,* Published in the Official Federation Diary, 31 December 1994.

[92] Domingo (n 313); Beatriz Magaloni, 'Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico' in Scott Mainwaring and Christopher Welna (eds), *Democratic Accountability in Latin America* (Oxford Studies in Democratization, 2003); Camilo Saavedra-Herrera, 'Judicialisation and Democratisation in Mexico The Performance of Supreme Court towards Political Fragmentation' (PhD, London School of Economics and Political Science 2014) 67–73.

[93] Magaloni (n 316) 288–89.

[94] ibid 290; Domingo (n 313) 723

[95] Hector Fix-Fierro, 'Judicial Reform in Mexico: What Next?' in Erik Gilbert Jensen and Thomas Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press 2003) 256.

cent of justices appointed between 1944 and 1994 lasted in their position more than 11 years.[96] Fix-Fierro also argues that 59.7 percent of justices were at least 68 years old when they finished their tenure and therefore they had just one year remaining in some cases or had reached the compulsory retirement age which was 69. Fix-Fierro argues that 'Concluding that the Supreme Court was subservient to the executive branch because of its control of appointment and removal procedures would be a gross simplification…because it does not fit with the existing evidence of the certain but limited independence exercised by the Court.'[97]

3.4.3 Precedent in the Mexican legal system.

Written judicial rulings are very different from formal judicial precedent in Mexico. The written opinion is always delivered as a single per curiam judgment and it includes the facts of the case, the court from which the case originated the legal question and the decision. These written opinions, which constitute the official decision from the courts, are seldom published and very rarely cited. However, there is a widely observed tradition among judges of obedience to previous rulings even when they do not constitute formal judicial precedent.[98]

Formal judicial precedent, which is called jurisprudence in Mexico, is a very short summary of the relevant point of law decided in a case. These short summaries, known as theses, do not include the facts of the case or even what was the ruling. A single ruling can produce more than one precedent.[99] For example, the written opinion in the case in which oil companies challenged the nationalization ordered by the government in 1938 resulted in nine

[96] Fix-Fierro (n 312) 189.

[97] ibid 186.

[98] Since the 1994 reform the importance and influence of written opinions has grown. See: Zamora and others (n 62) 87.

[99] José María Serna de la Garza, 'The Concept Of Jurisprudencia In Mexican Law' (2009) 1 Mexican Law Review 131, 141.

judicial precedents.[100] This peculiar approximation to judicial precedent is the result of 'the inherent difficulty of grafting even a modified version of *stare decisis* upon the body of a civil law system.'[101] The details that identify the cases from which the precedent is derived are published along with a heading that serves to identify the thesis. Precedents are published in Mexico as follows:

Register No. 291636
Location: Fifth Epoch
Court: Supreme Court sitting en banc
Source: Federal Judiciary Weekly
Page: 1125
Non-binding precedent
Subject: Administrative
EXPROPRIATION
To order it, it is necessary to fulfil all the formalities established by law and to pay the required compensation.
Administrative Amparo Suit.VerduzcoMaximino and co plaintiffs. April 10, 1918 Unanimity of ten votes. Absentee: José María Truchuelo

In the previous example there is no description of the facts of the case or any detail that could be useful to understand how to apply the legal ruled derived from this precedent. This precedent can be described as tautological because it says that expropriations have to be made according to the law for them to be lawful. The process by which the judiciary decided which were the key legal points in a written judgment has never been transparent and since the written ruling is not publicly available it is impossible to evaluate the accuracy of the summary of the points of law included in the precedent. Baker observes that at times there can substantial differences in emphasis or meaning between the ruling and the precedent derived from it.[102] The judiciary has unlimited discretion to draft precedents and this allows them to decide which aspects of their decisions are public. The judiciary could act

[100] *Amparo* en Revisión. 2902/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 2 December 1939.
[101] Baker (n 56) 266.
[102] ibid 256.

strategically and draft bland precedents from crucial written opinions reducing dramatically the visibility of the case. Before there were databases and their decisions were public the judiciary had more control of the information it wanted to make public about the cases and only the parties involved in the case could know more about the decision because precedents did not provide enough information about what the Court was doing.

3.5 Judicial Review of expropriation in Mexico

In conducting this research I collected all the rulings made by the Supreme Court in which an expropriation order was challenged and created a database of 510 decisions.[103]

The criteria which determines which cases reach the Supreme Court has been modified since 1917, but the general criteria is that only the Supreme Court decides in cases in which the constitutionality of a federal or state law is challenged. The evolution of such Supreme Court rulings can be seen in Figure 1 by which it is clear that after the 1951 reform the number of cases which reached the Supreme Court was reduced significantly.

[103] For a description of how the dataset was analysed see: 1.4.2 Systematic content analysis of judicial decisions.

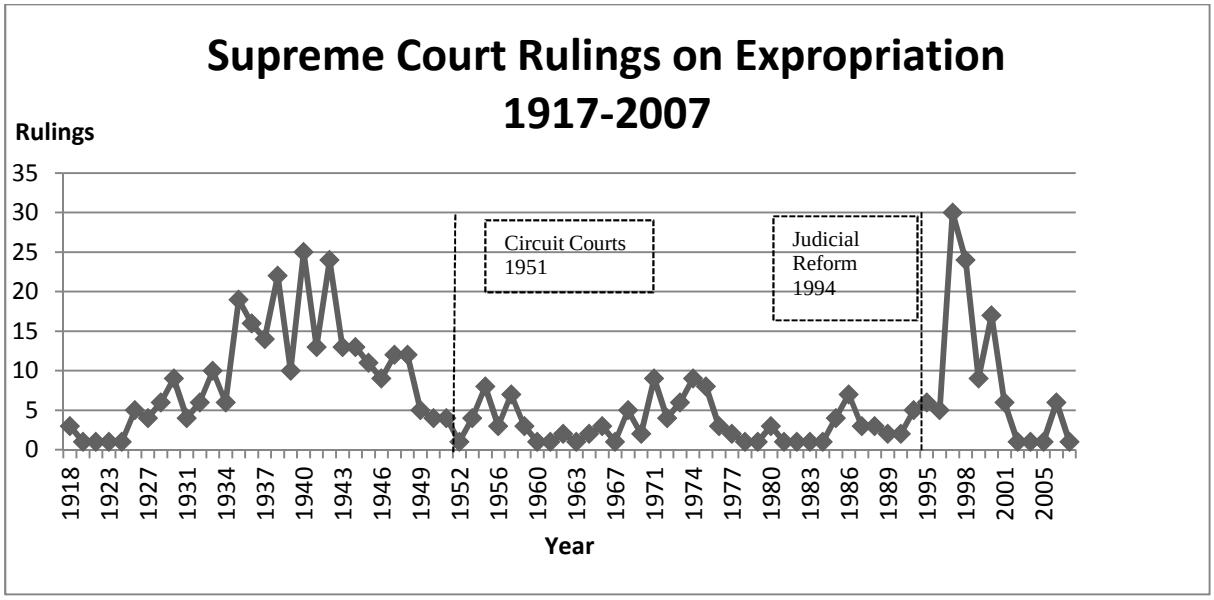


Figure 1

There appears to be an abnormal surge in the number of cases that reached the Supreme Court after the 1994 reform, but after that the numbers of rulings issued by the Supreme Court seem to return to its previous levels.

The majority of cases which reached the Supreme Court were concerned with state expropriations as can be seen in Figure 2.

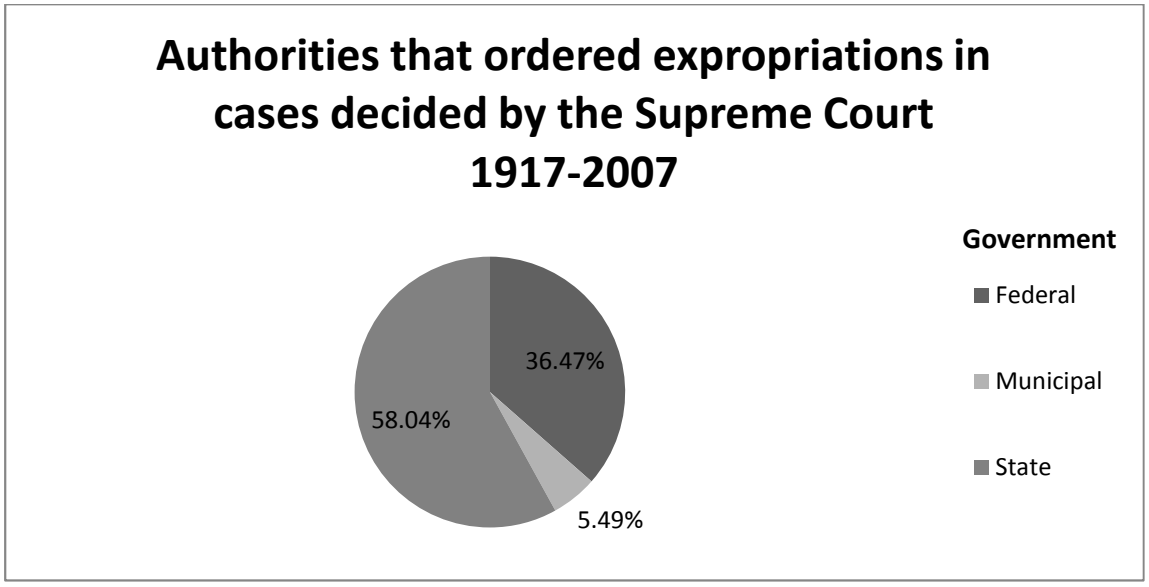


Figure 2

There were also a number of expropriation cases in which the federal government was involved and there are a very small number of cases in which municipalities ordered expropriations. The expropriation orders reviewed by the Court were predominantly from state or federal governments.

The expropriation orders could be challenged on several grounds, but the Supreme Court decided more than half of the cases on procedural grounds as can be seen in Table 4.

Grounds on which the decision was reached	Supreme Court Rulings
Compensation	18.82%
Hearing	0.59%
Jurisdiction	2.16%
Prior hearing	5.29%
Procedure	50.78%
Public purpose	22.35%
	100.00%

Table 4

After collegiate circuit courts were created in 1951 the number of cases decided by the Supreme Court on the grounds of public purpose requirement had a significant fall as can be seen in Figure 3.

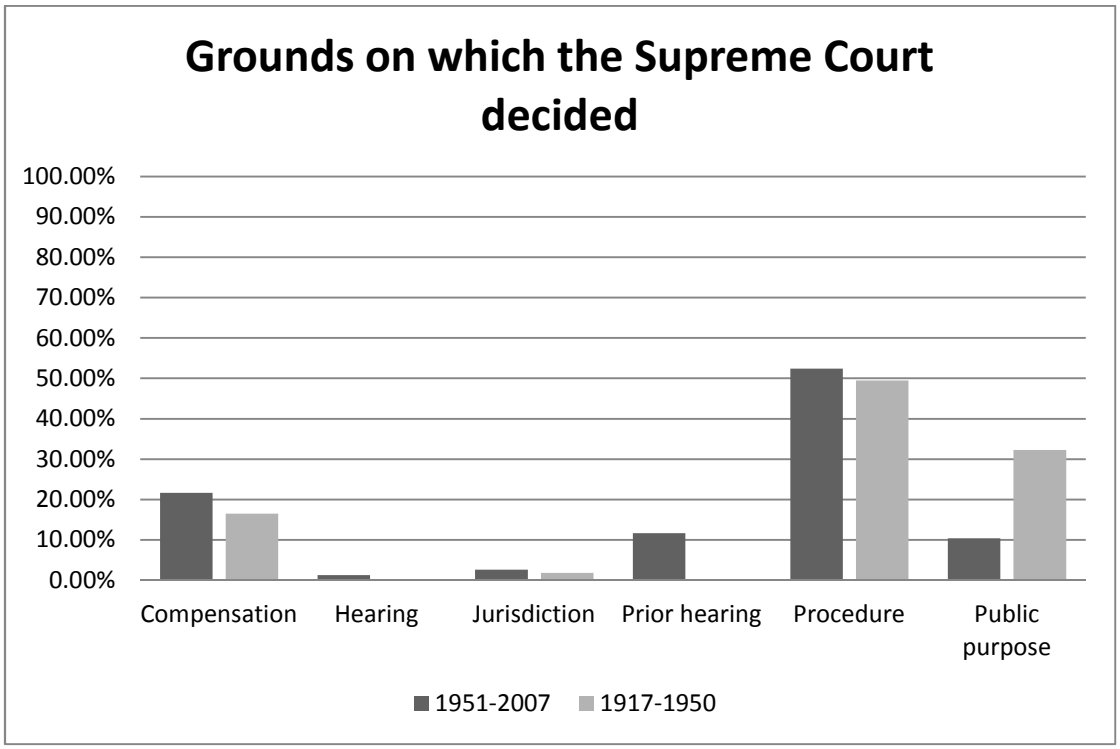


Figure 3

Overall the Supreme Court ruled against the government in 51.6% of the cases collected. In the United States Scigliano found that the Federal Government won 64% of the cases decided by the Supreme Court in which it was a party.[104] In a recent study, Miles and Sunstein found that the validation rate of agency decisions under arbitrariness review in Circuit Courts in the United States was 64%, which is consistent with the findings of Scigliano and both are

[104] Robert Scigliano, *The Supreme Court And The Presidency* (Free Press New York 1971) 177.

considerably higher than the validation rate found in the rulings of the Mexican Supreme Court in expropriation cases.[105]

There were no major differences between the rates of success in cases in which the expropriation orders were concerned with a state or federal government as can be seen in in Figure 4.

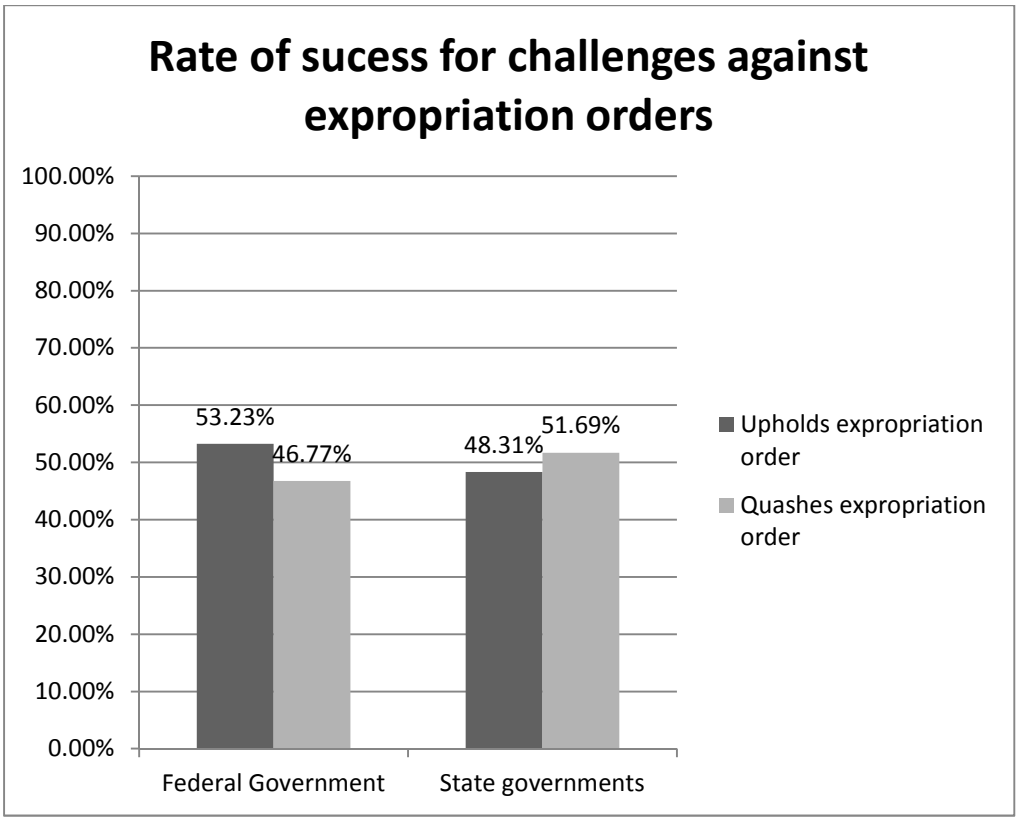


Figure 4

The two most ambitious empirical studies of *amparo* rulings before 1994 were conducted by Pablo Gonzalez Casanova[106] and by Carl Schwarz.[107] In both of these studies the authors

[105] Thomas J Miles and Cass R Sunstein, 'The Real World Of Arbitrariness Review' (2008) 75 The University of Chicago Law Review 761, 776.

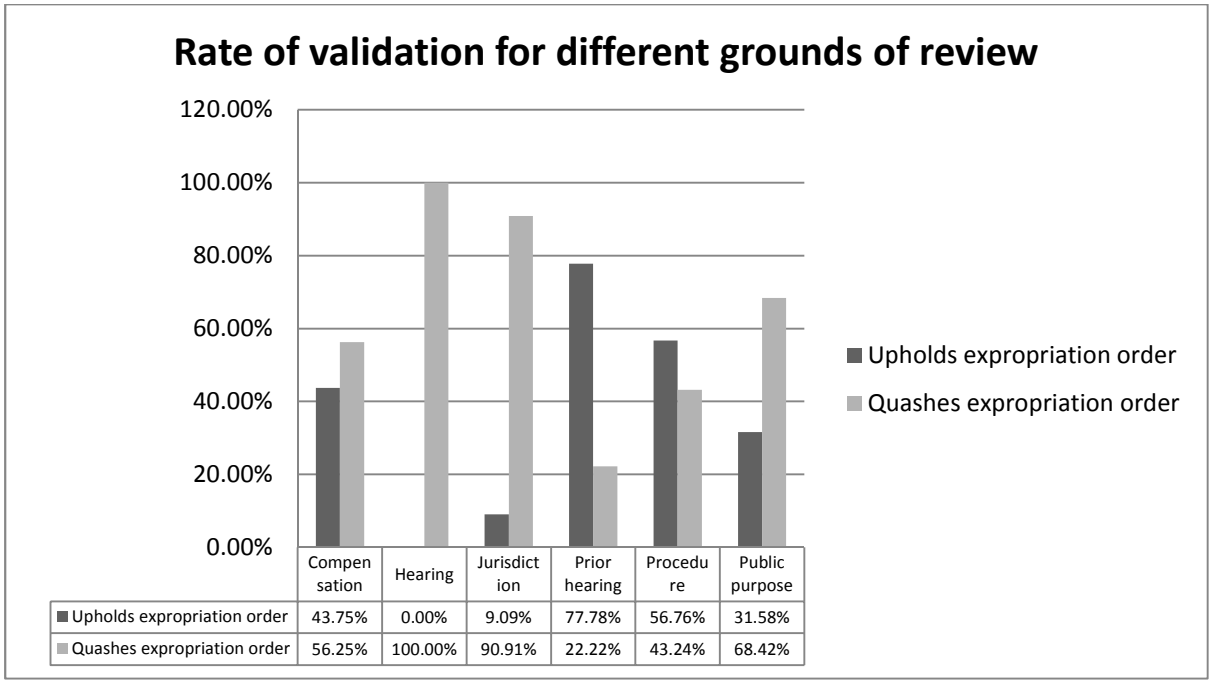
[106] Pablo González Casanova, *La democracia en México* (Ediciones Era 2003).

[107] Carl Schwarz, 'Judges Under The Shadow: Judicial Independence In The United States And Mexico' (1973) 3 Cal W Int'l LJ 260; Schwarz, 'Rights and Remedies in the Federal District Courts of Mexico and the United States' (n 57).

found that the judiciary decided against the government in a significant number of cases. Gonzalez Casanova analysed 3700 *amparo* decisions made by the Supreme Court between 1917 and 1960 in which the President was a defendant and he found that the claimants won 34% of the cases.[108] Schwarz analysed judgements from district courts during 1974 and he compared them with district courts in the United States. He found that in administrative and labour cases, district courts in Mexico ruled against the government in 61% of the cases compared with 45% in the United States.[109] In another body of research, he examined Supreme Court judgments between 1964 and 1968, finding that when the government was a party, the Court ruled against the government in 43% of the cases.[110] Schwarz specifically mentioned *amparo* rulings in expropriation cases and he stated that there was evidence that the Mexican Supreme Court 'has developed an increasing independent posture in mandating procedural fairness in agrarian expropriation proceedings'.[111]

The evidence from expropriation cases decided by the Supreme Court is consistent with the findings made in those two studies. The rate of validation was different for different grounds as can be seen in Figure 5.

[108] Casanova (n 83) 33–36.
[109] Schwarz, 'Rights and Remedies in the Federal District Courts of Mexico and the United States' (n 57) 105.
[110] Schwarz, 'Judges under the Shadow' (n 84) 320.
[111] ibid 322.



	Compensation	Hearing	Jurisdiction	Prior hearing	Procedure	Public purpose
Upholds expropriation order	43.75%	0.00%	9.09%	77.78%	56.76%	31.58%
Quashes expropriation order	56.25%	100.00%	90.91%	22.22%	43.24%	68.42%

Figure 5

An important finding is that there is a significant difference between those cases in which the Court ruled under the constitutionality head and in those cases in which it ruled under the legality head as can be seen in Table 5.

Grounds of review	Upholds expropriation order	Quashes expropriation order	Total	(N)
Constitutionality	**60.17%**	**39.83%**	**100.00%**	**118**
Compensation	56.86%	43.14%	100.00%	51
Hearing	0.00%	100.00%	100.00%	3
Jurisdiction	33.33%	66.67%	100.00%	3
Prior hearing	77.78%	22.22%	100.00%	27
Procedure	66.67%	33.33%	100.00%	21
Public purpose	46.15%	53.85%	100.00%	13
Legality	**44.90%**	**55.10%**	**100.00%**	**392**
Compensation	28.89%	71.11%	100.00%	45
Jurisdiction	0.00%	100.00%	100.00%	8
Procedure	55.88%	44.12%	100.00%	238
Public purpose	29.70%	70.30%	100.00%	101
Grand Total	**48.43%**	**51.57%**	**100.00%**	**510**

Table 5

The Supreme Court decided against the government considerably more often when the challenge was made under the legality head. Even when deciding cases on the same grounds, for example the public purpose requirement or compensation requirement, there was still a difference of more than 15%. These results are the first evidence of the pattern followed by the Court in which it preferred to adopt a formalistic approach when deciding against the government. This will be explored further in the next chapters, in the context of scrutinising the public purpose and compensation requirements.

The impact of losing fifty per cent of the cases is hard to estimate, but there is at least strong evidence that the Supreme Court applied a strong standard of review and limited the power of the government to expropriate. There is no benchmark to quantify whether the number of cases lost by the government is high or low. In the following section I explore how these findings correlate with the existing literature on the role of courts in authoritarian regimes.

3.6 The role of courts in authoritarian regimes and the Mexican Supreme Court

The evidence I have drawn from the data collection of judicial review of expropriation cases is consistent with new research in comparative constitutionalism which has highlighted the complex roles played by courts in authoritarian political contexts. These contributions challenge traditional understandings which assumed that courts in authoritarian regimes were simple tools willing to accept orders from the government.[112] For example, Moustafa has analysed the creation of a strong and independent constitutional court in Egypt.[113] One of the main reasons for the creation of a relatively strong constitutional court was to promote

[112] Tom Ginsburg, 'Courts And New Democracies: Recent Works' (2012) 37 Law & Social Inquiry 720, 722.

[113] Tamir Moustafa, *The Struggle For Constitutional Power: Law, Politics, And Economic Development In Egypt* (Cambridge University Press 2007).

foreign investment by giving the new court strong powers to protect property rights.[114] The Egyptian Constitutional Court went beyond the original expectations and expanded its power challenging the Egyptian government on a number of cases.[115] But ultimately the power of the Constitutional Court was limited by the government. Moustafa summarized the situation in the following terms:

> The Supreme Constitutional Court and the administrative courts were able to push a liberal agenda in less significant areas of political life and to maintain their autonomy from the executive largely because the regime was confident that it ultimately retained full control over its political opponents. Supreme Constitutional Court activism may therefore be characterized as "insulated liberalism." Court rulings had an impact upon state policy, but judicial institutions were ultimately bounded by a profoundly illiberal political system.[116]

This description has many similarities with the Mexican Supreme Court's treatment of review of expropriation cases.

In Chile the importance of legal cultures in understanding the role of the judiciary during the military dictatorship of Augusto Pinochet has been widely discussed.[117] The shared question

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[114] Tamir Moustafa, 'Law Versus The State: The Judicialization Of Politics In Egypt' (2003) 28 Law & Social Inquiry 883, 894–95.

[115] ibid 926.

[116] Tamir Moustafa, 'Law And Resistance In Authoritarian States: The Judicialization Of Politics In Egypt' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press Cambridge 2008) 155.

[117] Javier Couso, 'The Politics Of Judicial Review In Chile In The Era Of Democratic Transition, 1990–2002' (2003) 10 Democratization 70; Javier Couso, 'The Judicialization Of Chilean Politics. The Rights Revolution That Never Was' [2005] The Judicialization of Politics in Latin America 105; Lisa Hilbink, *Judges Beyond Politics In Democracy And Dictatorship: Lessons From Chile* (Cambridge University Press 2007); Lisa Hilbink, 'Agents Of Anti-Politics: Courts In Pinochet's Chile' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press Cambridge 2008); Javier Couso, 'Models Of Democracy And Models Of Constitutionalism: The Case Of Chile's Constitutional Court, 1970-2010' (2010) 89 Tex L Rev 1517; Javier Couso, 'The Transformation Of Constitutional Discourse And The

in all of these studies is why '[D]espite the formal independence they enjoyed…and the resources that the country's legal texts and traditions provided them, Chilean courts never sought to challenge the undemocratic, illiberal, and antilegal policies of the military government.'[118] Couso contends that Chilean courts acted strategically, avoiding political issues to preserve its autonomy.[119] Hilbink argues that the inaction of the courts in the face of government abuses could be explained by a combination of ideology and institutional structure.[120] The Chilean courts embraced a formalistic and conservative interpretation of the law which placed a significant value on apoliticism. The judiciary shared and enforced an institutional ideology, the core of which was that politics and adjudication should remain separated.[121] This state of affairs was exacerbated by the structure of the judiciary which was rigidly hierarchical, with the Supreme Court at the top in charge of judicial administration.[122] In this work Hilbink is highly critical of this ideology of apoliticism because it was used by judges to avoid protecting human rights during the dictatorship.

I contend that the Mexican Supreme Court adopted a variation of a formalist interpretation of law, but its objectives and its results were completely different from those described in Chile. The Mexican judiciary sought to keep politics and adjudication separated as a strategy to maintain a certain degree of autonomy. In the case of Mexico, apoliticism and formalism were used by the Supreme Court to protect individual rights. It is for this reason that the Supreme Court invalidated expropriation orders under the head of legality much more

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Judicialization Of Politics In Latin America' [2010] Cultures of Legality: Judicialization and Political Activism in Latin America 141; Alexandra Huneeus, 'Judging From A Guilty Conscience: The Chilean Judiciary's Human Rights Turn' (2010) 35 Law & Social Inquiry 99.

[118] Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile' (n 94) 102.

[119] Couso, 'The politics of judicial review in Chile in the era of democratic transition, 1990–2002' (n 94) 86.

[120] Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile' (n 94) 120.

[121] Hilbink, *Judges beyond politics in democracy and dictatorship* (n 94); Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile' (n 94).

[122] Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile' (n 94) 104; Couso, 'The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America' (n 94) 151.

frequently than under constitutionality.[123] The Mexican Supreme Court avoided politics or even defending property as a constitutional right, and, instead, when it decided against the government it decided on the basis of legal technicalities. Before 1994 legal apoliticism was adopted by the courts to defend their autonomy and legal formalism was employed to protect private citizens against government abuses.[124]

The research carried out on the role of the judiciary in Mexico in an authoritarian regime has focused on explaining the lack of judicial autonomy. Pilar Domingo in her work argues that the executive branch limited the autonomy of the judiciary and ensured that it remained subordinate by controlling the career paths of the Supreme Court Justices.[125] Beatriz Magaloni has also emphasized the subordinate role of the Mexican judiciary in the Mexican political system.[126] On the role of *amparo* during the authoritarian regime she states:

> The official discourse was that the *amparo* trial established the necessary constraints for the creation of a limited government and the rule of law. This discourse was to a large extent also promoted by the legal profession and the law schools. In practice, however, the overwhelming majority of *amparo* cases were dismissed, and citizens found little effective redress for their grievances through the courts.[127]

Among the evidence presented to support this scepticism about the relevance of *amparo* is that it did not protect property rights. According to this account expropriations were

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[123] See Table 5

[124] In Mexico legal formalism was interpreted as a doctrine by which the court will declare invalid any act of the government that does not adhere strictly to all the legal formalities. For example the lack of a signature is enough to render invalid an expropriation decree.

[125] Pilar Domingo, 'Judicial Independence: The Politics Of The Supreme Court In Mexico' (2000) 32 Journal of Latin American Studies 705.

[126] Beatriz Magaloni, 'Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press Cambridge 2008) 181

[127] ibid 190.

widespread during the 1930s and 1940s and '[M]any of these conflicts ended in the Supreme Court, as discussed above, triggering Lazaro Cardenas' (1934–1940) decision to crack down on the liberal Court and to appoint a new, enlarged body of more amicable justices.'[128] However between 1934 and 1940 the Supreme Court decided against the government in around 70% of the expropriation cases it reviewed as can be seen in Table 6.

Supreme Court Rulings in Expropriation Cases 1934-1940			
Year	**Upholds expropriation order**	**Quashes expropriation order**	**Grand Total**
1934	2	4	6
1935	8	11	19
1936	7	9	16
1937	4	10	14
1938	7	15	22
1939	2	8	10
1940	6	19	25
Grand Total	**36**	**76**	**112**

Table 6

It could be argued that there were very few cases in this period in which the Federal Government was a party. In fact there were only ten cases during this period in which the Federal Government had ordered the expropriation, but the Supreme Court ruled against it in four of these.

Even if *amparo* had many limitations it played a more important role in protecting rights, at least in expropriation cases, than has been previously considered to be the case. The role of the Mexican Supreme Court was more complex and even if it was not completely

[128] ibid 193.

independent, it found spaces to gain certain independence and increase its own power because, as the new literature on courts in authoritarian regimes shows, democracy is not an essential requirement for judicial independence.[129]

Leading on from this analysis, in following section I explore the impact of judicial review of expropriation on the Federal Government.

3.7 Impact of Judicial Review of Expropriation

In the course of this research project, I conducted twenty five interviews with different relevant actors to explore the impact of judicial review of expropriation. In my interviews with four former justices of the Supreme Court I confirmed that the main topic for which expropriation decrees were overturned was due to a lack of evidence to justify public purpose or because compensation had not been paid. There was widespread agreement among those members of the judiciary interviewed that all levels of government struggled to follow all the legal requirements to expropriate and that they were therefore susceptible to being challenged in the courts. Justice Ortiz Mayagoitia mentioned that government institutions lacked institutional memory and therefore they constantly repeated mistakes in the expropriation procedures and lost cases.[130]

A recurring example used by all the justices interviewed were the expropriations undertaken after the occurrence of the devastating earthquake of September 1985 in Mexico City in which thousands of people were injured and left homeless. In the aftermath a social movement made up of those who had lost their homes emerged and demanded a response

[129] James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter?: A Reevaluation Of Explanations For Judicial Independence' (SSRN Scholarly Paper, Institute for Law and Economics, 2012) 4.
[130] Ortiz Mayagoitia interview (n 51).

from the government. The city centre was the area most affected by the earthquake and it was predominantly inhabited by tenants living in controlled rent dwellings which were privately owned.[131] The associations representing low-income residents affected demanded the expropriation of the plots of land of the crumbled buildings in which they were living before the earthquake.[132] The government, acting under a lot of social pressure, undertook a massive expropriation of more than four thousand plots in the city centre and around 400 owners challenged the expropriation decree.[133] According to those justices interviewed major mistakes were made in the course of the expropriation decrees. For example, buildings which had not been damaged were included in the decree and, according to justices Ortiz Mayagoitia and Azuela, the decree had no elements to justify the use of expropriation in this particular case.[134] There was no planning and no studies which according to the Court's interpretation had to be done before the expropriation took place to justify taking private property. Even though the justices were aware that there was a clear public purpose in this expropriation as was mentioned by all four of them, the authorities had failed to justify it in the expropriation procedure. According to Justice Ortiz Mayagoitia and Dr. Ramirez Favela the government lost all the cases.[135]

This was a major problem because the social movements which had demanded the expropriations were, in many cases, already occupying the expropriated property. What

[131] Susan Eckstein, 'Poor People Versus The State And Capital: Anatomy Of A Successful Community Mobilization For Housing In Mexico City' (1990) 14 International Journal of Urban and Regional Research 274, 282.

[132] Alejandra Massolo, '"¡Que El Gobierno Entienda, Lo Primero Es La Vivienda!": La Organización De Los Damnificados' (1986) 48 Revista Mexicana de Sociología 195, 199.

[133] Martin Díaz y Díaz, 'Las Expropiaciones Urbanísticas En México. Aproximaciones A Un Proceso Sin Teoría' in Fernando Serrano Migallón (ed), *Desarrollo Urbano y Derecho* (Plaza y Valdés, Departamento del Distrito Federal, UNAM 1988).

[134] Azuela interview (n 51); Ortiz Mayagoitia interview (n 51).

[135] Ortiz Mayagoitia interview (n 51); Carlos Herrera Martin, Interview with Eduardo Ramírez Favela, 'Entrevista con el Doctor Eduardo Ramírez Favela' (In person, 1 March 2013).

followed was a major exercise of political negotiation to solve the problem of complying with the judicial ruling or at least giving an appearance of complying. Justice Azuela tells anecdotally of how he spoke with the owner of one of the houses and how she told him that the government was not offering her enough compensation. He asked her, 'how much would be enough?' and she gave him a number; then he called the government official who was in charge of awarding compensation and he asked him how much the government willing to pay the owner. According to Justice Azuela the answer was an amount considerably higher than the amount the old lady had told him. He told the government official to make an offer to the owner to settle the case and in this way one of the almost 400[136] cases in which the owner challenged the expropriation was settled.[137]

In this case, the authorities faced a major challenge because they could not enforce the judicial ruling without creating a major social conflict so they negotiated with the owners in order to increase the compensation awarded. Dr. Ramirez Favela tells of how he was invited to a meeting with the legal counselor of the Mexico City Department which at the time was part of the federal government and they told him they had a serious problem with the 400 cases they had lost and that it was necessary for him to declare a higher value of the properties as compensation to convince the owners to simulate that the ruling had been enforced even if their property was not given back as would have been the expected result of the rulings that declared expropriation invalid in these cases.[138] Dr. Ramirez Favela responded that he could not do that because the law clearly established that compensation should be paid using the fiscal value declared in the land registry and he could not invent a different value.

[136] Ramírez Favela interview (n 112).
[137] Azuela interview (n 51).
[138] Ramírez Favela interview (n 112).

His recommendation was to ask the Mexico City Treasurer to modify the fiscal values, because he had the legal power to do that, and then, taking into account the new fiscal value he could prepare a new valuation in which compensation was increased accordingly.[139] For Ramirez Favela it was important to at least respect legal formalities in order to solve the problem. According to him one week later he received an official communication from the Mexico City Treasure in which the fiscal values were increased and he prepared new valuations which contributed to solving the problem even if it had an economic impact on the Mexico City Government. Once legal formalities were respected he had no problem paying a bigger compensation to the owners.

According to Justice Schmill, when he started his tenure as President of the Court in 1988 the earthquake cases were still very much alive and in fact he made a phone call to the President of the Republic telling him that the Supreme Court was ready to remove and imprison the Chief of the Mexico City Department[140] for contempt of court because he had been ordered to pay compensation for another expropriation case and it had not been paid.[141] According to Justice Schmill the following day compensation was paid. They had also a major problem enforcing the rulings in the earthquake cases and in fact according to Schmill a commission was formed by the Supreme Court to review each individual case and to find a solution which in most cases involved the payment of some form of increased compensation.[142] Justice Díaz Romero confirmed that there was a major problem with enforcing judicial rulings in expropriation cases in which restitution of the expropriated land had been ordered because of

[139] ibid.

[140] The Chief of the Mexico City Department was the official title of the equivalent of the City Mayor before 1997. He was named by the President of the Federal Government.

[141] Schmill interview (n 51).

[142] ibid.

the social conflict which may result. The economic and political impact of judicial review of expropriation in these cases is clear and points to the possible consequences of applying strict standards of review to decide when there is public purpose in expropriation cases.

The impact has been increasingly felt by authorities who have to build infrastructure. In interviews with government officials in charge of building highways it appears that judicial review of expropriation is an increasing problem.[143] In the last 12 years the federal government has followed an express policy of limiting expropriation. According to one of the government officials interviewed, the government tries to avoid at all costs the use of expropriation when building infrastructure.[144] They had an internal regulation in which government officials could only use expropriation as a last resort. In general the federal government was afraid of using expropriation in infrastructure programs because of the political and legal conflict associated with it and they always preferred to negotiate. There were some major cases in which a highway in the state of Veracruz was stopped for almost two years after an owner challenged the expropriation order and obtained an injunction from the district judge.[145]

Government officials are therefore reluctant to use expropriation and they prefer to pass the responsibility of acquiring the necessary land to develop new infrastructure projects to the

[143] Carlos Herrera Martin, Interview with Salvador Lucio, 'Entrevista con el Ingeniero Salvador Lucio' (In person, 28 February 2013).

[144] Carlos Herrera Martin, Interview with Raquel Navarro, 'Entrevista con la Licenciada Raquel Navarro' (In person, 13 March 2013).

[145] Carlos Herrera Martin, Interview with Alfonso Leon, 'Entrevista con el Ingeniero Alfonso Leon' (In person, 7 March 2013); Carlos Herrera Martin, Interview with Jorge Santoyo, 'Entrevista con el Licenciado Jorge Santoyo' (In person, 5 March 2013).

construction companies, but, according to the interviewee, this poses major problems.[146] Private developers are faced with the impossibility of taking land or are faced with paying exaggerated prices because owners have a strong bargaining position at least when it comes to highway construction because once a road is decided and construction has started it is extremely complicated to change the planned route of the highway. According to the lawyers interviewed, the government in some recent concession contracts had made some changes and had included as part of the conditions that the construction companies were responsible for acquiring the land.[147]

Private constructors of highways have problems when owners whose land they need challenge the decision through *amparo* suit because they depend completely on the government and in the meantime they have to suspend the project.[148] On many occasions they preferred to pay more in order to avoid delays which they cannot control.[149] At the local level the Mexico City government mentioned the lack of coherence between the criteria applied by different Circuit Courts as major problem. In one case they expropriated some plots where stolen car parts were sold to create a park and a community centre but they lost four out of 56 cases, so the project was significantly delayed.[150] In the end they had to negotiate with the owner but, once again, they had to offer a larger sum of compensation. Probably the most notable example of how the government found it increasingly difficult to use expropriation

[146] Leon interview (n 122); Carlos Herrera Martin, Interview with Bernardo Luna, 'Entrevista con el Licenciado Bernardo Luna' (In person, 5 March 2013); Santoyo interview (n 122).

[147] Santoyo interview (n 122); Luna interview (n 123).

[148] Santoyo interview (n 122).

[149] ibid.

[150] Carlos Herrera Martin, Interview with Leticia Bonifaz, 'Entrevista con la Doctora Leticia Bonifaz' (In person, 6 March 2013).

was the internal order given by President Vicente Fox to use expropriation only after obtaining the agreement of the owners of the expropriated land.[151]

3.7.1 Judicial Review of Expropriation and Adversarial Legalism

The consequences of judicial review of expropriation in Mexico described by government officials and project developers fits surprisingly well with Kagan's account of the consequences of judicialization of administrative governance in the United States.[152] Kagan uses the term 'adversarial legalism' to describe the legal culture of the United States which is characterized by 'policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation.'[153] In administrative law the negative consequences of this approach are described by Kagan and it is astonishing how accurately they fit with the accounts of government officials in Mexico. Kagan writes: 'adversarial legalism means that decisions are sometimes shaped less by rational analysis than by a panicky scramble to avoid the risks, delays and costs of extended, legally unpredictable litigation.'[154]

There are three negative consequences of adversarial legalism which fit with the account of the impact of judicial review of expropriation in Mexico. The first one is legal uncertainty. Strong judicial review of expropriation produced legal uncertainty because the interpretation of the public purpose requirement gave too much discretion to the judiciary to determine its meaning and the government had very few elements to predict the possible outcome as will be highlighted in the next chapter. The interviewees' account of the highway in Veracruz

[151] Carlos Herrera Martin, Interview with Fernando Portilla, 'Entrevista Con El Licenciado Fernando Portilla' (In person, 24 April 2007).

[152] Robert A Kagan, 'Adversarial Legalism And American Government' (1991) 10 J Pol Anal Manage 369; Robert A Kagan, 'Trying To Have It Both Ways: Local Discretion, Central Control, And Adversarial Legalism In American Environmental Regulation' (1998) 25 Ecology LQ 718; Robert A Kagan, *Adversarial Legalism: The American Way Of Law* (Harvard University Press 2003).

[153] Kagan, *Adversarial Legalism* (n 129) 2.

[154] ibid 206.

which was delayed when owners challenged an expropriation order also fits with Kagan's description of the delays created by adversarial legalism. Finally costs of projects increased because there were delays and to avoid them the government or developers were willing to pay more compensation. Once again the account given by project developers and government officials fits very well with Kagan's description of the behavior of the same actors in the United States in the face of litigation. Kagan states that: 'When threatened with litigation, project developers often feel compelled to make expensive side payments demanded by local or ideological opponents'.[155] In the construction of highways project developers in Mexico described how they negotiated with local communities and accepted to pay for additional projects to avoid legal challenges and political conflicts.

These various accounts and cases, the majority of which were obtained in the course of interviews, provide substantial evidence of the impact of judicial review of expropriation and of its strength. There is also evidence of the sometimes cavalier attitude of the government towards the rule of law and legal formalities when they used expropriation.

3.8 Conclusion

In this Chapter I outlined the constitutional and legal framework of expropriation and judicial review in Mexico and I examined the historical evolution of judicial review of expropriation by creating and analyzing a dataset on Supreme Court rulings. I confirmed that judicial review of expropriation was strong and that the Court applied rigorous standards, even when operating with the limitations imposed by an authoritarian regime. My findings are consistent with the evidence from the study of courts in authoritarian contexts in other jurisdictions.

[155] ibid.

This strong judicial review had a significant impact on the Federal Government and on its capacity to undertake projects in which the use of expropriation was required. The consequences of judicial review of expropriation identified in the case of Mexico appear to be very similar to the consequences of judicialization of administrative governance in the United States identified by Kagan.

In the following Chapters I analyse the rulings made by the Supreme Court in greater detail, focusing on the Court's interpretation of the public purpose requirement and of the compensation requirement.

Chapter 4.

The Public Purpose Requirement in Mexican Law and Practice: An Introduction

4.1 Introduction

In this Chapter I explore the evolution of the interpretation of the public purpose requirement in expropriation cases by the Supreme Court. As I mentioned in Chapter 1, and explored in Chapter 2, the public purpose requirement can limit government's use of expropriation: all expropriations need to fulfil a public purpose and if an owner considers that a putative expropriation does not serve a public purpose they can challenge it on this basis. More specifically, the Mexican legal system follows an expropriation procedure in which the statute authorizing expropriation includes a vaguely worded list of what can be considered a public purpose. The executive branch then must interpret and apply these categories and justify individual cases on the ground that they fall within the authorizations set out by the legislature. This system relies on a heavy dose of administrative discretion. An expropriation order can be challenged on the grounds that it does not serve a public purpose, in which case the plaintiff can seek to get the expropriation order struck down on the grounds that the statute that authorized it is unconstitutional or that the public purpose stated in the order is not authorized by the statute.

I have argued previously that judicial review of cases of expropriation in Mexico was extensive and this has restricted the government's use of expropriation. In this Chapter, I analyse in greater detail how the public purpose requirement has been interpreted to

understand the impact and extent of judicial review of expropriation orders. Importantly, whilst the Supreme Court has adopted a deferential approach towards the legislative branch, it has not deferred to the administration. In a subtle way this approach to the review of the public purpose requirement has led to the substitution of administrative discretion with judicial discretion. In sum, the Supreme Court has developed an interpretation of the public purpose requirement which gives the federal judiciary a strong power to scrutinize the reasons advanced by the authorities to justify the expropriation order on the grounds that it fulfils a public purpose. The public purpose requirement has therefore been transformed into a 'giving reasons' requirement by this interpretation and it has become the cornerstone of a robust system of judicial review of expropriation cases. This transformation has accordingly given the courts a major role in deciding when the use of expropriation is justified and it has thereby limited the power of the government to use expropriation. Whilst this process can be interpreted as a necessary approach to restrain abuses of administrative discretion, it also means that the courts in Mexico and the Supreme Court in particular have had a major, albeit unacknowledged, role in policy making.

This Chapter is divided into three sections. In the first section I present some key concepts that structure the analysis and the evolution of the precedent developed by the Supreme Court; in the second section I undertake a general overview of how the Supreme Court has decided cases in which the public purpose of the action was challenged and in the fourth section I analyse the substantive content of these decisions to understand the evolution of the public purpose requirement as interpreted by the Supreme Court.

4.2 Theoretical framework

In short, the interpretation of the public purpose requirement adopted by the Supreme Court in Mexico has been insufficiently studied. In this section I present the concepts of the 'giving reasons' requirement and strategic deference which are used in the rest of this Chapter.

4.2.1 Giving reasons as the basis of substantive judicial review

Giving reasons is an essential element of legal accountability in modern democracies.[1] This obligation to give reasons when a decision is reached is recognized in the context of European Union Law and it is increasingly important in British law.[2] The recognition of this requirement has been described as an important development that 'makes decision-makers accountable to fundamental values without squeezing out the space for exercise of their discretion.'[3] However the rise of this requirement can also have some problematic effects because it can serve as the basis for an expansion of the power of the courts to review administrative decisions.

The evolution of a seemingly innocuous and purely formal requirement such as giving reasons for a decision into a 'pervasive and deeply intrusive style of judicial review'[4] has been analysed in depth in American administrative law.[5] This transformation in the standard

[1] Frederick Schauer, 'Giving Reasons' (1995) 47 Stanford Law Review 633, 633.

[2] Andrew Le Sueur, 'Legal Duties To Give Reasons' (1999) 52 Current Legal Problems 150; Jerry L Mashaw, 'Reasoned Administration: The European Union, The United States, And The Project Of Democratic Governance' (2007) 76 Geo Wash L Rev 101.

[3] David Dyzenhaus and others, 'The Principle Of Legality In Administrative Law: Internationalisation As Constitutionalisation' (2001) 1 Oxford U Commw LJ 6, 34.

[4] Martin Shapiro, 'The Giving Reasons Requirement' [1992] University of Chicago Legal Forum 179, 179.

[5] Stephen Breyer, 'Judicial Review Of Questions Of Law And Policy' (1986) 38 Admin L Rev 363; Tom Ginsburg, 'Judicialization Of Administrative Governance: Causes, Consequences And Limits' (2008) 3 NTU L Rev 1, 19–21; Shapiro, 'The Giving Reasons Requirement' (n 4); Cass R Sunstein, 'Deregulation And The Hard-Look Doctrine' (1983) 1983 The Supreme Court Review 177.

of review was the result of a combination of the 'hard look' doctrine,[6] and a requirement to keep records of all the decisions made by the administration.[7] Martin Shapiro's description of the evolution of what he calls the 'giving reasons' requirement in the United States[8] has many similarities with the evolution of the interpretation of the public purpose requirement developed by the Mexican Supreme Court.

In broad terms, expropriation orders in Mexico are decisions taken by the administration under an authorizing statute which gives the executive broad discretion to decide when expropriation is necessary. The requirement to give reasons is a protection against arbitrariness from government officials. The public purpose requirement fulfils a similar role in expropriation orders because it limits the power of the government to expropriate.

The 'giving reasons' requirement can be interpreted modestly by only demanding that authorities present some justification for their decisions, but refusing to evaluate those justifications. However, to enforce the giving reasons requirement the courts need access to the records kept by the administration. In Mexico, the interpretation of the public purpose requirement followed the same path, with courts requiring that the expropriation order be accompanied by the government presenting its justification for the decision. As Shapiro describes it: '[O]nce giving reasons reaches far enough to require the agency to give a fairly full account of the factual basis for its decision, judges are in a position to second-guess administrators.'[9] Although based on United States case law, this analysis provides a surprisingly precise description of the evolution of the interpretation of the public purpose requirement adopted by the Supreme Court in Mexico. Shapiro also offers an insightful

[6] Breyer (n 5) 383; Sunstein, 'Deregulation and the Hard-Look Doctrine' (n 5) 181–84.
[7] Ginsburg, 'Judicialization of Administrative Governance' (n 5) 19.
[8] Shapiro, 'The Giving Reasons Requirement' (n 4) 180–89.
[9] ibid 187.

analysis of the strategic use by the courts of the 'giving reasons' requirement as a form of substantive review:

> This inevitable shift of reason-giving from procedure to substance in the presence of facts is smoothed, however, by the procedural veneer of reasons-giving. Judges know that substantive review…constitutes a substitution of their policy views for the views of others. Giving reasons review is an ideal cover. First, it is cast in the form of procedural, rather than substantive, review. Judges will tell the agency, "It is not that the rule is necessarily unlawful, but rather that you have missed a procedural step. You have not given adequate reasons."[10]

This account is very similar to how the Mexican Supreme Court interpreted the public purpose requirement after transforming it into a 'giving reasons' requirement.

In the Mexican context, with a complex political system, the judiciary needed to strike a delicate balance between independence and self-restraint; the 'giving reasons' requirement allowed the Court to limit the power of the government without risking an open confrontation.

4.2.2 Public Enforcement Mechanism

The public enforcement model of judicial power developed by Vanberg can give some insights on the decision of the Court to transform the public purpose requirement into a giving reasons requirement.[11] This model tries to explain why courts have power. The central

[10] ibid.
[11] Jeffrey K Staton, *Judicial Power And Strategic Communication In Mexico* (Cambridge University Press 2010) 14.

premise is that judicial power can only work, that is, it can only force governments to comply with their decisions, when two conditions are met:

(1) Courts enjoy sufficient public support to make non-compliance unattractive.

(2) Voters are able to monitor legislative responses to judicial rulings effectively and reliably[12]

The model describes the second condition as exogenous, something over which the courts have no control. Vanberg's model predicts that judicial power will be stronger in countries in which the courts enjoy high level support and there is also a high level of transparency.[13]

This model has been used by Staton to analyse the Mexican Supreme Court, but he makes two important modifications to it. He considers the two conditions of the model (public support and transparency) as *endogenous* to the relationship between the courts and the government, and therefore the courts 'enjoy a measure of control over the boundaries of their power'.[14] Staton explains that the courts have some control over the level of transparency because they can develop communication strategies and improve public access to their decisions. They can further exercise a certain level of control over how the image of the courts is presented to the public. For example they can decide to give interviews to explain their rulings to the general public or they may engage with newspaper reporters to make sure that their judgements are understood. The support condition can also be influenced by the decisions the courts make. This means that they can choose to make popular decisions and they have the power to avoid making unpopular decisions which could damage their public support.

[12] Georg Vanberg, 'Legislative-Judicial Relations: A Game-Theoretic Approach To Constitutional Review' (2001) 45 American Journal of Political Science 346, 347.
[13] ibid 348.
[14] Staton (n 11) 14.

Two implications flow from Stanton's models that are relevant to understanding the interpretation of the public purpose requirement. The first is that the courts have certain control over the boundaries of judicial power and that their opinions have consequences. Second, there can be a tension between transparency and legitimacy and in some circumstances full transparency undermines legitimacy. The model is useful to predict levels of compliance under democratic regimes, but the Supreme Court's review of expropriation order points to a different relationship between these variables in an authoritarian context. In a political context where public support had little value, the Mexican judiciary concentrated on building a space independent of political pressure, or, at least, as independent as possible. In these conditions non-compliance had some costs for the government but public support for the Court did not increase them. On the contrary, the Court had more chances of success and of keeping its autonomy if it was discreet. By avoiding constitutional discussions the Court reduced the visibility of their decisions and therefore, seemingly, it's political importance and influence. This allowed the courts to create a space in which they could decide expropriation cases with little political interference, even if they were deciding against the government. In these conditions a good hypothesis could be that the Court valued more the opinion of fellow professional groups, who were their most relevant audience, than broad public support.[15] Adopting formalism reduced transparency and that had no cost because public support had no value. At the same time, the judiciary was developing a very strong locus of power which allowed them to decide when an expropriation was justified. Acting strategically, the Court was able to strengthen its power to decide such cases. By limiting transparency it reduced its

[15] For a discussion on the importance of professional groups in the behaviour of courts see: Lawrence Baum, *Judges And Their Audiences: A Perspective On Judicial Behavior* (Princeton University Press 2009) 99.

political pressure. Compliance, transparency and judicial effectiveness seem to respond to different incentives in an authoritarian context.

In this analysis of the Supreme Court's interpretation of the public purpose requirement, I use a combination of written opinions and precedent.[16] In summary, written opinions contain information about the facts of the case, the ruling and the reasoning while precedent is a source of law and it represents the official doctrine of the judiciary.[17]

4.3 Constitutional and Legal Framework of the Public Purpose Requirement

As has been previously described,[18] the Constitution declares that state and the federal legislatures have the power to define what is public purpose and the executive branch, state or federal, has to decide which cases fall within the authorization given in the statutes.

The first article of the Federal Expropriation Law provides a list of what can be considered a public purpose which is capable of justifying an expropriation.[19] The list includes: the creation, promotion or conservation of a public service; the construction, enlargement, or alignment of streets and the construction of roads, bridges and tunnels to improve urban and suburban transport; the beautification, expansion and improvement of towns and ports, the constructions of parks, hospital, schools, gardens, sporting grounds and airports, the construction of federal buildings and any other that will result in a collective benefit; the

[16] See section Chapter 2 in 3.4.3 Precedent in the Mexican legal system.
[17] Stephen Zamora and others, *Mexican Law* (Oxford University Press 2005) 83.
[18] See Chapter 2 in 3.2.4 Constitutional framework of expropriation.
[19] Ley Federal de Expropiación. Artículo 1. Published in the Official Federation Diary November 25, 1936. Last reformed January 27, 2012.

construction of public infrastructure and public services that require the acquisition of land authorized by an administrative concession or contract; the creation, promotion or conservation of a company for the benefit of the collective; and it ends with the all-encompassing provision in section XII 'all other cases defined in other statutes'.[20] This catalogue gives an indication of the vagueness of the definition of public purpose in the Mexican legislation.

Expropriations orders in the Federal Government fell under the exclusive jurisdiction of the President. The expropriation order had to include all the evidence (technical studies, plans, projects and such) that justified that the expropriation would serve a public purpose.

4.4 An overview of the rulings interpreting the public purpose requirement

The interpretation of the public purpose requirement was settled by the Supreme Court in cases decided between 1917 and 1957, with the majority of public purpose decisions taking place during this period, as seen in Figure 6. The interpretation has not been substantively modified since then. This interpretation adopts a strongly deferential approach towards the legislative branch and a strict scrutiny of the reasons given by the authorities to justify individual expropriation orders. This interpretation gave the judiciary a wide discretion to define what is public purpose. The collegiate circuit courts, which had jurisdiction over most of these cases after 1951, exercised this discretion in their rulings.

In the few cases decided by the Court after 1951 the relevance of the 'giving reasons' requirement doctrine is obvious. Examples of the application of this doctrine and of its

[20] Ley Federal de Expropiación. Article 1. Section XII. As Originally Published in the Official Federation Diary November 25, 1936. Last reformed January 27, 2012.

consequences were seen in the earthquake expropriation cases described in the previous Chapter and in some of the cases analysed in Chapter 6. Below, I analyse the cases in which the Supreme Court developed this doctrine and how it was applied in specific cases.

4.4.1 Analysis of general trends

There were 114 cases between 1917 and 2008 in which the Supreme Court ruled whether the expropriation decree complied with public purpose requirement. The rulings of the Court on this subject are distributed as follows:

Supreme Court Rulings on the Public Purpose Requirement	
Ruling	**Number**
Validates expropriation decree	36
Invalidates expropriation decree	78
Grand Total	**114**

Table 7

The historical evolution of the cases decided by the Supreme Court in which the public purpose requirement was interpreted can be seen in Figure 6.

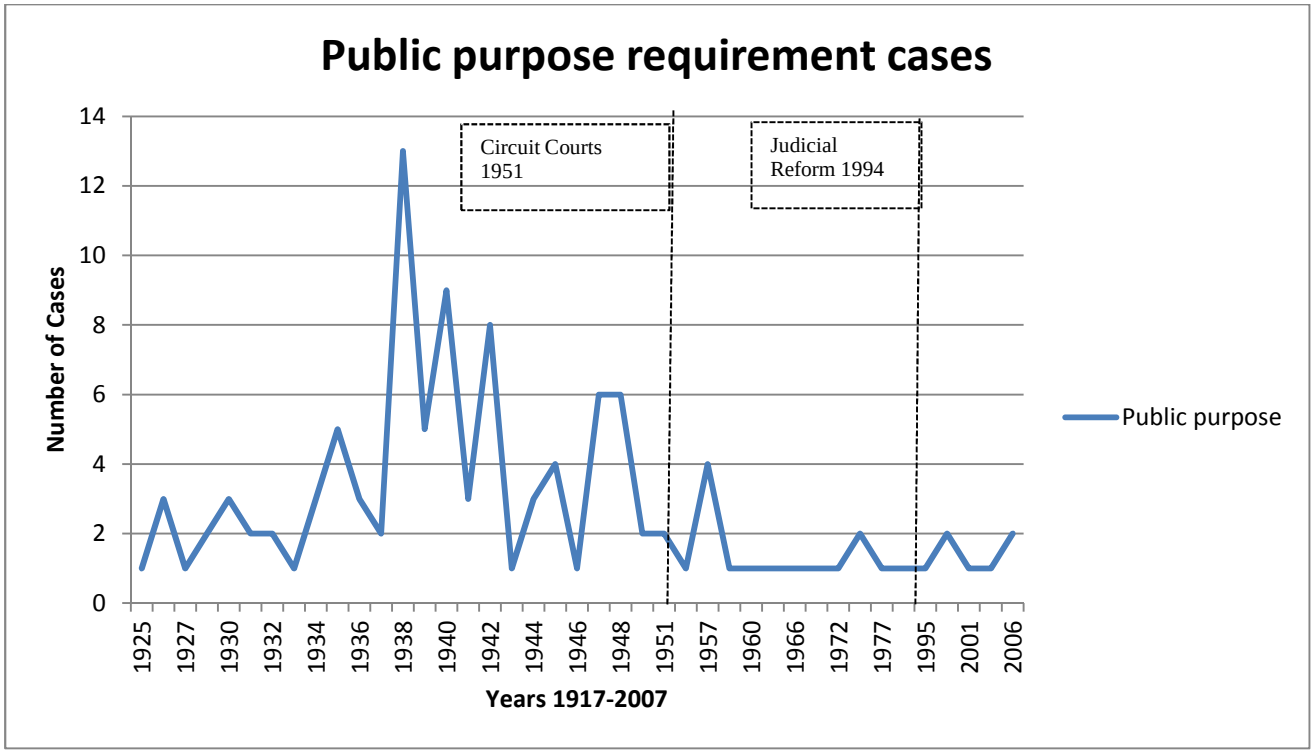

Figure 6

The majority of the cases in which the Supreme Court interpreted the public purpose requirement were decided before 1951. This is part of a wider trend in which the Court reduced the number of expropriation cases it reviewed directly, as can be seen in Figure 7, even if the reduction in the number of public purpose requirement cases is more dramatic than in other categories of expropriation cases.

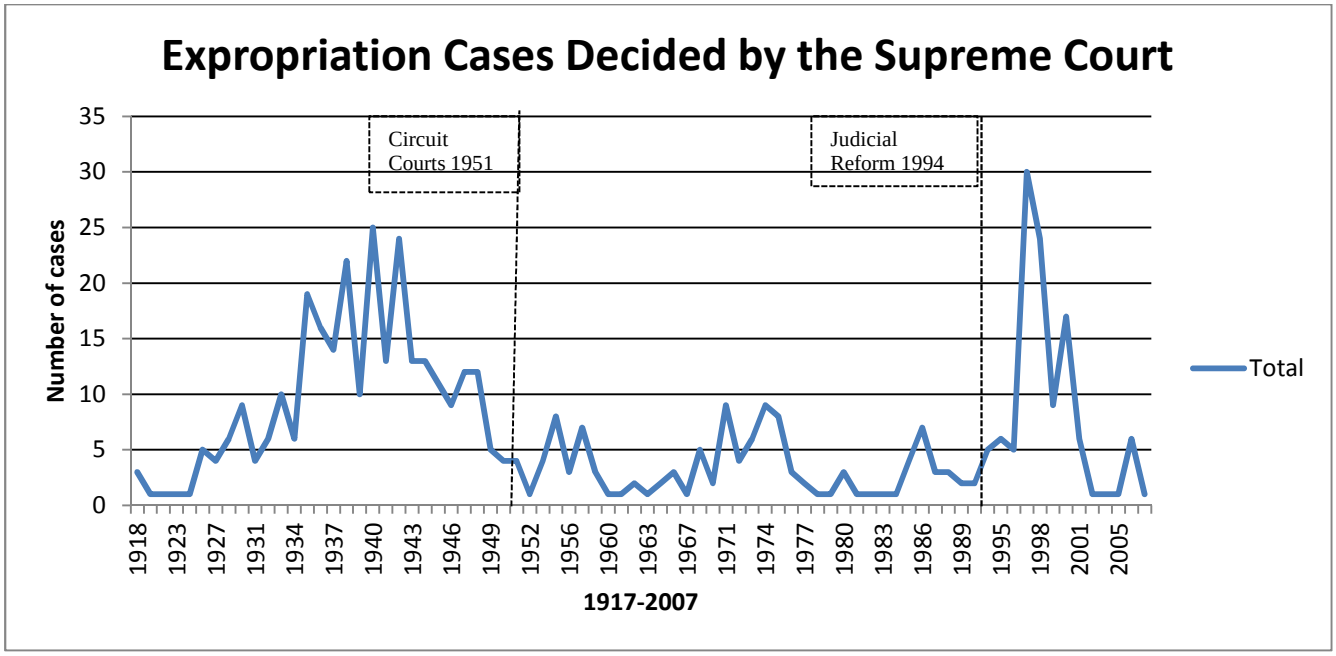

Figure 7

The number of expropriation cases reflects the attempts made by the Supreme Court to reduce its workload.[21] The role of the Court was to define the doctrine to be applied by the collegiate courts and it is for this reason that interpretation of the public purpose requirement developed by the Supreme Court has had such a huge impact on the development of the legal system, even if the Court was no longer ruling on cases directly.

It is significant that in cases in which the Supreme Court reviewed whether the authorities had complied with the public purpose requirement in expropriation orders, it decided against the government in 68% of cases. Interestingly, when the Supreme Court reviewed other requirements its validation rates were higher, as can be seen in Figure 8.

[21] See 3.4.1 Organization of federal judiciary

The two issues which have a lower validation rate (hearing and jurisdiction) are decided in only 15 cases, just 2.75% of the total number of cases in which the Supreme Court reviewed expropriation orders.

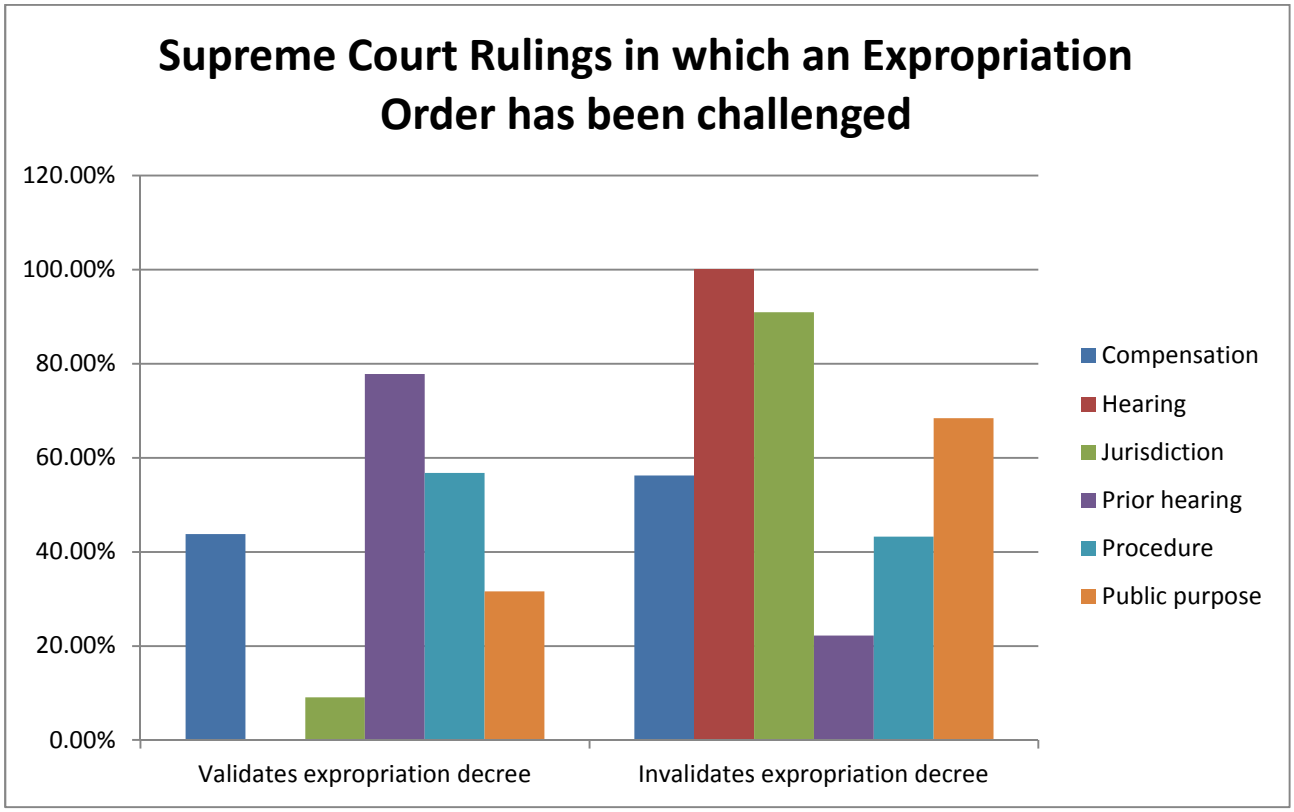

Figure 8

The majority of the cases which the Supreme Court decided from 1951 onwards because the petitioners considered that the public purpose requirement had not been met, challenged the constitutionality of legislation. In these cases, the Supreme Court was consistent with its interpretation of the 'public purpose' requirement which gave broad discretion to the legislative branch and refused to strike down statutes. As can be seen in Figure 9, there is a great difference in the validation rates between those cases in which the Supreme Court reviewed the constitutionality of legislation and those cases in which the Supreme Court reviewed the constitutionality of expropriation orders.

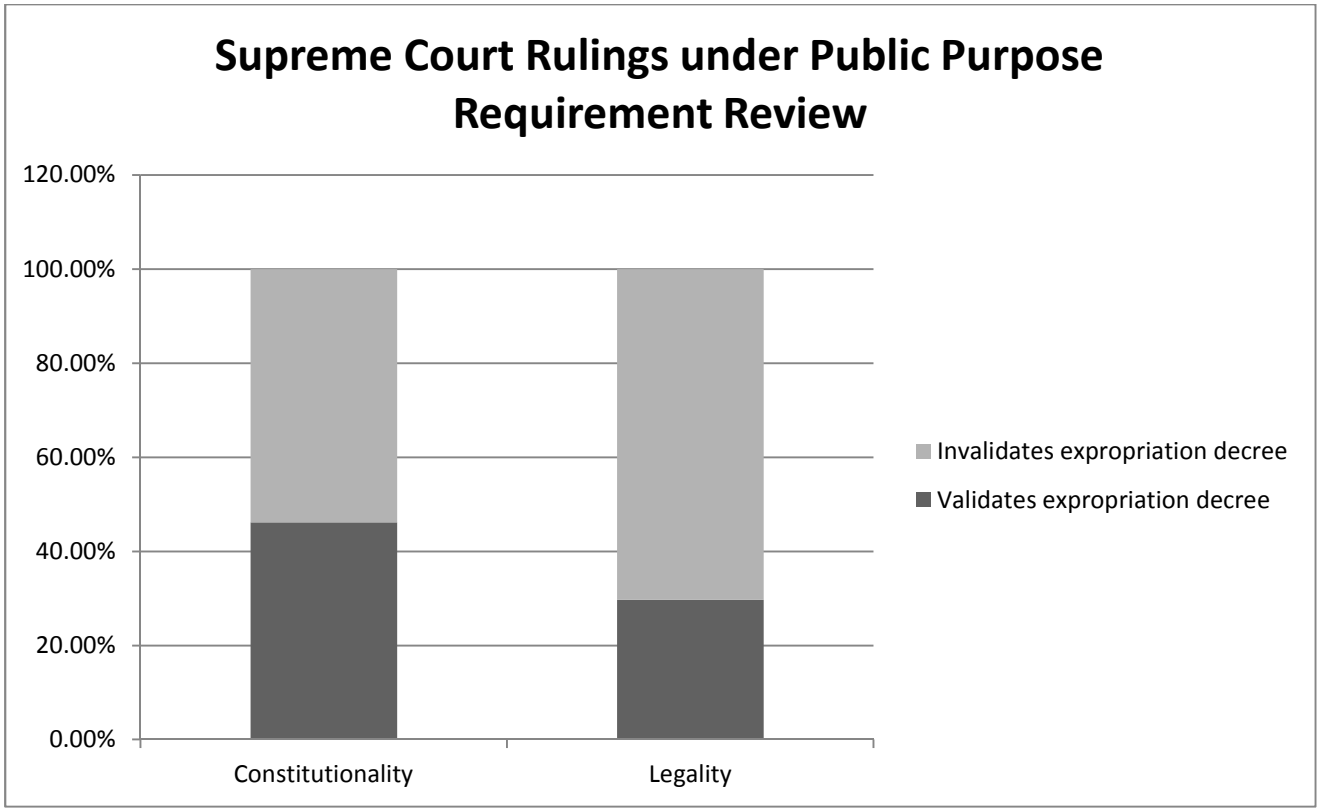

Figure 9

The validation rate of cases in which the Supreme Court decided on public purpose on grounds of legality was only 29.7%. This is an indication of the severity of the scrutiny undertaken by the Mexican Supreme Court. The Supreme Court made no significant distinction between federal or state authorities, but it was much more likely to invalidate expropriation orders made by municipal authorities, as can be seen in Table 8.

Supreme Court Rulings Under Public Purpose Requirement Review				
Government	**Validates expropriation decree**	**Invalidates expropriation decree**	**Grand Total**	**(N)**
Federal	27.78%	72.22%	100.00%	36
Municipal	20.00%	80.00%	100.00%	5
State	34.25%	65.75%	100.00%	73
Grand Total	**31.58%**	**68.42%**	**100.00%**	**114**

Table 8

The overall trend has been towards a reduction in the workload of cases assigned to the Supreme Court and as part of this trend there is an important reduction in the number of cases reviewed by the Supreme Court in which expropriation orders were challenged because they did not comply with the public purpose requirement. The Supreme Court developed its interpretation of the public purpose requirement as a 'giving reasons' requirement and the jurisdiction over the majority of cases was transferred to the collegiate circuit courts. These collegiate circuit courts continued applying the same standard of review developed by the Supreme Court when expropriation orders were challenged because they did not comply with the public purpose requirement. The relevance of this standard of review is also evident in those cases decided by the Supreme Court after 2000. In the light of this analysis, in the following section I explain in detail the interpretation of the public purpose requirement developed by the Supreme Court between 1917 and 1957 and how this standard of review is still applied today.

4.4.2 The restrictive interpretation of the public purpose requirement and its transition 1917-1933

Petitions for review of expropriation orders because they did not comply with public purpose requirement were heard by the Supreme Court soon after the new 1917 Constitution was passed. The three points debated in the cases reviewed by the Supreme Court were:

i) Whether property title needed to be transferred to a public body to comply with the public purpose requirement;

ii) Whether the judiciary could strike down legislation on the grounds that it did not comply with the public purpose requirement; and

iii) The standards the courts would apply to review the statement of public purpose in individual expropriation orders.

(i) Interpreting Public Purpose Requirement as a Constraint on Government

In 1918, the Supreme Court published its earliest precedent on this issue, which stated that expropriation orders have to comply with a public purpose requirement.[22] This can be interpreted as an attempt by the Supreme Court to impose certain limits on the government's power of expropriation. This understanding of public purpose as a limit to expropriation was confirmed in 1919 when the Supreme Court held that 'the Constitution demands that public purpose must act in expropriation cases as a real guarantee in favour of private property. That is, it must exist according to the essence and nature of things.'[23] The public purpose requirement would not be satisfied with a simple declaration and the Court could review if

[22]EXPROPIACIÓN, Pleno, Semanario Judicial de la Federación, Quinta Época, Registro No. 291,190.
[23]EXPROPIACIÓN POR CAUSA DE UTILIDAD PÚBLICA, Pleno, Semanario Judicial de la Federación, Quinta Época, Registro No. 289,889.

the justification for the expropriation was supported by the available evidence which points out to the intention of the Supreme Court to apply a strict standard of review.

The traditional interpretation of the public purpose requirement accepted by the Mexican Supreme Court considered that an expropriation could not serve a public purpose if property was not transferred to a public body. American doctrine on takings was influential in this early stage, especially the work of Thomas Cooley,[24] one of the few foreign scholars mentioned in any opinion. This understanding is fully articulated in a case from 1918 in which the Supreme Court held that there could only be public purpose if the expropriated property was transferred to public ownership. The Supreme Court declared:

> In the case that we are reviewing there is absolutely no public purpose because the classic doctrine of Cooley establishes the principle that there is only public purpose when property is transferred to the government. Taking property from its rightful owner to give it to a private person, be it an individual, a society or a corporation cannot serve a public purpose. "*La Plancha de Obreros del Ferrocarril Constitucionalista de Yucatan*" is nothing more than a cooperative society formed by rail workers and "*La Ciudad Escolar de los Mayas*", a school created to educate certain inhabitants of the state of Yucatan, and if the expropriation benefits them it cannot serve a public purpose.[25]

In deciding this point, the Court clearly demonstrates its very limited and traditional understanding of public purpose, in which the key element is the transfer of the property title to a public institution. The expropriation would benefit a workers' cooperative who asked for

[24] Thomas McIntyre Cooley, *A Treatise On The Constitutional Limitations Which Rest Upon The Legislative Power Of The States Of The American Union* (Little, Brown 1871).
[25] *Amparo* en Revisión. 271/1918. Pleno de la Suprema Corte de Justicia de la Nación. Decided 11 February 1918.

the land to build housing for their members and the expansion of a school that apparently focused on the education of the Maya people of Yucatan. In the case of the cooperative the interpretation of the Court seems questionable but understandable because property would be transferred to a third party, but in the case of the school the only justification given by the Court was that it would benefit only a specific group of inhabitants of the State of Yucatan.

This understanding was similar to the original interpretation of the public use clause in the United States which 'was understood to mean that if property was to be taken, it was necessary that it be used by the public.'[26] This limitation originally tried to prevent what Sunstein has called 'naked preferences' which are a form of redistribution of resources justified only by political power.[27] In the case of expropriation this means that an expropriation is not justified even if it is supported by political institutions if there is no justification. The interpretation of the American Supreme Court evolved and it recognized that the previous test was too rigid and that some actions that would have been considered naked transfers under the previous category, should now be accepted as a valid public purpose.[28]

This Lochnerian interpretation of the public purpose requirement adopted by the Mexican Supreme Court appeared to become a serious obstacle to the program of land redistribution which was a central element of the Mexican Revolution. In the years following this case, the Supreme Court was forced to modify this doctrine to adapt to the new political realities.

[26] Cass R Sunstein, 'Naked Preferences And The Constitution' (1984) 84 Columbia Law Review 1689, 1724.
[27] ibid 1689.
[28] ibid 1724–25.

In 1926, the Supreme Court ruled that an expropriation made by the Yucatan state government to build social housing for workers was valid because in this case 'the expropriation was ordered in favour of the Progreso municipality.'[29] The key element used by the Court to justify its decision was that the property had been transferred to the municipality first. The Court chose to ignore the obvious eventuality that after the property had been subdivided by the municipality it would be transferred to workers, that is that municipal ownership was merely an intermediate stage in the ultimate transfer to workers. In this case, the Supreme Court clung to a formalistic interpretation to justify the clear violation of its traditional interpretation of the public purpose requirement. However, as the Supreme Court began to abandon its traditional interpretation, it started to adopt a hard look review standard that gradually transformed the public purpose requirement into a 'giving reasons' requirement.

In 1926, the Supreme Court held that an expropriation order made by the Veracruz State Government to build social housing was invalid on the grounds that the public purpose had not been adequately proven. In its ruling, the Supreme Court declared that the construction of social housing could be considered a public purpose because even if those who benefitted directly were workers, the construction of clean and modern housing would ultimately benefit society.[30] The Supreme Court held that the legislature of the State of Veracruz had the power to include social housing as a public purpose in its legislation, thereby abandoning its traditional requirement that the title of property needed to be transferred to a public body. However, in this case the Supreme Court held that the state government presented no

[29] *Amparo* en Revision. 3839/1921. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 7 April 1926.
[30] *Amparo* en Revisión 1631/1924. Pleno de la Suprema Corte de Justicia de la Nación. Decided 4 February 1926.

evidence to justify that social housing was needed and that the plots of land which were expropriated were the ideal places to build social housing. The Supreme Court quashed the expropriation order on the grounds that there was no evidence that the expropriation would serve a public purpose.[31] In this case the Supreme Court stated clearly that its review of the powers of review went beyond the simple confirmation that there was a public purpose; it also had to present evidence so the courts could decide if the decision was correct. This account recollects Shapiro's description of the conditions under which the requirement to give reasons is transformed into a substantive restriction of government power.[32]

In 1927, the Supreme Court once again quashed an expropriation order made by the Michoacan State Government as part of an agrarian reform program on the grounds that it did not comply with the public purpose requirement. The Court found that 'the expropriation does not serve a public purpose because it takes property from one person to benefit a very small number of individuals which number less than 25 persons.'[33] The legal basis of the expropriation was a statute that authorized the state government to expropriate land to create small landholdings and to break up large estates. However, the Supreme Court held that the statute did not authorize this particular expropriation because this expropriation would not create small landholdings. The Supreme Court decided that: 'This expropriation does not create small landholdings, instead it tries to create miniature landholdings and that was not the intention of the state legislator when they passed the law.'[34] In this ruling, the Supreme Court did not defer to the administration's interpretation of the legislation, even if it could be

[31] *Amparo* en Revisión 1631/1924. Pleno de la Suprema Corte de Justicia de la Nación. Decided 4 February 1926.
[32] Shapiro, 'The Giving Reasons Requirement' (n 4) 185.
[33] *Amparo* en Revisión 1006/1926. Pleno de la Suprema Corte de Justicia de la Nación. Decided 24 August 1927.
[34] *Amparo* en Revisión 1006/1926. Pleno de la Suprema Corte de Justicia de la Nación. Decided 24 August 1927.

argued that this was reasonable. The Supreme Court gave no margin of discretion to administrative authorities to interpret what constitutes small landholdings.

In 1930, the Court once again quashed an expropriation order made by the Veracruz state government to build social housing on the grounds that it did not serve a public purpose.[35] In this case, the statute passed by the state of Veracruz authorized expropriation of empty plots of land inside the limits of the most important State cities to build social housing. The Supreme Court considered that in this case the petitioner's property was outside the city, and therefore its expropriation did not serve a public purpose. The issue of whether the plot of land was inside the limits of the city or not was a factual question which had no easy answer because the city limits were not clearly defined. This provides a further example of the Court adopting a hard look standard of review in these cases.

In these early years, the other great constitutional debate in the Court was on the proper interpretation of which authority could decide what was the public purpose. The question was to what extent the judiciary could review the constitutionality of legislation that defined what should be understood as the public purpose and, therefore, whether the judiciary had the power to strike down legislation authorizing expropriation on the basis that it did not comply with the public purpose requirement. The question seemed settled if we concentrate on the cases analysed in this section, but, in the following years, the Court went back and forth on this issue which can be seen to contain at least two elements. First, the Court had to decide if it could strike down statutes authorizing expropriation on the grounds that it did not comply with the public purpose requirement and therefore if the Court had the power to limit

[35] *Amparo* en Revisión 614/1929. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 11 March 1930.

legislative discretion. The second element to consider was how much discretion should the executive branch enjoy in its decisions to use expropriation.

(ii) Legislative discretion and administrative discretion

The first precedent that touches on this subject is from 1919 and this declares: 'An expropriation ordered without public purpose is unconstitutional; federal courts are authorized to decide on the constitutionality or unconstitutionality of state and federal laws that define in which cases a public purpose justifies expropriation and on the administrative acts that apply them.'[36] This ruling confirmed that the federal judiciary had the power to strike down legislation and administrative acts if the courts considered that the expropriation would not serve a public purpose. However, in 1926, the Supreme Court radically changed its interpretation of the power of the judiciary to strike down legislation on the grounds that it authorized expropriations that would not serve a public purpose. An expropriation to build social housing undertaken by the Veracruz state government was challenged on the grounds that the law that authorized it was unconstitutional. The Court held:

> Only the mention of the public purpose, which the expropriation will achieve, is enough to confirm its existence…The Federal Constitution has intended to grant and has granted to the State legislatures, when property is in their jurisdiction, a sovereign power that no other authority can invade, meaning that this faculty is not susceptible to being reviewed in an *amparo* suit; otherwise the Court would substitute the criteria of the legitimate authorities, according to the Constitution, with its own.[37]

[36]EXPROPIACIÓN, Pleno, Semanario Judicial de la Federación, Quinta Época, Registro No. 810,380.
[37] *Amparo* en Revisión 1639/1924. Pleno de la Suprema Corte de Justicia de la Nación. Decided 3 July 1926. *Amparo* en Revisión 1972/1924. Pleno de la Suprema Corte de Justicia de la Nación. Decided 3 July 1926.

This judgment introduced a strong concept of legislative discretion in the interpretation of the public purpose requirement. In the following years the Court would veer between a concept of absolute legislative discretion and an interpretation that granted the courts in general a power to strike down legislation that was considered unconstitutional.

4.4.3 The great expropriations and the stabilization of the interpretation of the public purpose requirement 1934-1940

In 1934, Lazaro Cardenas became president, and embarked upon one of the most ambitious programs of land reform seen in Mexico (as discussed in Chapter 2). The land reform program was just one of several left-wing policies enacted during his administration and many of these measures, such as oil nationalization, relied on acts of expropriation. Perhaps unsurprisingly, the Supreme Court was extremely active during this period which accounts for the majority of its rulings on expropriation. Importantly, during this period, the interpretation of the public purpose requirement was settled, and these cases remain highly relevant in terms of how the federal judiciary reviews expropriation orders on the grounds that they do not serve a public purpose.

In 1934, the Supreme Court once again ruled that state legislatures were sovereign and had the power to define public purpose in their own laws, and that this was not reviewable by the judiciary. [38] At the same time that the Courts were creating this strong legislative discretion, they were establishing a standard of review that did not defer to the administration.

[38]EXPROPIACIÓN POR CAUSA DE UTILIDAD PÚBLICA, Segunda Sala, Semanario Judicial de la Federación, Quinta Época, Registro No. 336,055.

The interpretation of the Mexican Supreme Court can be summarized in the following statement from a case decided in 1939, in which an owner challenged an expropriation order made by the Veracruz State Government to build social housing:

> It is true that according to article 27 of the Mexican Constitution, it is a prerogative of the state legislatures, to determine what can be considered a public purpose that justifies the use of expropriation, but it is also evident that administrative authorities are in charge of verifying that a case falls within the authorization given by the legislature. In this case, the Veracruz government presented no evidence that the government needed more land to build social housing.[39]

The Supreme Court modified slightly its previous interpretation which declared that the state legislatures had a sovereign power to declare what could be considered public purpose. This new precedent declares:

> The sovereignty of the state's legislatures to define those cases in which public purpose justifies the occupation of private property is limited by the Federal Pact; Article 27 of the Constitution defines public purpose as an individual guarantee that property can only be taken when it serves a public purpose and the federal judiciary is fully empowered to decide in an *amparo* suit if federal and state laws in their respective jurisdictions, respect this guarantee.[40]

This precedent admits that, in certain cases, the federal courts can strike down legislation that authorizes expropriations for reasons that cannot be considered to serve a public purpose.

[39] *Amparo* en Revisión. 3776/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 30 October 1939.

[40]EXPROPIACIÓN, EL PODER JUDICIAL TIENE FACULTADES PARA APRECIAR LAS CAUSAS DE UTILIDAD PÚBLICA, Segunda Sala, Semanario Judicial de la Federación, Quinta Época, Registro No. 329,172.

In summary, the Supreme Court has only struck down legislation in exceptional circumstances, and it has generally deferred to the legislative branch to define exactly what can justify the use of expropriation. The standard of legislative deference was settled. Closely related to this development, the Supreme Court also modified its traditional interpretation that considered there could be no public purpose if the property title was not transferred to a public body. The landmark decision which changed this interpretation derives from a case from Yucatan. From 1880 Yucatan went through a boom in the production of henequen, which resulted in a period of unprecedented prosperity for the plantation owners.[41] Mexico enjoyed almost a monopoly on the production of henequen fibre, which was sold to American companies.[42] However, the prosperity of the plantation owners did not benefit the majority of the peasants working in the plantations, who worked in shocking conditions under a system of debt peonage which has been compared to a form of slavery.[43] When President Lázaro Cardenas came to power in 1934, the conditions of the workers had not improved and the planters had been able to resist all attempts to distribute land made by revolutionary governments up until that point.[44] President Cardenas supported strongly the partition of the henequen haciendas. This process, which started in 1934 and concluded in 1939, was heavily resisted by the planters.[45] As part of the resistance to this process of land reform one of the owners affected by an early expropriation order petitioned for judicial review on the grounds that the expropriation order did not comply with the public purpose requirement. The case eventually reached the Supreme Court, and in 1936 it ruled in favour of the government, thus

[41] Jeffery Brannon and Eric N Baklanoff, 'The Political Economy Of Agrarian Reform In Yucatán, Mexico' (1984) 12 World Development 1131, 1132.
[42] Gilbert M Joseph, 'Mexico's" Popular Revolution": Mobilization And Myth In Yucatan, 1910-1940' (1979) 6 Latin American Perspectives 46, 51.
[43] Alan Knight, 'Mexican Peonage: What Was It And Why Was It?' (1986) 18 Journal of Latin American Studies 41, 61–74.
[44] AJ Graham Knox, 'Henequen Haciendas, Maya Peones, And The Mexican Revolution Promises Of 1910: Reform And Reaction In Yucatan, 1910-1940' (1977) 17 Caribbean Studies 55, 77.
[45] José Luis Sierra Villarreal and José Antonio Paoli Bolio, 'Cárdenas Y El Reparto De Los Henequenales' [1986] Secuencia 033, 45–48.

developing a new understanding of the public purpose requirement. The previous interpretation of the Supreme Court considered that an expropriation could not serve a public purpose if the property title was not transferred to a public body. In their opinion, the Supreme Court held that the Mexican Constitution of 1917 created a new concept of property and that a more progressive interpretation of public purpose was necessary.[46] To justify the broad power of the government to use expropriation the Supreme Court created three categories of public purpose, thus going beyond the traditional understanding of the public purpose requirement.

The three categories were:[47]

i) *Public interest*, following the traditional understanding of public purpose, in which the property is transferred to a public body;

ii) *Social interest* where expropriations are justified because they benefit a disadvantaged social class, which indirectly benefits society as a whole. In this category of expropriations, property can be transferred to other private owners, who are members of the class which will benefit from the expropriation. This category could be used to justify the expropriations undertaken as part of the agrarian reform, which would benefit peasants as a social class; and

iii) *National interest* where expropriations are justified in those cases in which it is required for the defence of territorial integrity or national sovereignty.

The Supreme Court admitted that 'a clear line cannot be drawn between the three categories of public use, social interest and national interest.'[48]

[46] *Amparo* en Revision. 605/1932. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 8 December 1936.
[47] *Amparo* en Revision. 605/1932. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 8 December 1936.

This interpretation of the public purpose as a broad concept and the development of three categories which could justify the use of expropriation was confirmed by the Supreme Court in 1939. In its ruling in the case of the oil expropriation,[49] the Supreme Court declared that 'there is no substantive difference between public purpose and public interest'.[50]

This broad interpretation of the public purpose requirement, combined with its interpretation of the powers of the state and federal legislatures to define what can be considered public purpose, closed off almost any possibility to strike down legislation on the grounds that it did not comply with the public purpose requirement. Almost any category included in a statute could be considered to benefit at least a social class and was unlikely to be declared unconstitutional. Nonetheless, the Supreme Court still developed a substantial body of decisions interpreting the public purpose requirement in a way which limited the power of the executive branch to use expropriation. In the following years, the rulings of the Supreme Court gradually transformed the public purpose requirement into a 'giving reasons' requirement and this combined with a substantive standard of review gave the judiciary broad discretion to decide what evidence was necessary to justify the use of expropriation.

(i) Public Purpose and its transformation into a substantive standard of review

In 1938, the Supreme Court quashed an expropriation order from the Tlaxcala state government to build a school on the grounds that there was not enough evidence that a new building for a new school was needed. The Supreme Court held:

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[48] *Amparo* en Revision. 605/1932. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 8 December 1936.
[49] *Amparo* en Revision. 2902/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 2 December 1939.
[50] *Amparo* en Revision. 2902/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 2 December 1939. P. 34.

> It is obvious that the government can legitimately expropriate private property to create schools; but it is also obvious that it is not enough to justify the expropriation just by mentioning the section of the statute that authorizes it. It is also necessary to justify in each particular case the existence of public purpose which has been mentioned, either because the authorities don't have the buildings in which to create public schools or the buildings in which they are functioning are insufficient to contain the school population.[51]

This opinion implies that it is not enough to declare that an expropriation would serve a public purpose. In this case the Court did not question that building a school was a public purpose, but it was not convinced that a new school was required. This mirrors Shapiro's description of the transformation of the giving reasons requirement in the United States where the judges went from only examining if reasons had been given to demanding that 'agencies make right decisions clearly and consciously directed by properly articulated public values and resting on correct technical analysis.' [52] In the interpretation of the public purpose requirement this meant that the courts in Mexico would not only examine if it was authorized in a relevant statute; they would demand evidence that a school was needed, and then they would evaluate if the evidence presented by the government was sufficient. The case of Tlaxcala failed to pass this second test because no documentation that the school was needed was provided.

[51] *Amparo* en Revisión 523/1938. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 August 1938.
[52] Martin M Shapiro, *Who Guards The Guardians?: Judicial Control Of Administration* (University of Georgia Press 1988) 75.

In 1941, the Supreme Court quashed an expropriation order from the Michoacan state government to construct social housing on the grounds that it would not serve a public purpose because there was not enough evidence that the population of the town had grown and more housing was needed. The Court declared unconstitutional this expropriation order because it considered that the Michoacan state government had not produced enough evidence about population growth and the corresponding need for housing.[53] The question left unanswered by the Supreme Court was what type of evidence the authorities needed to present to justify that the expropriation would serve a public purpose. Similarly, in 1941 the Supreme Court once again quashed an expropriation order made by the Tlaxcala state government to build a road on the grounds that it would not serve a public purpose. The Supreme Court ruled that there was not enough evidence that a new road was needed, finding that: 'There is an easy way to travel between the two neighbourhoods that the road is trying to connect.'[54]

Such lack of deference towards the executive branch and its unquestioning assumption that it was better placed than the local authorities to make a decision on the local need for a new road is problematic.

In 1946, the Supreme Court once again adopted this interpretation of the public purpose requirement to quash an expropriation order from the Michoacan state government to build a school, once again because there was not enough evidence that the specific expropriated land was the only one in which a school could be built.[55]

[53] *Amparo* en Revisión 4653/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 12 March 1941.
[54] *Amparo* en Revisión 6944/1941. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 2 December 1941.
[55] *Amparo* en Revisión 545/1946. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 7 October 1946.

From these cases it is possible to reconstruct the review of the public purpose requirement developed by the Supreme Court as a three-tiered test. The first element of this test is to find if the purpose stated in an expropriation order is authorized by a statute. All of the cases I have just described comply with the first tier of the test. Building a school, constructing social housing and building roads were all authorized by their respective statutes. In 1945 the Supreme Court quashed an expropriation order made by the Federal Government to build social housing on the grounds that it did not comply with the public purpose requirement because the Federal Expropriation Law did not specifically give the power to the federal government to expropriate to build social housing.[56] The Federal Government argued that expropriations for social housing were authorized under section III of article 1 of the Federal Expropriation Law.[57] The Supreme Court did not agree because they considered that the legislative branch had to specifically include a category as public purpose in the legislation. If the category was not included the executive had no power to expropriate.

When the expropriation order complied with the first tier, the Supreme Court reviewed the second element which was whether the government had given reasons and provided evidence to support its claim. This meant that the Supreme Court examined if there were good reasons and if any evidence was provided by the government to prove that the affected land was

[56] *Amparo* en Revision. 10040/1944. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 11 July 1945.

[57] Article 1, Section III stated: 'undertake any other project destined to provide services that benefit the collective' Ley Federal de Expropiación. Article 1. Section III. Published in the Official Federation Diary November 25, 1936. Last reformed June 5, 2009.

needed. In the two cases in which Tlaxcala was involved, the Court quashed the expropriation order because it did not pass this second tier.[58]

In the third tier the Court had to decide if the evidence provided by the government to prove that a specific property was needed was convincing. The two cases in which Michoacan was involved failed this final test.[59]This third tier gave the Supreme Court, and by extension the courts in general, the power to substitute the judgment of the authorities with their own. They could evaluate the facts and reach their own decision on whether expropriation was justified. For example in the case in which the Court invalidated an expropriation to build a school in Michoacan, the Court recognized that building a school was a public purpose and that the state government had presented evidence that a new school was necessary, but it had not proven that the plaintiff's land was the only one in which the school could be built. This requirement was almost impossible to comply with because it is impossible to prove that the school could not be built in other sites.[60]

Importantly, in all of the cases I have just analysed the Court invalidated expropriations which would have served a public purpose. A road, social housing, and two schools were therefore not built because the Court invalidated expropriation orders. The benefits of these public works can be debated, but it is hard to justify that they did not serve a public purpose.

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[58] *Amparo* en Revisión 523/1938. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 August 1938.
Amparo en Revisión 6944/1941. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 2 December 1941.

[59] *Amparo* en Revisión 4653/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 12 March 1941.
Amparo en Revisión 545/1946. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 7 October 1946.

[60] *Amparo* en Revisión 545/1946. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 7 October 1946.

There are also some examples of how the Supreme Court controlled what were on any view clear abuses of power. A perfect illustration is a ruling from 1939 in which the Supreme Court quashed an expropriation order from the Queretaro state government to build a community education centre in an estate in which a government official had been killed. According to the authorities, the expropriation was justified because the murder of the left-wing government official was the result of the right-wing sympathies of the villagers living in that area.[61] The governor intended to use the expropriation order as a punishment for the murder of the government official, when the owner was not even guilty of the crime. The Supreme Court mentioned in its ruling that it was always praiseworthy to create educational centres to 'enlighten the masses':

> [B]ut it is absolutely unacceptable in our institutional regime that without having determined the responsibility of those accused of the crime, to proceed using administrative law and impose as punishment a type of confiscation. That is not only forbidden in our legal system which prohibits confiscatory punishments, it also goes against the most fundamental notions of culture to employ these primitive methods, to take reprisals with passions inflamed, as a violent mean to impose a punishment based on terror, instead of prosecuting them and let the proper authorities take charge. [62]

In this opinion, the Supreme Court held that this expropriation did not meet the public purpose requirement. It is case in which the role of the judiciary in preventing government abuses is very evident.

[61] *Amparo* en Revisión 641/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 August 1939.
[62] *Amparo* en Revisión 641/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 August 1939, p. 4.

(ii) The interpretation of the public purpose requirement and the limits of legislative discretion

The Supreme Court decided two cases in which its interpretation of the public purpose requirement limited the discretion of the legislative branch to define public purpose. In 1940 the Supreme Court held that section IV of article 2 of Coahuila´s expropriation law was unconstitutional on the grounds that it did not meet the public purpose requirement.[63] That section authorized expropriations to improve the conditions of slum dwellers, and it specifically authorized the Coahuila state government to expropriate land inside the city which was occupied by persons that were not the owners. Section IV of Article 2 of the expropriation law gave the state government the power to expropriate the occupied land, build some basic infrastructure and transfer it to those that were occupying it. The context for this case is that during this period, some slums were formed when organized groups invaded empty plots of land inside the city to build housing. The houses were poorly constructed and had no sanitation. Slums were also formed through irregular sales. The owner of the land illegally subdivided a plot of land with no infrastructure and sold it very cheaply to low-income settlers with no official paperwork. Such transfers of property were not recognized by the legal system.[64]

In the specific case reviewed by the Supreme Court, it is impossible to know if it was an invasion or an illegal sale. The Court ruled that the statute authorizing the expropriation was

[63] *Amparo* en Revisión 40/1940. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 7 May 1940.
EXPROPIACIÓN PARA URBANIZAR EN EL ESTADO DE COAHUILA, Segunda Sala, Semanario Judicial de la Federación, Quinta Época, Registro No. 329,170.

[64] Antonio Azuela and Emilio Duhau, 'Tenure Regularization, Private Property And Public Order In Mexico' in Edesio Fernandes and Ann Varley (eds), *Illegal Cities: Law and Urban Change in Developing Countries* (Zed Books Ltd 1998).

unconstitutional on the grounds that it would not serve a public purpose. The Court offered two reasons to support its ruling. First, the section authorized expropriations inside the city limits and according to the Supreme Court´s interpretation it was impossible to build new urban infrastructure inside the city. This argument points to the limitations in the expertise of the judiciary when dealing with such issues. The Court could not appreciate the conditions of the slums nor what needed to be done to address the health and amenity problems which ensued. The Supreme Court also argued that the section authorized expropriations to serve a private purpose because it gave power to the Coahuila state government to resolve a conflict between the occupiers and the owners, who were just two private parties. According to the Supreme Court, this authorization included in the legislation was unconstitutional because resolving this conflict did not serve a public purpose.

In 1946, the Supreme Court struck down a statute that authorized the state of Nuevo Leon to use expropriation to build an airport and quashed an expropriation order published under the powers granted by that statute.[65] The Court held that legislation that declared that the construction of airports could be a public purpose was unconstitutional on the grounds that the Nuevo Leon state legislature went beyond their power in declaring this since such declarations were reserved for federal jurisdiction. This can therefore be understood as a jurisdiction case. But, in its ruling, the Supreme Court framed it as a limit to the power of state legislatures to decide what can be considered a public purpose.[66]

[65] *Amparo* en Revisión 3350/1946. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 October 1946.
[66] EXPROPIACIÓN EN NUEVO LEÓN, INCONSTITUCIONALIDAD DE LA LEY DE SEIS DE DICIEMBRE DE MIL NOVECIENTOS TREINTA Y OCHO, Segunda Sala, Semanario Judicial de la Federación, Quinta¨Época, Registro No. 321,467.
Amparo en Revisión 3350/1946. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 October 1946.

4.4.4 The consolidation of the public purpose requirement as a legality test

The public purpose requirement was transformed into a 'giving reasons' requirement and precedents after 1951 precedent only demanded that the government include adequate proof that an expropriation would serve a public purpose along with the expropriation order.[67] A judicial reform in 1958 sent a clear message about the risks associated with rulings in which legislation was struck down.[68] The reform was avowedly passed because political actors in the legislative and the executive branch considered that the Administrative Chamber of the Supreme Court, having jurisdiction over expropriation cases, was too active.[69] This reform was successful in almost eliminating rulings in which the Supreme Court struck down legislation, not only because of the political blow, but also, in a more subtle way, because of the delays which accompanied this modification. [70] In 1959, the Supreme Court was faced with 2000 cases in which parties were seeking to strike down legislation. The Plenary Court was able only to rule on 18 of these cases.[71]

Not surprisingly, the Supreme Court responded strategically and, from 1959 onwards, it avoided striking down legislation. It did, however, find an incredibly effective instrument to limit the power of the executive branch to use expropriation in the transformation of the public purpose requirement into a 'giving reasons' requirement. The great benefits of this instrument were that it was discreet, and that because it was not an exclusive jurisdiction of the Supreme Court, it could be adopted widely by all levels of the federal judiciary.

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[67] *Amparo* en Revisión 2707/1956. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 8 March 1957.
[68] Richard D Baker, *Judicial Review In Mexico: A Study Of The Amparo Suit* (Latin American monographs / University of Texas at Austin. Institute of Latin American Studies, Published for the Institute of Latin American studies by the University of Texas P 1971) 72.
[69] ibid.
[70] Carl Schwarz, 'Judges Under The Shadow: Judicial Independence In The United States And Mexico' (1973) 3 Cal W Int'l LJ 260, 313.
[71] Baker (n 69) 72–73.

From 1960, the Supreme Court decided only 16 cases out of 201 on public purpose grounds. In those cases, the Supreme Court confirmed that the legislative branch had broad discretion. The precedent which best summarizes the Court's interpretation of the public purpose requirement adopted by the federal judiciary is the following:

> Authorities need to present enough evidence to justify that an expropriation order will serve a public purpose. It is essential that the evidence is based on objective and certain facts, and not subjective and arbitrary opinions. Otherwise the use of such an extraordinary procedure to acquire property is not justified. One of the essential requirements for an expropriation is that the public purpose is proven, and it is not enough that the authority claims that there is a public purpose; it is essential that evidence that justifies the claim is presented. [72]

This interpretation of the public purpose requirement enabled the federal judiciary to exercise substantive review of expropriation orders without having to consider the constitutionality of legislation. Substantive review can be described as 'a polite way of saying that, to some degree, judges substitute their own policy guesses for the policy guesses of others.'[73] The three-tiered test was ideal because it could be masked as a purely procedural review. For example, the federal judiciary could accept that legislation authorized an expropriation for economic development. They could accept that authorities had provided evidence to justify that expropriation was necessary and that it would serve a public purpose. But, still courts could declare that insufficient evidence had been provided. This type of review did not

[72] EXPROPIACIÓN. PRUEBA DE LA CAUSA DE UTILIDAD PÚBLICA, Segunda Sala, Semanario Judicial de la Federación, Sexta Época, Registro No. 268,912.
[73] Shapiro, 'The Giving Reasons Requirement' (n 4) 187.

question the constitutionality of statutes and therefore it fell within the jurisdiction of collegiate circuit courts.[74]

The executive branch enjoyed no deference when it considered which individual cases fell into the categories of public purpose written in the statutes. The ultimate authority to decide this was the judiciary and, more specifically, collegiate circuit courts. The Supreme Court only reviewed cases in which statutes were challenged or when federal authorities were involved. The strong judicial discretion implicit in the Court's jurisprudence was exercised by collegiate circuit courts.

A systematic review of expropriation rulings in collegiate circuit courts is beyond the limits of this thesis. There is, however, enough evidence to accept the relevance of the Supreme Court's interpretation of the public purpose requirement. In interviews with court officials and justices with long careers in the federal judiciary they described standards of review that conform to the interpretation of the public purpose requirement described in this Chapter.[75] There were also some relevant cases, such as the earthquake expropriations in Mexico City (discussed in Chapter 2), in which collegiate circuit courts applied this interpretation of the public purpose requirement and quashed all the challenged expropriation orders. In spite of the great social and political impact generated by those decisions, the federal judiciary did not modify its interpretation of the public purpose requirement.

[74]Collegiate circuit courts had jurisdiction in all appeals in in which the constitutionality of statutes was not challenged or in which the federal authorities were not involved. See 3.4.1 Organization of federal judiciary. For more see: Fix-Zamudio and Cossío Díaz (n 21) 157.

[75] Dolores Rueda Aguilar, 'Entrevista con la Licenciada Dolores Rueda Aguilar' (In person, 15 July 2010); Raúl Mejía, 'Entrevista con el Licenciado Raul Mejía' (In person, 15 July 2010); Roberto Lara Chagoyán, 'Entrevista con el Doctor Roberto Lara Chagoyán' (In person, 15 July 2010); Carlos Herrera Martin, Interview with Juan Díaz Romero, 'Entrevista Con El Ministro Juan Diaz Romero' (In person, 12 March 2013).

Since the 1994 judicial reform, the Supreme Court has had the power to grant certiorari to review cases in which the constitutionality of statutes was not challenged if it considered that the case had a special relevance. In each, the Supreme Court adopted the interpretation of the public purpose requirement which has been described in this Chapter. In the three cases in which the Court reviewed the facts which, according to the government, justified the use of expropriation, the Court concluded that they were not persuasive enough; it quashed the expropriation orders in all of them.[76]

Shapiro has explored the role of administrative review as an instrument of protection against government abuses in developing democracies.[77] His account of administrative review in authoritarian regimes is very similar to Ginsburg's. In this model authoritarian regimes use administrative law to control government agents.[78] Ginsburg argues that the administrative law will be used to discipline government agents when the benefits are higher than the costs in light of other alternatives.[79] Shapiro goes further and he identifies the potential of administrative review and a narrow conception of the rule of law as an instrument to protect individuals from government abuses. He states that:

> [Co]urts which step forward to enforce the accountability of officials not to constitutional rules but simply to law may protect individuals under the guise of serving dominant government authority…(S)uch courts protect the individuals without provoking confrontations with the politically more powerful. And to the

[76] *Amparo* en Revisión 455/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 17 November 2005.

Amparo en Revisión 1134/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 17 January 2006.

Amparo en Revisión 1135/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 16 January 2006.

[77] Martin Shapiro, 'Judicial Review In Developed Democracies' (2003) 10 Democratization 7, 21.

[78] Tom Ginsburg, 'Administrative Law And The Judicial Control Of Agents In Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press Cambridge 2008).

[79] ibid 65.

extent they do thwart government initiatives, they leave government the option of enacting new laws rather than destroying courts.[80]

He also states that statutory administrative law review can be the basis of the future development of a strong constitutional review.[81] The strategy followed by the Mexican Supreme Court in judicial review of expropriation cases explored in this chapter was similar to the one described by Shapiro. Shapiro is very optimistic about the benefits of stronger judicial review in developing democracies, but the overall balance of costs and benefits of this approach are debatable. However it is unquestionable that the process by which the Mexican Court developed an interpretation of the public purpose requirement without openly confronting the government fits very well with Shapiro's model.

4.5 Conclusions

As the role of interpreting this requirement was transferred to the collegiate circuit courts, one of the major problems for those authorities which needed to carry an act of e expropriation was the lack of legal certainty. State and federal governments were forced to face courts that applied very different standards of evidence required to justify an expropriation.

In an interview, the former legal counsel for the Mexico City government, discussed an expropriation in Iztapalapa in which the public purpose was the construction of a community a park and a community centre in which 56 owners challenged the expropriation.[82] The

[80] Shapiro, 'Judicial review in developed democracies' (n 78) 23.

[81] ibid 24.

[82] Carlos Herrera Martin, Interview with Leticia Bonifaz, 'Entrevista con la Doctora Leticia Bonifaz' (In person, 6 March 2013).

Mexico City government won 52 of them, but in four cases the collegiate circuit court adopted different criteria and decided that the government had not presented enough evidence to justify the expropriation even if the same expropriation order had been considered valid in the other 52 cases. As a result the project was significantly delayed; eventually the Mexico City government had to settle out of court, offering the owners more money than what had been paid as compensation to other owners. Cases such as this illustrate that the judiciary has an almost absolute discretion to decide what is required to prove that an expropriation will serve a public purpose or when an expropriation will serve a public purpose.

The transformation of the public purpose requirement into a substantive standard of review was an effective tool to limit the power of the government to use expropriation and it conferred upon the courts a strong power to decide in which cases an expropriation could be considered justified. The evolution of this interpretation has many similarities with Shapiro's account of how the giving reasons requirement was transformed into a strong standard of review. The Supreme Court at first only required that the expropriation was authorized by relevant legislation; then it expanded the requirement in order to require the government to include all the evidence that justified the use of expropriation; the last step was to adopt the power to evaluate the evidence considered by the government and substitute the decision made by the authority with its own.

This judicial interpretation of the public purpose requirement was developed in an authoritarian context and it protected rights without openly confronting the government as described by Shapiro's model of administrative review in developing democracies.[83] The Supreme Court acted strategically and it avoided conceptual discussion on public purpose

[83] Shapiro, 'Judicial review in developed democracies' (n 78) 21–25.

which could generate controversy, giving the legislative branch broad discretion on what could be considered a public purpose. When I describe the behaviour of the Court as strategic, I am making the simple assumption that the Court wants to expand its power and its independence and that it is aware of the wider effects of its decisions and that it is willing to modify them if it served their primary goal. Discussions over what evidence was necessary to justify an expropriation and over how it should be evaluated were much more technical than a discussion about what could be considered a public purpose. The Court also realized that in an authoritarian context less transparency increased its chances of protecting its autonomy and its power and reduced the chances of being subject to political pressure. The Court used legal formalism as an instrument to protect fundamental rights and a limited version of the rule of law. The Supreme Court's use of the public purpose requirement to invalidate expropriation orders and protect property also highlights an unacknowledged tension in Mexico between a sometimes progressive, but authoritarian, executive branch and an often conservative judiciary that upholds of the rule of law.

With Mexico having turned into a fully democratic regime, the other problematic consequence of the judiciary's interpretation of the public purpose requirement is that there are serious questions about the legitimacy of the judiciary to decide what is a public purpose, and what is required to justify the use of expropriation. In the following Chapter, I analyse the major social and political impacts which flow from judicial decisions about what can be considered as a public purpose, even if such decisions are hidden as a simple 'giving reasons' requirement.

Chapter 5.

Public Purpose up Close: Two Case Studies

5.1 Introduction

In this Chapter I examine the Supreme Court's application in its recent case law of the public purpose doctrine which has been discussed in Chapter 4. I analyse the two most important cases to reach the Mexican Supreme Court in the last decade, both concerning challenges to public purpose. In the first part of the Chapter, I analyse the *Pascual* Cooperative Case and in the second I examine the *Colima* Case. Both provide perfect examples of the approach followed by the judiciary in cases in which public purpose was challenged, namely strong deference towards the legislature, accompanied by searching review of administrative bodies. The refusal of the Court to discuss the constitutionality of laws or to strike down legislation and their heightened scrutiny of administrative action and specifically of expropriation orders is marked in both rulings.

The Court adopted a case-by-case style of decisions making which was extremely useful to preserve the independence of the federal judiciary. However I use the theoretical framework developed by Komesar to highlight the limitations of the approach developed by the Court. Among the limitations of the interpretation of the Court were that it engaged in public policy discussion for which it was poorly prepared and it did not contribute much to the development of legal doctrine or legal certainty. Finally I analyse the symbolic impact of the *Pascual* ruling on the public image of the Court by looking at the reaction in the media

5.2 Comparative Institutional Analysis

In this section I apply and develop Komesar's comparative institutional analytical framework in order to more fully examine the standard of review developed by the Supreme Court in Mexico. There are several forms of comparative institutional analysis and many of them do not follow the Komesarian blueprint, but they remain relevant. In the legal sphere, for example, Vermeule and Sunstein[1] are concerned with the importance of institutional analysis in judicial interpretation, although their analysis is not comparative in nature.

Comparative institutional analysis has traditionally been linked with New Institutional Economics developed by North.[2] There are, however, fundamental differences with Komesar's approach. For North, and economists[3] who use new institutional economics approaches, institutions are defined as 'the humanly devised constraints that shape human interaction.'[4] In contrast, for Komesar, institutions are the sites of decision-making processes, such as courts, politics and the market. Comparative institutional has also been applied to economic sociology[5] and in comparative politics,[6] as described by Shaffer,[7] but each of these approaches differ from that espoused by Komesar, whose work I take as the basis of case analysis in this Chapter.

[1] Cass R Sunstein and Adrian Vermeule, 'Interpretation And Institutions' (2003) 101 Michigan Law Review 885.
[2] Douglass C North, *Institutions, Institutional Change And Economic Performance* (Cambridge University Press 1990).
[3] Avner Greif, 'Historical And Comparative Institutional Analysis' (1998) 88 The American Economic Review 80; Masahiko Aoki, *Toward A Comparative Institutional Analysis* (MIT Press 2001).
[4] North (n 2) 3.
[5] John L Campbell, *Institutional Change And Globalization* (Princeton University Press 2004).
[6] Kathleen Thelen, 'Historical Institutionalism In Comparative Politics' (1999) 2 Annual Review of Political Science 369; Glenn Morgan and others, *The Oxford Handbook Of Comparative Institutional Analysis* (Oxford University Press 2010).
[7] Gregory Shaffer, 'Comparative Institutional Analysis And New Legal Realism' (2013) 2013 Wisconsin Law Review 607, 611.

5.2.1 Komesar and the lessons of messy compromise

Komesar's comparative institutional analysis can be understood as a framework to better explore the weaknesses and strengths of different decision-making processes. According to Komesar, an institution is broadly understood as a decision-making process and, for the purpose of his analysis, he identifies three main institutions – the court, politics and the market.[8] Komesar emphasizes that his framework does not provide a substantive discussion on law and policy. Instead the framework tackles questions about how to allocate authority between different institutions and who should decide different issues at stake. He writes that 'constitutional law analysis is largely a debate about social goals and values such as resource allocation efficiency, Rawlsian justice, or Lockean protection of property.'[9] Comparative Institutional Analysis is a framework that is compatible with descriptive and normative analysis in which different goals are pursued. It tries to tackle the question of how to allocate authority between different institutions or about who should decide.

Komesar's approach is powerful because of its clarity and its applicability to the analysis of law and public policy. The central premises of this approach are summarized by Komesar.[10] It is a common assumption that certain institutions are better suited to achieve certain goals. For example, that the market is better suited to achieve resource allocation efficiency and the government is better at achieving equality, but Komesar's framework challenges these assumptions and argues that deciding the institution better suited to achieve a specific goal is an open question which should be investigated. Institutional analysis cannot simply identify a market failure, problems with a government regulation or point to the structural limitations of the courts. It is necessary in each case to compare the merits and weakness of each institution.

[8] Neil K Komesar, *Imperfect Alternatives: Choosing Institutions In Law, Economics, And Public Policy* (University of Chicago Press 1997) 9.
[9] ibid 4.
[10] ibid 271–73.

Komesar emphasizes that there are no perfect alternatives and therefore identifying problems with institutions is not enough to discard them. The most probable outcome is that when comparing institutions there will be no best outcome, just one least bad. To properly analyse the different institutions Komesar proposes a participation-centred approach which analyses institutions and its decisions in terms of three simple factors: distribution of stakes, cost of participation and cost of organization. The identification and combination of these three basic elements provides the basis for evaluating the performance of different institutions in different contexts. In the case of the political process Komesar uses concepts of interest group theory of politics and develops his own 'two force model of politics'. The traditional interest group theory identifies minoritarian bias as the major malfunction of the political system. Komesar extends this model to recognize the possibility of a majoritarian effect and even the possibility of a majoritarian bias. There is a clear question of when a majoritarian or minoritarian influence can be described as bias and Komesar uses research on allocation efficiency to identify bias.[11] A minoritarian bias occurs when a group has higher stakes than the majority. The minority will receive a large benefit and the cost for the majority is not perceived as significant because it is too low on a per capita basis. However when information and organization costs are low a majority can impose costs on a minority that exceed the benefits that the majority receive.

Komesar framework devotes considerable attention to the courts. He focuses mainly on court-based law as has been identified by some of its critics.[12] The judiciary has very high participation costs as a consequence of the effort made to achieve and maintain judicial independence. The high participation and information costs combined with unevenly distributed stakes produce litigation dynamic in which important issues which are highly

[11] ibid 76–77.
[12] Thomas W Merrill, 'Institutional Choice And Political Faith' (1997) 22 Law & Social Inquiry 959, 993–94.

dispersed and therefore have low stakes per capita are not adjudicated. Going to court is costly because it involves time, there is a need to hire a lawyer, evidence needs to be collected in a format that can be presented in a court of law; and only those that expect a significant benefit or significant cost will be willing to take the risk of losing and pay all the costs. Adjudication is more likely when an issue involves high stakes per capita for a concentrated minority. Therefore adjudication is not very well suited to remedy minoritarian bias malfunctions such as air pollution in which a small concentrated minority gets more benefits per capita by continuing polluting that the benefits gained by each individual if pollution stopped. Therefore no one in the majority is willing to risk paying all the costs of going to court and the members of the minority will be prepared to go to courts if an attempt is made to stop them polluting because their stakes are sufficiently high and they are willing to take the risk. As a result, if left to adjudication, pollution will continue even if society would receive more benefit more from stopping it.

The other elements necessary to understand the strengths and limitations of the judiciary are scale and competence.[13] Competence is important because access to courts requires expertise and acquiring expertise is costly which increases the costs of participation. On the other hand acquiring expertise is a slow process that cannot be accelerated and therefore courts are not easily scalable. Training lawyers takes time and if there is a sudden increase in the demand for courts there is no easy way to increase the supply. Another limitation to the expansion of courts is the pyramidal structure of the judiciary which creates a bottleneck at the top which

[13] Komesar, *Imperfect Alternatives* (n 8) 138–49.

is difficult to overcome.[14] Even if a form of fast-tracking the creation of new first instance judges is found there can only be one superior court.

Komesar uses this comparative institutional analysis to develop a framework to understand specifically the adjudicative process.[15] He understands law to be the product of an adjudicative process which depends on systemic forces which can be organized in a framework of supply and demand of rights.[16] The supply in his model is a function of the capacity of the judiciary which includes the costs of information and access, as well as the limitations of scale and expertise.[17] The demand for judicial review is a function of the failure, or the perceived failure, of other institutions to achieve satisfactory results.[18] The problem with judicial review is that its demand increases when other institutions start to malfunction which is normally when numbers and complexity increases, but at the same time increasing numbers and complexity strain the capacity of the adjudication process.[19] According to Komesar we face a scenario of increasing demand and decreasing supply of judicial review. In this scenario, court decisions become a scarce resource which has to be allocated carefully and comparative institutional analysis is an extremely useful tool to decide this allocation.

5.3 *Pascual* Cooperative

The current home of the Supreme Court was built between 1936 and 1941 at the beginning of the process of consolidating the post-revolutionary political regime in Mexico. One of the most striking elements of the Supreme Court building in Mexico is its murals. The walls of

[14] Neil K Komesar, *Law's Limits: Rule Of Law And The Supply And Demand Of Rights* (Cambridge University Press 2001) 40.
[15] Komesar, *Law's Limits* (n 14).
[16] ibid 3.
[17] ibid 4.
[18] ibid.
[19] ibid 159–60.

the Supreme Court are adorned with the work of José Clemente Orozco, one of the so called '*tres gandes'*[20] of the Mexican Muralism movement. These murals are striking because it is unusual to have such a negative representation of law and justice in what could be considered the most important physical location of the legal system.

Two of the murals are entitled Justice. These compositions are double-sided. On one side a man is attacking a group of criminals with an axe. On the other lightning strikes a group of criminals who are attacking a bounded man on the floor. This is a passionate, angry image of justice far removed from the traditional image of a blind woman holding a scale and a sword.[21]

The mural on the opposite wall is also double sided. On one side a man holding a torch attacks a group of false revolutionaries who are trying to bury a man under a pile of legal files and records. On the other lightning is once again striking a masked justice and what could be seen as a masked group of lawyers. In the background another traditional image of justice is sleeping on a chair, paying no attention to what is happening.

These images are a good representation of a strong left-wing critique of the courts. This critique is a combination of high distrust and high expectations for what the courts should achieve. These images are also helpful in understanding the reaction to the Supreme Court's decision in the *Pascual* Cooperative case and its social and political impact, in particular the way in which the ruling reinforced the traditional distrust of legal institutions among the political left in Mexico. In the next section I explain in detail the *Pascual* Cooperative case, its legal and symbolic importance and its impact on the media.

[20] Mary Katherine Coffey, 'Muralism And The People: Culture, Popular Citizenship, And Government In Post-Revolutionary Mexico' (2002) 5 The Communication Review 7, 16.

[21] These murals can be seen online here: http://www2.scjn.gob.mx/tour/

5.3.1 The myth and origins of *Pascual*

The *Pascual* cooperative is a small sized Mexican soft drink company that carries great symbolic importance for the political left in Mexico. Until 1982 it was an unremarkable, privately owned, company. In 1982 the workers of *Pascual* demanded the recognition of a new union and a pay rise and when their demands were not met the workers went on strike.[22] The company's owner, Victor Jimenez Zamudio, refused to negotiate and on May 31 of that same year there was an attempt by the owner to take back the plant by force using armed thugs.[23] According to some accounts of these events, the owner came with a group of peasants who worked for him at the fruit plantations he owned and they were armed with cubs and some even had guns.[24] They also brought the trucks used to deliver soft drinks and ran over some of the workers guarding the entrance to the plant. Two strikers were killed and seventeen injured. This triggered the start of a long conflict between the owner and the workers.

The workers received advice from the left-wing Mexican Workers Party and especially from Demetrio Vallejo, a very well-known figure in the Mexican labour movement in Mexico.[25] Vallejo had led the railway workers union between 1958 and 1959 and was one of the few independent figures in the labour movement in Mexico. He was jailed for eleven years

[22] Raúl Trejo Delarbre, *Crónica del Sindicalismo en México, 1976-1988* (Siglo XXI 1990) 281.
[23] Araceli Nava Navarro, 'De La Acción Colectiva Al Movimiento Social. El Caso De La Cooperativa Pascual' (1997) 59 Revista Mexicana de Sociología 301, 307.
[24] Takhashi Thiroshi, 'Pascual Boing, Un Éxito Luego De Tragos Amargos', *El Universal* (Mexico D.F., 7 July 2003) <http://www2.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=34482&tabla=finanzas> accessed 2 April 2011.
[25] Elena Poniatowska, 'Cooperativa Pascual: 25 Años', *La Jornada* (Mexico D.F., 15 June 2010) <http://www.jornada.unam.mx/2006/02/25/index.php?section=opinion&article=023a1pol> accessed 20 May 2011.

between 1959 and 1970 and in 1988 he became one of the founders of the Democratic Revolution Party (PRD) which today is the main left-wing political party in Mexico.[26]

The conflict dragged on for the next two years with no clear solution. The workers achieved a series of legal decisions in their favour, but the owner of the company refused to comply with the rulings. As a result, in August 1984, the company's assets were seized and given as payment to the workers.[27] Once they were given the company name and assets the workers had to decide what to do with them. They had three options: they could ask the government to take control of the company; they could sell the assets and keep the money or they could keep the company running as a worker's cooperative.[28]

On 18 August 1984 a worker's assembly voted in favour of the third option and thus the *Pascual* Cooperative was born.[29] The new cooperative was supposed to get a credit line and technical support from the federal government, but the government did not keep its promise. This put the cooperative in a desperate situation as they lacked sufficient funds to restart production. They received an emergency loan from the National University Union, one of the few independent unions in Mexico at the time, which represented workers from the National Autonomous University.[30] Apart from the loan, a group of left-wing artists, including Rufino

[26] Oscar Alzaga, 'Demetrio Vallejo En Su Centenario', *La Jornada* (México D.F., 12 December 2010) <http://www.jornada.unam.mx/2010/12/12/sem-oscar.html> accessed 23 May 2011; Agustín Escobar Ledesma, '50 Aniversario Del Movimiento Ferrocarrilero', *La Jornada* (México D.F., 26 July 2009) <http://www.jornada.unam.mx/2009/07/26/sem-agustin.html> accessed 23 May 2011; Ricardo Guzmán Wolffer, 'Demetrio Vallejo, Ética Y Sindicalismo', *La Jornada* (México D.F., 12 December 2010) <http://www.jornada.unam.mx/2010/12/12/sem-wolffer.html> accessed 23 May 2011; Luis Hernández Navarro, 'Demetrio Vallejo, El Indoblegable', *La Jornada* (México D.F., 22 December 2009) <http://www.jornada.unam.mx/2009/12/22/index.php?section=opinion&article=013a2pol> accessed 23 May 2011; Elena Poniatowska, 'Demetrio Vallejo, A Los 20 Años De Su Muerte', *La Jornada* (México D.F., 12 December 2005) <http://www.jornada.unam.mx/2005/12/12/a03a1cul.php> accessed 23 May 2011.
[27] Navarro (n 22) 311.
[28] ibid 312.
[29] ibid.
[30] Poniatowska, 'Cooperativa Pascual: 25 años' (n 24); Jesus Ramirez Cuevas, 'La Coca Y La Pepsi No Pudireon Desaparecerlos. Historia De Una Cooperativa Ese Modelo Mal Visto Que Sí La Hizo.', *La Jornada*

Tamayo, David Alfaro Siqueiros and Francisco Toledo among others, donated some of their pieces to the cooperative so they could be auctioned to get funds.[31] The cooperative eventually decided not to sell the artwork and instead began to build a popular art collection in which the donated art is still exhibited.[32]

After almost three years of struggle, the cooperative started to operate with 170 members on 27 November 1985. *Pascual* Cooperative has since provided one of the few examples of a successful cooperative in Mexico, and has great symbolic importance for the political left in Mexico.[33] There are three elements that constitute its epic narrative. The first element constantly mentioned is its endurance against insurmountable odds. According to this narrative the workers demonstrated that an independent worker's organization, still a rare entity in Mexico at that time, could be as successful as a private company. It tells the story of workers overcoming adversities to create a successful company; a feature that is repeated in almost every newspaper article in which they are mentioned to the extent that there is a common belief that the struggle of their creation somehow grants them a special status.[34]

Second and more broadly, the cooperative, a successful Mexican company in a market dominated by transnational companies, was portrayed as a beacon of hope and a symbol of successful economic nationalism which was extremely important for the political thought of the Mexican Left. Although left-wing governments have risen to power in several countries

(México D.F., 27 July 2003) <http://www.jornada.unam.mx/2003/07/27/mas-ramirez.html> accessed 23 May 2011.

[31] Poniatowska, 'Cooperativa Pascual: 25 años' (n 24).

[32] ibid.

[33] Navarro (n 22) 314.

[34] Ramirez Cuevas (n 29); Thiroshi (n 23); Bernardo Bátiz, 'La Corte Y La Cooperativa Pascual', *La Jornada* (México D. F., 25 October 2005) <http://www.jornada.unam.mx/2005/10/25/023a1pol.php> accessed 25 May 2011; Rosa Albina Garavito Elías, 'En Defensa De La Pascual', *El Universal*, Opinión (México D. F., 26 November 2005); Miguel Ángel Granados Chapa, 'Plaza Pública/¡Boing!', *Reforma*, Opinión (México D.F., 25 October 2005); Poniatowska, 'Cooperativa Pascual: 25 años' (n 24); Martín Hernández, 'Pascual, Ejemplo A Seguir Entre Cooperativas Del País', *El Universal* (Mexico D.F., 11 October 2010) <http://www.eluniversal.com.mx/finanzas/82437.html> accessed 20 May 2011.

in the last decade, it has struggled to find an alternative to the capitalist economic order which it criticizes.[35] Lomnitz argues that 'the foundational discourse of the Latin American Left builds on the remnants of an older nationalist discourse that is not the special possession of the Left.'[36] This nationalist discourse argued that the real nation was marginalized by elites who imposed a foreign neoliberal economic model and the role of the New Left was to protect the real nation from these foreign impositions and recover its true character.[37] This defensive idea of nationalism which looks to the past for its justification was not dominant in Mexico until the economic crisis of 1982.[38] After the crisis this defensive nationalism coexisted with 'one which sees reaching full modernization and the rule of the international standard as the ultimate patriotic act'.[39]

The story of *Pascual* Cooperative fits into both ideals of nationalism. By constantly mentioning its use of Mexican fruit and sugar and thus its intrinsically superior products, the cooperative illustrates an idea of defensive nationalism because its products conjure up an era before Mexico opened up its borders and was 'invaded' by foreign companies. This is combined with a shade of competitive nationalism because it is a source of great national pride that the cooperative has been successful in a market dominated by multinational companies – in sum, 'Coca-Cola and Pepsi could not make them disappear.'[40]

The final element is that the *Pascual* Cooperative was depicted as a successful alternative to traditional forms of capitalist economic organization. A cooperative was identified as a form of organization that cares about its workers because they are co-owners and do not only seek

[35] Claudio Lomnitz, 'Foundations Of The Latin American Left' (2007) 19 Public Culture 23, 24.
[36] ibid 24.
[37] ibid 25.
[38] 'Fissures In Contemporary Mexican Nationalism' (1996) 9 Public Culture 55, 56.
[39] ibid 66.
[40] Ramirez Cuevas (n 29).

profit. In summary, the cooperative has carefully cultivated its image as an emblem of the Left in Mexico; it has supported independent unions, social movements and has close ties with the *Partido de la Revolución Democrática* (PRD), the main left-wing political party in Mexico.[41]

5.3.2 The Factory and its location

The Pascual plant was located in the borough of Cuauhtémoc which has very good transport links and was at the time mainly populated by middle and lower middle class families. Before the assets of the company were seized, the owner had transferred the property of the land where the plant stood to his wife. After the assets of the company were transferred and the Cooperative was formed a new legal struggle over the plot of land started.[42] The Cooperative had leasehold over the land, but the relationship with the owner was not good and she started proceedings to evict them.[43] According to the urban development program of the borough, the area's zoning regulation allowed mixed uses, which included housing, commercial and light industrial use.[44]

This area, together with the rest of Mexico City, lost most of its industrial base to the northern states close to the border with the United States.[45] In 1980, Mexico City contributed 46.2% to the national industrial GDP, but in 2003 its contribution had dropped to just

[41] La Jornada, 'Apoyan más de 100 agrupaciones lucha de la Cooperativa Pascual', *La Jornada* (Mexico D.F., 10 November 2005) <http://www.jornada.unam.mx/2005/11/10/index.php?section=politica&article=020n2pol> accessed 20 May 2011; Julian Sánchez, 'Organizaciones Sociales Cierran Filas Con La Pascual', *El Universal* (México D.F., 14 November 2005) <http://www.eluniversal.com.mx/nacion/132049.html> accessed 23 May 2011.

[42] Miguel Ángel Granados Chapa, 'Plaza Pública/ El Golpe A Pascual', *Reforma* (México D. F., 18 November 2005) <http://busquedas.gruporeforma.com/reforma/Documentos/DocumentoImpresa.aspx> accessed 25 May 2011.

[43] Granados Chapa, 'Plaza Pública/¡Boing!' (n 33).

[44] *Decreto que contiene el Programa Delegacional de Desarrollo Urbano para la Delegación Cuauhtémoc* Published in the Mexico City Official Gazette 10 April 1997, p. 15.

[45] Jaime Sobrino, 'Desempeño Industrial En Las Principales Ciudades De México, 1980-2003' (2007) 22 Estudios Demográficos y Urbanos 243, 263.

21.5%.[46] This loss of its industrial base led to the underuse of parts of the city where the industry had been located. The area not only suffered the loss of its industrial base but also population, with the borough of Cuauhtémoc, where the centre of Mexico City is located, losing 27% of its population between 1980 and 1990, a trend that was accentuated after the 1985 earthquake which affected mainly the central part of Mexico City.[47] Between 1990 and 2000 the rate of decrease slowed down, but the borough still lost 13% of its population.[48] As a result, repopulation of the city centre and more efficient use of the available infrastructure has become one of the most important urban policies for the Mexico City Government since 2000.[49] This has been followed by measures to bring back some light industry to Mexico City to promote and create employment.

Returning to *Pascual*, the proceedings to evict the cooperative from the plant which was located in this area dragged on for the next seventeen years, but by 2003 the plant's owner, obtained a judicial ruling which evicted the Cooperative from the plant.[50] This created a desperate situation for the Cooperative because it needed more time to move production to a new plant which it was already building, and, if evicted from their plant, it could go bankrupt. The Cooperative, however, had a powerful ally in the Mexico City government which was governed by PRD. The Mexico City mayor at this point was Andres Manuel Lopez Obrador, who was leading the polls for the coming presidential election of 2006. His tenure as a mayor was characterized by constant conflict between the mayor's office and the federal judiciary.

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[46] ibid.

[47] *Decreto que contiene el Programa Delegacional de Desarrollo Urbano para la Delegación Cuauhtémoc* Published in the Mexico City Official Gazette 29 September 2008, p. 39.

[48] Alfonso Iracheta Cenecorta, Políticas Públicas Para Gobernar Las Metrópolis Mexicanas (Miguel Angel Porrua 2009) 202.

[49] Daniel Delaunay and Catherine Paquette, 'Movilidad Residencial Y Política De Redensificación: El Área Central De La Ciudad De México' (2009) 105 Revista Latinoamericana de Estudios Urbanos Regionales 95, 1.

[50] Suprema Corte de Justicia de la Nación, 'Versión Taquigráfica De La Sesión Pública Ordinaria Del Pleno De La Suprema Corte De Justicia De La Nación, Celebrada El Jueves 20 De Octubre De Dos Mil Cinco' (20 October 2005) 63 <https://www.scjn.gob.mx/PLENO/ver_taquigraficas/PL051020.pdf> accessed 18 May 2014

5.3.3 The Expropriation Order

According to Vicente Lopantzi, who at the time was in charge of arguing cases for the Mexico City government in the Supreme Court, the Cooperative asked the Mexico City government for help. The Legal Services Department of the Mexico City Government was asked by the Mayor to come up with a solution and their recommendation was to expropriate.[51] The Legal Services department acknowledged that it was a risky strategy because the owner would probably challenge the expropriation decree and the outcome in the courts would be uncertain. The Mexico City government recognized that this would be a controversial expropriation decree and as a result the expropriation decree was prepared with strong supporting documentation and with as much evidence as possible of the economic importance of the cooperative.

The expropriation decree was finally published on 18 February 2003 in the Mexico City Official Gazette but at the time of its publication little attention was paid to this expropriation. The only newspaper that registered it was *La Jornada,* which is the most important left-wing daily in Mexico.[52] The coverage of the expropriation in this newspaper was very favourable, as might be expected.

The legal basis for the expropriation decree was section IX of article 1 of the Federal Expropriation Law.[53] This statute governs expropriations undertaken by the Mexico City government, and that section authorizes expropriations for: '[T]he creation, promotion or

[51] Carlos Herrera Martin, Interview with Vicente Lopantzi, 'Entrevista con el Licenciado Vicente Lopantzi' (In person, 4 September 2010).
[52] Bertha Teresa Ramirez, 'Expropia el GDF nueve predios en favour de Cooperativa Pascual', *La Jornada* (Mexico D.F., 19 February 2003) <http://www.jornada.unam.mx/2003/02/19/041n1cap.php?origen=capital.html> accessed 20 May 2011.
[53] *Ley Federal de Expropiación*. Published in the Official Federation Diary 25 November 1936. Last reformed 5 June 2009.

conservation of a company for the benefit of the collective.'[54] This section gives the government broad discretion to undertake expropriations in favour of a company in those cases that benefit the collective. The government justified the expropriation with two main arguments.[55] First, that it has a special duty to promote and conserve workers' cooperatives. They cited the International Labour Organization recommendation on cooperatives (1966) which states that governments should promote the creation and conservation of cooperatives because they advance social, cultural and economic development in developing countries.[56] The government also stated that according to the General Statute of Cooperatives,[57] federal, state and municipal governments have a responsibility to promote cooperatives in their respective jurisdictions. Finally, they referred to article 1, section IX of the Federal Expropriation Law which grants the Mexico City government the power to expropriate to create, conserve or promote companies that benefit the collective. [58]

The government's second line of argument was that the expropriation was justified because it would promote economic development, and that according to the Economic Promotion Statute for Mexico City and the Development Planning Statute for Mexico City, the government has an obligation to promote employment creation and economic development in Mexico City.[59] In support of this, the General Program for Development of the Federal

[54] *Ley Federal de Expropiación.* Article 1. Section IX. Published in the Official Federation Diary 25 November 1936. Last reformed 5 June 2009.
[55] *Decreto expropiatorio de nueve predios ubicados en las delegaciones Cuauhtémoc y Gustavo A. Madero, para que las sociedad cooperativa de trabajadores de Pascual S.C.L. los destine a las actividades productivas y sociales en beneficio de sus agremiados.* Published in the Mexico City Official Gazette 18 February 2003.
[56] *Decreto expropiatorio de nueve predios ubicados en las delegaciones Cuauhtémoc y Gustavo A. Madero, para que las sociedad cooperativa de trabajadores de Pascual S.C.L. los destine a las actividades productivas y sociales en beneficio de sus agremiados*. Published in the Mexico City Official Gazette 18 February 2003.
[57] *Ley General de Sociedades Cooperativas*. Published in the Official Federation Diary 3 August 1994. Last reformed August 13, 2009.
[58] *Ley Federal de Expropiación.* Article 1. Section IX. Published in the Official Federation Diary 25 November 1936. Last reformed 5 June 2009.
[59] *Ley de Fomento Para el Desarrollo Económico en el Distrito Federal*. Articles 1, 2. Published in the Official Federation Diary and in the Mexico City Official Gazette 26 December 1996. Last reformed 14 September 2012.

District authorized the city government to take measures to promote the creation of stable jobs[60] and the urban strategy of the boroughs in which the expropriated land was located[61] called for the government to 'offer the material conditions to conduct productive activities and promotion for job creation'.[62] Such provisions and plans emphasised that the expropriated plots should be used for industry because Mexico City had suffered a major loss of manufacturing jobs and the contribution of manufacturing to the total economic output in Mexico City had been reduced from 27% in 1980 to 16.6% in 2000,[63] leading to a drastic deterioration of industrial urban infrastructure and the underuse of the existing facilities. According to the Mexico City government the expropriated plants generated 2,200 jobs which sustained 22,000 people. The decree also mentioned that the *Pascual* Cooperative contributed directly or indirectly to the generation of jobs for 50,000 families.[64] Finally, the government contended that the Cooperative was an important source of fiscal revenue for the city and that 70% of the Cooperative's production was located in the Mexico City plant, and that, if lost, the Cooperative would be condemned to bankruptcy.[65]

5.3.4 *Pascual* Cooperative and the courts.

The Supreme Court's ruling in this case is a perfect example of the interpretation of the public purpose requirement as a three-tiered test which was developed by the Court as a

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Ley de Planeación del Desarrollo del Distrito Federal. Articles 1,2 Published in the Mexico City Official Gazette 27 January 2000. Last reformed 28 June 2013.

[60] *Programa General de Desarrollo del Distrito Federal.* Published in the Mexico City Official Gazette 4 December 2001, p 59.

[61] *Programa Delegacional de Desarrollo Urbano de Gustavo A. Madero*. Published in the Mexico City Official Gazette 10 April 1997.

Programa Delegacional de Desarrollo Urbano de Cuauhtémoc. Published in the Mexico City Official Gazette 10 April 1997.

[62] *Decreto expropiatorio de nueve predios ubicados en las delegaciones Cuauhtémoc y Gustavo A. Madero, para que las sociedad cooperativa de trabajadores de Pascual S.C.L. los destine a las actividades productivas y sociales en beneficio de sus agremiados*. Published in the Mexico City Official Gazette 18 February 2003,p. 3.

[63] ibid 4.

[64] ibid. 5.

[65] ibid 5.

substantive method of review (as analysed in the previous Chapter). It also provides an example of the limitations and the negative impact that such strong judicial review involves. Returning to the facts of the case, the owner of the land challenged the expropriation decree and filed an *amparo* suit. The district judge ruled that the expropriation decree was unconstitutional because article 1 section IX of the Federal Expropriation Law was unconstitutional on the ground that the authorization given to the administration by that section of the law was too vague and it delegated too much power to the executive branch. The district judge did not even need to apply the three-tiered test because it struck down the section of the statute that authorized the expropriation. The ruling considered that the section was too vague because it authorized expropriations of companies and the only limitation was that they were made for the benefit of the collective. This broke the model of expropriation which was discussed in the previous chapter. According to this conception, the legislative branch had to define what could be considered public purpose and the administrative branch decided which cases felt within the categories defined in the statutes. The courts could then review if the expropriation was authorized by the statute; if the government had included all the facts that supported its decision; and finally review if the facts supported the decision according to the interpretation of the court. The main problem according to the ruling was that the term 'collective benefit' had no meaning and therefore it put no restrictions on the power of the government to expropriate, giving it an unfettered discretion to decide when the public purpose requirement was met. There is also an implicit assumption that the legislature could not authorize the expropriation just to benefit a private company. The judge reasoned that the government can only expropriate land to benefit a company under exceptional circumstances. Therefore implicit in the discussion is a limited conception of what can be defined as a public purpose.

This decision is closely related to an earlier ruling from the Supreme Court in 1996 in which it declared unconstitutional a section of the federal expropriation law.[66] Section III of article 1 of the Federal Expropriation Law declares that expropriation was authorized for:

> 'The embellishment, expansion, urban renewal of towns and ports, the construction of hospitals, schools, parks, gardens, sport facilities, airports, construction of Federal Government offices and any other project destined to provide services that benefit the collective.' [67]

In that case the Mexico City government had expropriated a plot of land to build a public market and the owner challenged the expropriation. In its ruling the Supreme Court declared that section III was unconstitutional because the authorization to expropriate 'for any other project that benefits the collective' was too generic and that it gave the government unfettered discretion. The Supreme Court's interpretation in this case is exactly the same to that held by the district judge in the *Pascual* Cooperative case.

A striking aspect of the ruling of the Supreme Court in 1996 (almost ten years before *Pascual)* is that the Court decided not to publish it and it produced no precedents. This is very unusual because the ruling was of great constitutional significance. There is only one other example of a federal statute being declared unconstitutional by the Supreme Court in expropriation cases in the past 26 years. This decision could be explained as a continuation of the strategic behaviour of the court in an authoritarian political context described in the previous chapter. The declaration of unconstitutionality of a federal law would attract

[66] *Amparo* en Revisión. 216/1996. Pleno de la Suprema Corte de Justicia de la Nación. Decided 24 November 1998.
[67] *Ley Federal de Expropiación.* Article 1. Section III. Published in the Official Federation Diary 25 November 1936. Last reformed 5 June 2009.

considerable scrutiny and the Court, taking advantage of its wide discretion to decide when to publish judicial precedent, decided to avoid promoting it.

The decision by the district judge in the *Pascual* case was appealed by the Mexico City Government and the Supreme Court granted a writ of certiorari. In this case the Supreme Court had to review the constitutionality of section IX article 1 of the Federal Expropriation Law. In its ruling the Supreme Court rejected the interpretation of the district judge and by extension its own interpretation from ten years ago, and avoided a substantial discussion on the authorizing statute. It followed the traditional interpretation of the public purpose requirement, accepting that the legislature had an almost absolute discretion to define what is public purpose, and applying the three-tiered test which has been described in the previous chapter. The Court considered that in this case the facts on which the Mexico City government based its decision to expropriate, did not support that conclusion and therefore the expropriation order should be struck down.

In the first part of its ruling the Supreme Court acknowledged its previous decision in which it declared that section III Article 1 of the Federal Expropriation Law was too vague and constituted an improper delegation of power. At the same time the Court declared that 'the fundamental characteristics of every law are generality, abstraction and impersonality'[68] and conducted a balancing test to evaluate if section IX struck the right balance between vagueness and generality. In *Pascual* and in the cases decided ten years before, the Court had to decide if the term 'collective benefit' used in the Federal Expropriation Law gave unfettered discretion to the executive branch to decide what is a public purpose. In the 1996 ruling the Court declared that 'because of its great ambiguity… it cannot be considered as a

[68] *Amparo* en Revisión. 455/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 17 November 2005, p. 48.

clear and precise determination of what constitutes a real public purpose'.[69] According to the Supreme Court:

> The imprecision mentioned means that the administrative authority will be the one that defines in each case, and subjectively, if the project that is going to be undertaken in the expropriated land, will be destined to satisfy a collective necessity. [70]

In *Pascual* the Supreme Court reached the opposite conclusion and overturned the opinion of the district judge. The Court stated that the term 'collective benefit' did not give the government unfettered discretion and that article 1 section IX, of the Federal Expropriation Law, was constitutional. However, the Supreme Court did not justify why section IX of article 1 of the Federal Expropriation Law was different from section III, since both used the term 'collective benefit'. On this point, the Court's justification is very poorly explained. It began by deciding the collective benefit as 'something that creates benefits or is useful to a group of individuals'.[71] The Court then provided a couple of examples in which the term collective benefit was used and swiftly concluded from this that 'although it is true that the challenged law does not include a concrete definition of the term "collective benefit" … the term has a common connotation clear enough to understand its meaning.'[72]

Once the Supreme Court held that section IX of article was constitutional it then reviewed the evidence presented by the authorities to justify that the expropriation would serve a public purpose. The Court ruled that even if section IX was not unconstitutional, in this case the

[69] *Amparo* en Revisión. 216/1996. Pleno de la Suprema Corte de Justicia de la Nación. Decided 24 November 1998, p. 197.
[70] *Amparo* en Revisión. 216/1996. Pleno de la Suprema Corte de Justicia de la Nación. Decided 24 November 1998, p. 201.
[71] *Amparo* en Revisión. 455/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 17 November 2005, p. 56.
[72] *Amparo* en Revisión. 455/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 17 November 2005, p. 58.

Mexico City Government had not presented enough evidence that the expropriation would serve a public purpose and therefore the expropriation order was invalid.

The Supreme Court considered the reasons given by the authorities to justify the expropriation First the Court considered whether the fact that *Pascual* is a cooperative gave it a special status and on this the Supreme Court stated:

> The promotion and conservation of a cooperative society cannot be considered a public purpose because it would go against the constitutional principles that govern restrictions to private property, if the State provided the land necessary to achieve their purpose using expropriation, with the exclusive aim of favouring cooperative societies.[73]

The rest of the arguments were also dismissed by the Supreme Court without too much consideration. The Supreme Court declared that economic reasons were not enough to justify an expropriation. In their written opinion the Supreme Court reasoned:

> The economic importance of the cooperative for the local, national or international economy is not a relevant consideration to justify the public purpose in an expropriation...to justify that the expropriation serves a public purpose the administrative authority needs to consider, within the limits imposed by the statute, the elements of collective benefit, so it can decide if the expropriation is justified for the public purpose pursued. [74]

[73] *Amparo* en Revisión. 455/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 17 November 2005, p 95-96.
[74] *Amparo* en Revisión. 455/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 17 November 2005, p. 96.

This ruling is a good example of how the Court and in general the courts, exercised substantive review and replaced the authorities decision with its own. First the Court accepted that the statute that authorized expropriations in favour of companies that benefitted the collective was lawful. According to the interpretation of the Court the crucial question was when a company could be considered of collective benefit. The Court held that this specific expropriation did not fall within those authorized by the statute because there was not enough evidence that it would serve a collective benefit.

The Supreme Court did not discuss why this specific expropriation was not included in those authorized by section IX which stated that expropriations could be ordered to preserve a company that benefits the collective. It would appear that the article only required that the company contribute to the collective benefit. The Court considered that in this case there was no public purpose and therefore the expropriation was not justified, but at the same time it refused to develop a clearly reasoned criteria setting out in which cases companies can be considered to benefit the collective or even a rule on the standards of evidence necessary to justify that the company benefitted the collective.

During the discussion of this case only two judges recognized that the decision could be considered arbitrary. Both judges wanted the Court to uphold the ruling of the district judge and adopt a stronger review of legislation because they considered that the reasoning of the Court could end in arbitrary decisions by the judiciary.[75] Justice Gudiño Pelayo pointed out that 'it seems to me that if we accept the constitutionality of such an open concept as collective benefit, then how can you say that creating jobs is unconstitutional, if creating jobs

[75] In Mexico the Supreme Court debates and votes on its cases publicly. These discussions are available on their webpage and can be followed on television.

is a collective benefit?'[76] Justice Gudiño Pelayo was in favour of declaring that section unconstitutional because he recognized the impossibility of defining what is a collective benefit. Justice Cossío wanted to make a substantive interpretation of public purpose and collective benefit to define in which cases the creation, conservation, or promotion of companies could justify the use of expropriation. He recognized that almost any expropriation to create jobs can be considered to be a collective benefit, so the question he tried to address is where can the line be drawn. [77]

The majority of the Supreme Court considered that the term 'collective benefit' was not vague and that according to the Mexican Constitution the legislative branch had broad discretion to define what is public purpose.[78] They argued that if the Supreme Court developed a substantive concept of public purpose they would be conditioning the legislators and altering the Federal Constitution that states that public purpose will be defined by Federal and State legislatures. In this respect, Justice Silva Meza made clear that the judiciary had the role of reviewing how the administrative authority applied this section and all of the judges agreed that 'collective benefit is an expression with a clear meaning which can be specified in each individual case and we conclude that in each case in which the legislation is applied it can be established if there is a collective benefit or not.'[79]

With this decision the Supreme Court confirmed its previous interpretations of the public purpose requirement. However, it was a different political context and with great power comes great responsibility and this ruling had a major symbolic impact and affected the

[76] Suprema Corte de Justicia de la Nación, 'Versión taquigráfica de la sesión pública ordinaria del Pleno de la Suprema Corte de Justicia de la Nación, celebrada el jueves 20 de octubre de dos mil cinco' (n 49) 23.
[77] ibid 26–28.
[78] ibid 30–33.
[79] ibid 19.

image of the Supreme Court among left-wing political parties in Mexico. To this reason, in the in the next section I review the media's coverage of this case to further analyse its political impact.

5.3.5 Pascual Cooperative in the media

The following analysis is drawn from a review of all the newspaper articles and opinion pieces in which *Pascual* Cooperative was mentioned in three major national newspapers - *La Jorna*da, *Reforma* and *El Universal* - between 2002 and 2008. This included 67 articles in which the *Pascual* Cooperative was mentioned. Of those, 20 were opinion pieces, with 11 in favour of the expropriation and defending the importance of *Pascual* Cooperative and nine being critical of the expropriation and of the Mexico City Government.

La Jornada has always been very supportive of the *Pascual Cooperative* and so it is not surprising that most of the coverage came from this paper which dedicated 24 articles to the cooperative during this period, as opposed to 13 articles by El Universal and only five by Reforma. The majority of articles highlighted the character of *Pascual* as a cooperative and its importance as a symbol of the workers struggle in Mexico. The coverage of the case by *La Jornada* reflects the ambivalent attitude towards law in Mexico's left. The paper firmly believes in the redemptory capacities of law and in its ability to change social reality, while simultaneously being deeply mistrustful of its applications and the mechanisms of enforcement.

In most of these articles – both opinion pieces and news reports - the authors highlight the importance of the status of *Pascual* as a cooperative and the moral superiority this gives the company. The *La Jornada* articles draw upon an implicit assumption that any government action that benefits the cooperative represents a collective benefit. This view of the

cooperative as having a high, almost moral, status that justifies any measure taken to support it is expressed in an opinion piece written by Miguel Angel Granados Chapa in *Reforma*:

> After severe conflicts in which there was even violence when strike-breakers tried to break a legal strike, the workers won and got all their demands, and as part of the settlement they were given the assets of the company and twenty years ago they started the cooperative organization of the company in which they have prospered notwithstanding the difficulties of a very complicated and competitive market. [80]

In contrast to such political significance being drawn to attention, there is practically no mention of its legal significance. From the mass media perspective, the conflict was relevant because of the symbolic importance of the *Pascual* Cooperative, which was emphasized by opinion pieces defending the expropriation.

The majority of coverage of the Supreme Court's judgement was negative and highly critical, although the critics offered only a partial view, and the discussion in the press was shallow. However, the Supreme Court did not offer arguments strong enough to discard criticism. In particular, as mentioned, the ruling did not offer any clear guidance about what could be considered a public purpose or what evidence the government needed to justify expropriation, which makes the opinion written by the Supreme Court seem more arbitrary.

Most of the coverage failed to engage with the legal questions addressed by the Supreme Court. The coverage was case specific, focused on the exceptional nature of the *Pascual* Cooperative as an institution rather than broader legal argument and principle: For example in one such article, it was argued that the expropriation was justified because the cooperative

[80] 'Plaza Pública/¡Boing!' (n 33).

formed an important part of the social sector of the economy. According to Bernardo Batiz in *La Jornada*:

> The Constitution in its article 25, gives the power to the Mexican State to guide the economy and development of the country. According to that article the government should aspire to achieve a fairer distribution of wealth and income. In the same article cooperatives are recognized as members of the social sector of the economy and therefore they cannot be considered as simple private companies or money-making societies. They have a special status and the Mexican Government should promote them along with *ejido*s, workers organizations and other community organizations. This interpretation of the Mexican Constitution gives justification to the interpretation made by the Mexico City Government of section IX of article 1 of the Federal Expropriation Law. [81]

This case was seen as a test of the sensibility of the Supreme Court to the context in which law operates. The critics of the decision constructed a narrative in which there is a tension between a technical and formalistic application of law and a contextual application of the law. Rosa Albino Garavito, in an opinion piece in which she criticizes the Supreme Court's decision, asserts: '[T]he ruling of the Supreme Court that declared unconstitutional the expropriation decree has consequences that weaken the legal technicalities in which it is based.'[82]

In general, the critics argued that the Court exhibited a lack of sensitivity about the social context in which the decision took place. Newspapers and opinion makers expected the Court to recognize the singularity of the Cooperative due to its symbolical importance. One opinion

[81] (n 33).
[82] (n 33).

summed this approach up as follows: 'For the ten justices that voted in favour of the decision, *Pascual* is just another company and the expropriation was in favour of just another economic actor. In their arguments they decided to ignore that it is a cooperative.'[83] According to such comments the Supreme Court failed to take into account relevant facts in reaching its decision in this case.

Media's reports tended to transform the case into a battle against formalism in the application of the law. For example, Granados Chapa wrote:

> The court opted for a narrow and formalistic interpretation of the law and did not consider that it could have applied general principles of law, that are a valid instrument of interpretation, and that would have allowed an outcome in which the impact of the decision on social equality could be considered. The Supreme Court threw Pacual Cooperative out in the street when it struck down the expropriation decree of the land in which the plant of the company is located.[84]

Such coverage in *La Jornada* gave a voice to the members of the Cooperative and to others critics of the Supreme Court decision in which arguments for the invalidity of the expropriation decree were qualified as *leguleyo,*[85] a pejorative expression meaning that the technicalities of law are used to obtain an improper benefit. It refers to the use of law to subvert law and, therefore, is a term commonly used by the left to criticize legal decisions in which the arguments focus on technicalities, but evade the substantive issues. Such critiques also became personal in nature. For example in an interview to congress members by *La*

[83] ibid.
[84] Granados Chapa, 'Plaza Pública/ El golpe a Pascual' (n 41).
[85] Its close meaning would be pettifogging.

Jornada before the final decision was made, the left-wing legislators called the members of the Supreme Court a classless and unreasonable elite.[86]

In contrast, right-wing commentators argued that property rights should receive stronger protection. Sergio Sarmiento, the most well-known op-ed writer, interprets conflicts over expropriation and this one in particular, as another example of the lack of protection of property rights in Mexico. In the *Pascual* case he applauded the ruling because he considered that it limited the use of expropriation for private purposes. He declared: 'This case is extremely important because it establishes the criteria that the government cannot expropriate to benefit private companies even if they are Cooperatives. For an expropriation to be legal the authorities most prove that there is public purpose.'[87] Of the nine opinion pieces that criticize the expropriation decree and applaud the Court's ruling, six were written by Sergio Sarmiento.

In response it may be recalled that during the cause of the case, Justice Cossío stated 'I do not ignore the very important social struggle that was undertaken in a specific moment by the workers of the cooperative'.[88] It is clear that the most important message that the Court was trying to transmit was that it was aware of the symbolic importance of this case. In another intervention Justice Cossío justified his vote in this case by arguing: 'we are not discussing social themes.'[89] In the same session, Justice Aguirre Anguiano declared: 'In this business we are not discussing the benefits of cooperatives, or the support that it needs, we are not

[86] Georgina Saldierna and others, 'Ministros, Elite Desclasada E Insensata: Legisladores', *La Jornada* (México D. F., 26 October 2005) <http://www.jornada.unam.mx/2005/10/26/026n2pol.php> accessed 25 May 2011.
[87] Sergio Sarmiento, 'Jaque Mate/Expropiaciones', *Reforma*, Opinión (México D. F., 18 November 2005).
[88] Suprema Corte de Justicia de la Nación, 'Versión Taquigráfica De La Sesión Pública Ordinaria Del Pleno De La Suprema Corte De Justicia De La Nación, Celebrada El Jueves 17 De Noviembre De Dos Mil Cinco' (17 November 2005) 4–5 <https://www.scjn.gob.mx/PLENO/ver_taquigraficas/PL051117.pdf> accessed 18 May 2014.
[89] ibid.

discussing a labour problem, nor the protection that workers need, we are discussing property rights of an individual opposed to the public purpose.'[90] Along these lines, in another intervention, Justice Silva Meza declared: '[I]ndependently of the respect and the attention deserved by any company and a company of these characteristics, because of the social struggle they have had, this is alien and independent from the topic that we are looking into: review the constitutionality, the legality of the contested acts from the authorities.'[91]

It is interesting to note that, although the Court chose to ignore the symbolical importance of the Cooperative for the workers movement in Mexico in their written opinion, it was constantly mentioned when the case was being discussed. Justice Diaz Romero mentioned in the discussion that he was voting because: 'The fact that expropriation is used to avoid the loss of jobs is not very precise, as far as I can see, because, with or without expropriation the Cooperative is not going to go bankrupt, it is going to continue functioning and functioning well.'[92]

The Supreme Court tried to avoid confrontation with other branches of government by following its tradition of strong legislative deference, but this was unsuccessful. Problematically, the Court's approach produced very little legal certainty. The Court declared that section IX article 1 of the Federal Expropriation Law was constitutional and therefore the government can use expropriation to create, promote or conserve a company when it benefits the collective; however, they interpreted that the Mexico City government did not give sufficient reasons to justify this particular expropriation and they failed to clarify what the government needed to do to comply with the 'giving reasons' requirement in future

[90] ibid 15–16.
[91] ibid 21–22.
[92] ibid 29.

cases. As a consequence the government cannot predict if an expropriation order will be upheld by the courts because this depends on the subjective understanding of the judges that review the case. This increases the social impact of these decisions and affects the public image of the judiciary since its decisions lack a clear rule and therefore may appear arbitrary and unjustified.

The Supreme Court's avoidance of the question 'what is (a) public purpose' was confirmed in Colima, which constitutes a second case study on this issue.

5.4 The Colima Case

Both critics and admirers agree that Article 27 of the Mexican Constitution is one of the first examples in the world in which the principle of the social function of property is enshrined. Some authors hold that the 1917 Constitution does not even consider property as a constitutionally protected right.[93] That property in Mexico is limited or defined as a social function is so accepted that this topic is no longer discussed. The Supreme Court cultivated this assumption by avoiding striking down legislation on constitutional grounds and preferring a discreet approach to judicial review of expropriation. The lack of discussion about the constitutionality of legislation explains the absence of precedents on the meaning of public purpose or on property as a constitutional right.

In its case law the Court provides evidence that supports the relevance of two of the keys to success suggested by Shapiro to strengthen constitutional courts in democratic systems.[94] I consider that these elements can strengthen courts even if they are not in a democratic context

[93] Stephen H Haber and others, *The Politics Of Property Rights. Political Instability, Credible Commitments, And Economic Growth In Mexico, 1876-1929* (Cambridge University Press 2003) 62.

[94] Shapiro, Martin, 'The Success Of Judicial Review And Democracy' in Martin M Shapiro and Alec Stone Sweet (eds), *On law, politics, and judicialization* (Oxford University Press 2002) 165.

or even if the courts are not constitutional courts. The first one is that the courts should cultivate their reputation as courts of law. According to Shapiro courts depend on their reputation as institutions that uphold the rule of the law to preserve their power.[95] The Mexican Supreme Court used legal formalism to uphold their reputation as neutral decision-makers. The use of legal technicalities in their decisions enabled them to present themselves as courts of law that could be trusted to be fair. The importance of legal formalism to the construction of the image of the Mexican Court has been explored in the work of Karina Ansolabehre.[96] The second element is the case-by-case mode of decision-making. According to Shapiro, the advantages of this type of decision-making are that it reduces the potential of clashes with other institutions '[b]ecause the immediate stakes are low and the language and processes of litigation arcane, any particular constitutional case enjoys relatively low public visibility.'[97] It also contributes to the institutional strength of the courts because it allows them to deal with unanticipated consequences of their decisions and change direction if needed.[98] The Mexican Court was particularly faithful to this form of decision-making. It avoided general pronouncements as much as possible and it preferred a formalistic approach to judicial review. Shapiro considers that this form of decision-making is justified as a prudential strategy of policy-making. In the case of Mexico I would argue that this style of decisions by the Court protected the autonomy of the federal judiciary. It was a poor approach to the development of policy or legal certainty, but it was successful in preserving a space of autonomy for the federal judiciary. The ruling in the Colima case corroborated the

[95] ibid 165–68.

[96] Karina Ansolabehere, 'Legalistas, Legalistas Moderados Y Garantistas Moderados: Ideología Legal De Maestros, Jueces, Abogados, Ministerios Públicos Y Diputados' (2008) 70 Revista mexicana de sociología 331.

[97] Shapiro, Martin (n 93) 169.

[98] ibid 169–70.

strong aversion of the Supreme Court to general pronouncements and its preference for a case-by-case style of decision making on technical grounds as in the *Pascual* case.

5.4.1 The Colima State Expropriation Law

Colima state has been always governed by the *Partido Revolucionario Institucional* (PRI) which was the ruling party in Mexico for almost seventy years. PRI was in power not only in the federal government, but also in all of the state governments until 1989. Colima is one of the few states in which the ruling party has been able to remain in power even in a context of free and democratic elections. It is in this political context that the conflict that leads to the unconstitutionality action arose. Such actions are frequently used as a political instrument as much as a procedure of constitutional review and in a context where PRI is still firmly in control, minority parties use unconstitutionality actions as a political instrument to challenge the state government.

5.4.2 Unconstitutionality Actions

One of the most important results of the Mexican judicial reform of 1994 was that it created a legal procedure to conduct abstract review of legislation.[99] This process of abstract review was copied from European models of abstract constitutional review and it was used as an instrument to protect minorities from majority abuses.[100]

Until the 1994 judicial reform, the most important constitutional review mechanism in Mexico was the *amparo su*it, which could only be filed when the legislation was applied and

[99] Hector Fix-Fierro, 'Judicial Reform And The Supreme Court Of Mexico: The Trajectory Of Three Years' (1998) 6 US-Mex LJ 1.
[100] Stephen Zamora and others, *Mexican Law* (Oxford University Press 2005) 283.

a concrete violation of the Constitution was committed.[101] In contrast, unconstitutionality actions have to be filed before a law comes into force and only specific institutions have standing to present them.[102] The other aspect in which this legal instrument is unique is in its effects. Unconstitutionality actions and constitutional controversies are the only judgments which can lead to the invalidation of the challenged provision with general effects. If a majority of eight justices decide that a section of the law is unconstitutional, the law in question is repealed and can no longer be applied. It is also the only constitutional procedure in which all the arguments included in the decision constitute binding precedent. In cases in which this majority is not achieved, the official outcome is that the case is dismissed, but the decisions can be published and it can be used by judges as a minority vote would be used.

This instrument effectively gives the Supreme Court a veto power over legislation in those cases that are brought before it.[103] In a sense this instrument gives the Supreme Court the role of arbiter between different branches of government and establishes a procedure to process conflicts between political parties. This is evident from the fact that most of the unconstitutionality actions resolved by the Supreme Court have been related to electoral law.[104]

Various studies have analysed the relationship between the legislative branch and the Supreme Court by looking at how the Court has decided and which political parties have

[101] Richard D Baker, *Judicial Review In Mexico: A Study Of The Amparo Suit* (Latin American monographs / University of Texas at Austin. Institute of Latin American Studies, Published for the Institute of Latin American studies by the University of Texas P 1971).
[102] Zamora and others (n 98) 284.
[103] Beatriz Magaloni and Guillermo Zepeda, 'Democratization, Judicial And Law Enforcement Institutions, And The Rule Of Law In Mexico' in Kevin J Middlebrook (ed), *Dilemmas of political change in Mexico* (Institute of Latin American Studies, University of London 2004) 168.
[104] ibid 169.

been favoured by which decisions.[105] The most important and controversial rulings from the Supreme Court have been in unconstitutionality action cases, two of the most notorious of which have seen the Supreme Court decide upon the constitutionality of legalizing abortion and same-sex marriages, both in Mexico City. The unconstitutionality action has been an important element in the transformation of the Supreme Court into a very important political actor and in its increasing visibility.

5.4.3 The Debate in State Congress

The Colima State Legislature passed a reform of the state expropriation law, which permitted expropriation for economic development on 20 April 2004,[106] and it came into effect on May 8 of that same year.[107] The minority in the Local Congress decided to seek a declaration of unconstitutionality on this statute from the Supreme Court. In this action the Court was asked to define what was the public interest or a public purpose and, indirectly, how should the social function of property be understood.

The Colima State Expropriation Law followed the model of the Federal Expropriation Law and included a catalogue of what can be considered a public purpose. The catalogue is included in Article 5 of the Colima State Expropriation Law. This amendment added and clarified two cases which could justify the use of expropriation. A short paragraph was added to section V of Article 5 of the Colima State Expropriation Law. This had the effect of adding 'as well as the creation and conservation of land reserves for establishing them' to the

[105] Julio Ríos-Figueroa, 'Fragmentation Of Power And The Emergence Of An Effective Judiciary In Mexico, 1994-2002' (2007) 49 Latin American Politics and Society 31; Camilo Saavedra-Herrera, 'Judicialisation And Democratisation In Mexico The Performance Of Supreme Court Towards Political Fragmentation' (PhD, London School of Economics and Political Science 2011).

[106] Diario de Debates del H Congreso del Estado de Colima. Sesión Ordinaria Número Siete Celebrada Por Los Ciudadanos Diputados Integrantes De La Quincuagésima Cuarta Legislatura Constitucional, El Día 20 De Abril Del Año Dos Mil Cuatro.

[107] Ley de Expropiación para el Estado de Colima. Published in the Official Diary "The State of Colima" 12 September 1992. Last reformed May 8, 2004.

existing reference to 'the creation, promotion or conservation of a company for the benefit of the collective' and it authorized expropriation of land with touristic development potential.[108] The amendment was approved by the PRI majority in the State Congress with the vote going against both of the opposition parties, *Partido Acción Nacional* (PAN) and *Partido de la Revolución Democrática* (PRD) with representation in State Congress.

In the debate that preceded the approval of the amendments, Congressman Cavazos Ceballos argued that the amendment gave legal certainty to citizens about what can be considered a public purpose. He claimed that promotion of economic development and job creation sometimes required the use of expropriation and he mentioned that with this reform the Government could deal with situations in which property owners blocked new investments that would create large number of jobs because they were asking for too much money for their land.[109] Other legislators emphasized that Colima had no industrial parks and that the state government needed to take a more active role in promoting economic development and job creation.[110] Finally supporters of the amendment also claimed that it would contribute to better planning of urban growth because industries could be located in specific places and grouped together creating industrial parks.[111]

The underlying assumption of all of the arguments in favour of the amendment was a belief that Government should play an important role in promoting economic development and job

[108] Ley de Expropiación para el Estado de Colima. Article 5. Section V and Section XIV, Published in the Official Diary The State of Colima 12 September 1992. Last reformed 8 May 2004.
[109] Intervención del Diputado Silverio Cavazos Ceballos. Diario de Debates del H Congreso del Estado de Colima. Sesión Ordinaria Número Siete Celebrada por los Ciudadanos Diputados Integrantes de la Quincuagésima Cuarta Legislatura Constitucional, el día 20 de abril del año dos mil cuatro.
[110] Intervención del Diputado José Antonio Orozco Sandoval. Diario de Debates del H Congreso del Estado de Colima. Sesión Ordinaria Número Siete Celebrada por los Ciudadanos Diputados Integrantes de la Quincuagésima Cuarta Legislatura Constitucional, el día 20 de abril del año dos mil cuatro.
[111] Intervención del Diputado Florencio Llamas Acosta. Diario de Debates del H Congreso del Estado de Colima. Sesión Ordinaria Número Siete Celebrada por los Ciudadanos Diputados Integrantes de la Quincuagésima Cuarta Legislatura Constitucional, el día 20 de abril del año dos mil cuatro.

creation and that this justified the use of expropriation. In contrast, the PRD opposed the reform because they claimed that it was passed to benefit a specific group in power and that it was only going to benefit land speculators. They did not criticize the objectives of the reform and agreed with the need for a strong role for the government in promoting economic development, but they were highly suspicious of a hidden agenda.[112] Legislators of the right-wing PAN considered that creating a new company could not be considered a valid public purpose. They claimed that companies are private enterprises that only benefit their owners and that therefore expropriation to benefit them should not be allowed because it would constitute a violation of property rights. They also claimed that the precedent of the Supreme Court strictly forbade expropriation to transfer property to other private owners, however they only cited precedents which had been abandoned by the Supreme Court more than 70 years ago.[113]

In the debate both parties - those in favour and those against the reform - had a clear idea that the amendments authorized the government to expropriate in favour of a private company with no further requirements. Contrary to the view held by the Supreme Court in the *Pascual* case, both sides were aware that the collective benefit of the expropriation would be the creation of jobs and taxes and that any company could be benefitted. At no point did the majority consider that expropriations to benefit companies are limited to a specific type of company or to companies that benefit the collective, in strict terms, because they considered that all companies benefit the collective in broad terms by paying taxes and creating jobs. For

[112] Intervenciones de los Diputados Armando González Manzo y Jubal Ayala Jiménez. Diario de Debates del H Congreso del Estado de Colima. Sesión Ordinaria Número Siete Celebrada por los Ciudadanos Diputados Integrantes de la Quincuagésima Cuarta Legislatura Constitucional, el día 20 de abril del año dos mil cuatro.
[113] Intervenciones de los Diputados Esmeralda Cárdenas Sánchez, Luis Fernando Antero Valle y José Antonio Álvarez Macías. Diario de Debates del H Congreso del Estado de Colima. Sesión Ordinaria Número Siete Celebrada por los Ciudadanos Diputados Integrantes de la Quincuagésima Cuarta Legislatura Constitucional, el día 20 de abril del año dos mil cuatro.

example, congressman Cavazos Ceballos, one of the biggest supporters of the reform, remarked during the debate: '[W]ithin the sphere of private enterprises, there is no difference and we have to recognize this, because it is in the law and in the code, the only objective of companies is to gain profit, they are not charities and they won't risk their money if they are unsure of getting a profit.'[114]

The case received very little attention. This was a small political battle between state politicians, but the case had the potential of having a major legal impact.

5.4.4 The Supreme Court and the Colima Case

On 7 June 2004 the unconstitutionality action was filed by the opposition parties of the State Congress of Colima. The opposition had two main arguments. First they argued that the state congress did not have a discretionary faculty to decide what public purpose is. In their view there is a constitutional definition of what should be understood by public purpose and in this case the Colima Congress was stepping over the limit of its discretion in this respect. It is obvious that the states enjoy broad discretion in defining what constitutes a public purpose but the Supreme Court had to address whether there were limits to its exercise.

The opposition also claimed that in this case there could be no public purpose in an expropriation made for a private company or for tourist development. They claimed that if the modification was constitutional then *everything* could constitute a public purpose and that in the case of private companies the main beneficiary of an expropriation was the owner of the company and that the government should not support a private company by taking property from another private owner. The plaintiffs and the defendants in this case agreed

[114] Intervención del Diputado Silverio Cavazos Ceballos. Diario de Debates del H Congreso del Estado de Colima. Sesión Ordinaria Número Siete Celebrada por los Ciudadanos Diputados Integrantes de la Quincuagésima Cuarta Legislatura Constitucional, el día 20 de abril del año dos mil cuatro.

that if the Court interpreted that the statute was constitutional, then the state government could expropriate to benefit any type of private companies.[115]

The State Government of Colima and the State Congress had to defend the constitutionality of their amendments in the Supreme Court and their main claim was that the reform promoted legal certainty. They claimed that the reform did not introduce a new and radical concept of public purpose because the State Expropriation Law already authorized expropriations to create or promote companies. The amendments only clarified their power to define where new companies should be established and therefore contribute to promoting an orderly urban development. It also contributed to avoiding the establishment of otherwise harmful industries near inhabited areas. The authorities also mentioned that public purpose should be understood in a wide sense and that the creation of jobs was clearly part of what could be considered a valid public purpose. They argued that the Supreme Court had interpreted public purpose to include also social and national interests.[116]

One of the most surprising twists in this case was that the Federal Government sided with the state government even if they were from different political parties. The General Attorney, who is allowed to brief the Supreme Court, argued that the definition of public purpose should be widely understood following the traditional interpretation of the Supreme Court. The Federal Government considered that the legislative branch had broad powers to define what constitutes public purpose. According to the interpretation of the Federal Government, state governments have the obligation to fulfil certain social needs, such as education,

[115] *Acción de Inconstitucionalidad. 18/2004. Pleno de la Suprema Corte de Justicia de la Nación*. Decided 24 November 2005, p. 5-28.
[116] *Acción de Inconstitucionalidad. 18/2004. Pleno de la Suprema Corte de Justicia de la Nación*. Decided 24 November 2005, p. 29-35.

security and health care and it falls within their powers to use expropriation to promote economic development.[117]

(i)The Supreme Court Ruling and the dissenting opinion

The Supreme Court judged that the law was constitutional and therefore that an expropriation could be used to create, promote or conserve, industrial parks, industrial districts, or industries or to create tourist areas. The Court recognized that property is a constitutionally protected right but considered that this constitutional right is limited by its social function.

The reasoning of the Court was very similar to the first part of *Pascual* Cooperative case in which, as analysed above, the Supreme Court decided against striking down a section of the federal expropriation law. The Court first declared that 'the Constitution limits property rights by its social function… and therefore, expropriation is established at a constitutional level as a necessary figure to achieve the objectives of the State'[118]. The Court then reinforced its criteria that 'the concept of public purpose cannot be restrictive; on the contrary, it has to be understood broadly so the State can deal with social and economic needs.'[119] Once again, when deciding if a law should be struck down, the court is broadly deferential to the legislative branch. The Court declared that public purpose cannot be defined and it should therefore be reviewed on a case by case basis, conferring upon the judiciary the power to use their interpretive skills to decide in each case if there is a public purpose or not:

[117] *Acción de Inconstitucionalidad. 18/2004. Pleno de la Suprema Corte de Justicia de la Nación*. Decided 24 November 2005, p. 36-44.

[118] *Acción de Inconstitucionalidad. 18/2004. Pleno de la Suprema Corte de Justicia de la Nación*. Decided 24 November 2005, p. 66.

[119] *Acción de Inconstitucionalidad. 18/2004. Pleno de la Suprema Corte de Justicia de la Nación*. Decided 24 November 2005, p. 66-67

> If in a specific case the executive branch states that an act will benefit the collective, it should provide legal basis and justification for its decision so the institution that is in charge of controlling legality can review its actions…When indeterminate legal concepts are applied the legality control of administrative action is of paramount importance because it is essential to satisfy two important requirements: the need to allow the institution in charge of applying the law to take into account individual circumstances and the need to give legal certainty and prevent arbitrariness by the administrative authority.[120]

This interpretation of the public purpose requirement therefore defers to the legislature. A traditional expropriation model is that the legislative branch defines what is public purpose, for example; creating an industrial park. Then the government applies the law to specific cases and undertakes studies to justify that it is in fact going to build an industrial park. However, it is not enough for the judiciary that the government demonstrates that it is going to use the expropriated land to build an industrial park as authorized by the legislature. The Supreme Court's interpretation of public purpose also requires that the government demonstrate that the park will serve a public purpose and it is this additional requirement that makes judicial review of expropriation in Mexico particularly strong. This additional requirement gives the judiciary the power to decide on a case-by-case basis what is a public purpose.

Justice Cossío Díaz and Justice Gudiño Pelayo voted against the decision and they wrote a dissenting opinion in which they argued that: '[I]t is true that the Federal Constitution gives the legislative branch the power to define what can be considered public purpose, but this

[120] *Acción de Inconstitucionalidad. 18/2004. Pleno de la Suprema Corte de Justicia de la Nación.* Decided 24 November 2005, p. 79-80

cannot be interpreted as a broad authorization for the federal or state legislatures to determine arbitrarily the content of this fundamental concept.'[121] They considered that there are limitations as to what can be defined as a public purpose and in this case they argued that Section V of the Colima State Expropriation Law is unconstitutional because it gave the executive branch too much discretion. In challenging the interpretation of public purpose of the majority they wrote: '[W]e find it alarming that we are giving the administrative authority the power to give meaning to the concept of public purpose in each specific case, precisely because it has no precise meaning.'[122] They considered that the Supreme Court should have struck down the law because:

> [I]n our opinion it is not constitutional for the legislator to grant the executive branch a blank cheque to determine when an expropriation is justified because it will provide a collective benefit, even if after it has been done, the owners can challenge the expropriation order using an *amparo* suit so the judiciary can decide if the authority was right or not.[123]

This dissenting opinion considered that the Colima Expropriation Law gave too much power to the administration to decide what is public purpose. In reality, though, the decision confers the power to determine what is public purpose to the judiciary because of its interpretation of the giving reason requirement which replaced administrative discretion with judicial discretion. Since the courts in Mexico have not developed a concept of administrative deference, when challenged, they have no qualms about substituting their judgment for that

[121] *Acción de Inconstitucionalidad. 18/2004. Voto Particular Suscrito por los Ministros José Ramón Cossío Díaz and José de Jesús Gudiño Pelayo* Decided 24 November 2005, p. 9.
[122] *Acción de Inconstitucionalidad. 18/2004. Voto Particular Suscrito por los Ministros José Ramón Cossío Díaz and José de Jesús Gudiño Pelayo* Decided 24 November 2005, p. 11.
[123] *Acción de Inconstitucionalidad. 18/2004. Voto Particular Suscrito por los Ministros José Ramón Cossío Díaz and José de Jesús Gudiño Pelayo* Decided 24 November 2005, p. 11.

of the authorities. The Supreme Court has developed very demanding, but inconsistent, review criteria for establishing a public purpose, which means that the administration and citizens have no legal certainty about what can be considered public purpose. This case was decided just one week after the *Pascual* ruling, the significance of which was referred to in the Colima discussions.

(ii)The debate in the Supreme Court

As mentioned above two justices wanted to strike down the law. Justice Gudiño-Pelayo considered that section V of the Colima Expropriation Law, as it stood, would allow expropriations in favour of private companies. He argued that the section was too vague and that it gave the administration unfettered discretion to decide when to expropriate.[124]

Justice Cossío argued that the Court had to construct a constitutional concept of public purpose. He claimed that in the Mexican Constitution the concept of public purpose serves as a guarantee that protects property and this has to be protected from infringements by other branches of government. Although federal and state congresses enjoy a broad discretion to define public interest, there are limits to their discretion and in this case the limits had been overstepped. In Cossío's view an expropriation in favour of a private company could not be considered a public purpose. He questioned: '[C]an the legislator determine whatever he pleases or is there a minimum material content in the Constitution with respect to the concept

[124] Suprema Corte de Justicia de la Nación, 'Versión Taquigráfica De La Sesión Pública Ordinaria Del Pleno De La Suprema Corte De Justicia De La Nación, Celebrada El Jueves 24 De Noviembre De Dos Mil Cinco' (24 November 2005) 28–32 <https://www.scjn.gob.mx/PLENO/ver_taquigraficas/PL051124.pdf> accessed 18 May 2014.

of public purpose that the legislator has to respect and this Court to guarantee?'[125] He clearly considered that there is minimum material content, even though he did not articulate the details of this clearly in his dissenting opinion.

Of the majority, some justices agreed that the application of the Section should be subject to limitations. For example, Justice Aguirre mentioned that they should evaluate if it was necessary to include some guidance on how to apply the law in their ruling.[126] The majority did not side with him and in this discussion they continued to emphasise that public purpose was an indeterminate concept and any attempt to give meaning to it was doomed to fail.

Justice Díaz-Romero declared that 'the need to establish a concept of public purpose that has been reiterated by Justice Cossío and Justice Gudiño is a very important challenge for the Supreme Court, and I would say a daunting challenge for any legal academic or lawyer.'[127] Justice Díaz-Romero ended his intervention by stating: '[A]part from the difficulties of finding a definition of public purpose, in the end, I believe that here it depends a lot on the good judgment of the judge, in relation to the specific cases that are presented to them.'[128] From this discussion it is clear that in the view of the majority of the Supreme Court, the concept of public purpose was too vague to be defined, and that they had a great deal of faith in the capacity of the judges to decide when an expropriation was justified. They do not appear to trust the administration, but they are confident that they can limit its discretion with the giving reason requirement. According to Justice Ortiz Mayagoitia 'There is no other way; the one who applies the law should justify that the expropriation will achieve a public

[125] ibid 38.
[126] ibid 35–36.
[127] ibid 39.
[128] ibid 41.

purpose.'[129] In effect, the majority of the Supreme Court held that public purpose is whatever the judges say it is.

5.5 Comparative Institutional Analysis and Public Purpose in Mexico

Expropriation is an instrument that tries to achieve a balance between social costs and social benefits and therefore the risk of majoritarian or minoritarian dominances is always present. When courts decide if the public purpose justifies a case of expropriation, they are in effect making a judgement about whether the social benefits outweigh the social costs. Komesar identifies three possible strategies which the courts adopt in the case of property rights disputes, depending on their standards of deference: [130]

1. High judicial activism with low judicial activity

2. Low judicial activism with high judicial activity

3. Low judicial activism with low judicial activity.

As interpreted by Cole: '[T]he level of judicial activism depends on the extent to which the court allows politics to play a role in organizing social relations.'[131] Judicial activism is high when the courts define clear and general rules excluding the political process of participating in a decision.

In public purpose cases a court would follow the first strategy if it constantly decided on the constitutionality of legislation. An example of this would be if the Supreme Court developed a constitutional concept of public purpose, which adopted a bright-line rule of what is public purpose, thus limiting the power of the legislative branch to define this. In this example, the

[129] ibid 44.
[130] Komesar, *Law's Limits* (n 14) 116; Daniel H Cole, 'Taking Coase Seriously: Neil Komesar On Law's Limits' (2004) 29 Law & Social Inquiry 261, 281.
[131] Cole (n 135) 281.

Court would be following the first strategy because it would limit what the legislative branch can do.

This was the position adopted by the two justices who wrote the dissenting opinion in *Colima*. This interpretation would involve low judicial activity because the Court would strike down laws and it would not have to solve expropriation challenges on a case-by-case basis. The original interpretation adopted by the Supreme Court of the public purpose requirement (as analysed in Chapter 3) in which property needed to be transferred to public ownership for the expropriation to be considered valid is an example of high judicial activism because it limits what the legislative and the executive branch can do and provides strong protection for property rights. It is a very clear rule and it should lead to less cases being challenged.

The second approach is closer to how Mexican courts approach public purpose in expropriation cases. The courts tend to not review the constitutionality of laws and do not develop a general concept of public purpose. There is less judicial activism in the sense that the courts do not limit openly what the legislative branch or the executive branch can do. There is, however, a great deal of judicial activity in respect of the courts' protection of property rights, albeit that this takes place on a case-by-case basis. The interpretation of the public purpose requirement by the Supreme Court in Mexico is a good example of this strategy, with judicial activity increased because the courts have to review every case and decide if the government has offered sufficient reasons to justify the expropriation. Since every aspect of the expropriation order can be reviewed, this has the unhappy effect that owners have incentives to challenge every expropriation order.

The third approach is more similar to the interpretation advanced by the American Supreme Court. Courts which adopt a strongly deferential attitude to legislative and administrative

branches present a low level of judicial activism because they do not seek to limit the activity of other branches of government. The courts that follow this strategy do not have to review so many cases because owners are aware that they can only seek review on very limited grounds.

In Mexico, courts have interpreted the public purpose requirement so that 'they, and not the political process, will decide who balances the societal benefits and detriments'[132] and they have decided to do so on a case-by-case basis. An initial problem with this judicial approach is that it increases the demand of recourse to the law and this strains the capacity of the courts to deal with this. In the past this increase in the demand in favour of litigation has led to serious delays because the courts simply could not cope with the workload. Significantly, as the courts try to deal with the increasing demand created by their interpretation of the public purpose requirement, they also struggle to achieve consistency in their interpretation of what can be considered a public purpose.

The second problem with the courts deciding what is public purpose is that the dynamics of litigation raise the costs of information and of participation. In expropriation cases the court can only get information from the owners who decide to challenge a decision and from the government, but the high participation costs prevent the participation of those who would benefit from it. The available information will be limited and it will have a severe bias towards those who are challenging the expropriation. This is particularly problematic if the owners argue that the expropriation does not serve a public purpose because then the Court has to consider factual information and evaluate it to decide if the government has justified the need to expropriate. For example, in an expropriation to build public housing where the owner argues that public housing is not needed, those who are likely to benefit from the

[132] Komesar, *Law's Limits* (n 14) 162.

project cannot participate during the litigation. The owners of an expropriated plot of land, as was the case of the *Pascual* Cooperative, are a minority but they have very high stakes and the government does not have the capacity to devote the same resources to each case in which public purpose is challenged. Therefore the adjudication process in these cases will tend to show a bias towards powerful minorities such as property owners.

Finally, a further problematic aspect with giving the responsibility of deciding what is a public purpose to the courts – as highlighted by comparative institutional analysis - is that the courts lack the expertise to make these decisions. In *Pascual* the Supreme Court's evaluation of the factual considerations that the Mexico City government presented to justify the expropriation was not very sophisticated. The judiciary has to face these same complications when it has to decide if expropriations to build a highway or to build an airport are justified. The reliance on judicial interpretation transforms the public purpose requirement into a strong 'giving reasons' requirement and forces courts to decide on complex technical issues which, arguably, they are not adequately trained to undertake.

To highlight the strength of the review of public purpose developed by the judiciary in Mexico it is helpful to compare the reasoning in these two decisions with the ruling of the United States Supreme Court in *Kelo* which was analysed in detail in Chapter 2.

5.6 Comparing *Kelo* and *Pascual*

In both cases decided by the Mexican Supreme Court, the legal questions are very similar to those posed in *Kelo*.[133] In *Kelo* two questions are addressed by the Court: first, the Court has to define if the legislative authority has violated property as a constitutional right by authorizing expropriation for the purpose of economic development; and second, whether the

[133] Stevens, '*Kelo V. New London (Opinion Of The Court)*' (23 June 2005) 545 US 469 (note).

plan put forward by the city of New London is reasonable enough to justify the specific expropriation.

In *Pascual*, the Courts had to decide first, if Congress has violated property as a constitutional right by authorizing expropriations that benefit companies, and, following from this, whether the concrete interpretation of the law by the administration complied with the law.

In these three cases, Pascual, Colima and Kelo, the Courts considered that the legislative branch had a broad discretion to determine what can be considered a public purpose that justifies the expropriation. In each case, the Courts decided against striking down the relevant law. The major difference is that Mexican courts are not influenced by a strong idea of administrative deference. This difference gives Mexican courts a very strong sense of power to determine in which cases a public purpose justifies the use of expropriation.

Furthermore, Mexican and United States courts differ in how they approach their review of the justification for the expropriation presented by the authorities. In *Pascual*, the Mexico City Government tried to build an argument in favour of the expropriation as part of a plan to avoid the effects on the local economy that would come from a plant closure. They considered that the Federal Expropriation Law gave them the power to undertake this expropriation.

In *Pacual* and *Kelo* a specific company was going to receive a lot of benefits: the *Pascual* Cooperative in Mexico and Pfizer in the United States, because they were going to be the main tenants in the new development. Mexico City Government and the City of New London justified their respective expropriations on the basis that they would serve to create jobs,

generate tax revenue and promote economic development and therefore should be considered as a valid public purpose.

After having decided that it would not adopt a 'bright-line rule' as proposed by the petitioners,[134] the United States' Supreme Court declared that it had a limited scope of review in these cases, citing *Midkiff* in which the Court declared that: '[W]hen the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings…are not to be carried out in the federal courts.' [135] In *Kelo* the Supreme Court confirmed its long-standing precedent of legislative deference in this type of review, and refused to adopt a heightened standard of review arguing that this would be very problematic.[136] The Court finally stated that 'we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project,'[137] an interpretation which has been heavily criticized by libertarian academics in the United States who would like to see a heightened standard of review to achieve stronger protection of property rights.[138]

The Mexican Supreme Court adopted a very strong giving reason requirement to the review of expropriation in which the public purpose is challenged of which *Pascual* is a good example. It recognized that the purpose of the legislative branch was legitimate and made clear in its discussion that the government could expropriate to create, conserve or promote

[134] ibid.
[135] Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) at 242.
[136] Richard A Epstein, 'Not Deference, But Doctrine: The Eminent Domain Clause' (1982) 1982 Sup Ct Rev 351, 352.
[137] *Kelo v New London* (n 138) 18.
[138] Kristi M Burkard, 'No More Government Theft Of Property - A Call To Return To A Heightened Standard Of Review After The United States Supreme Court Decision In Kelo V. City Of New London' (2005) 27 Hamline J Pub L & Pol'y 115; Epstein, 'Not Deference, but Doctrine' (n 141); Richard A Epstein, 'The Necessary History Of Property And Liberty' (2003) 6 Chapman Law Review 1; Richard A Epstein, 'Public Use In A Post-Kelo World' (2008) 17 Supreme Court Economic Review; Katherine M McFarland, 'Privacy And Property: Two Sides Of The Same Coin: The Mandate For Stricter Scrutiny For Government Uses Of Eminent Domain' (2004) 14 BU Pub Int LJ 143.

companies or, in the case of *Colima*, to create industrial parks, and promote tourism. In *Pascual*, the means to achieve this purpose were not irrational. However, the Mexican Supreme Court substituted their judgment and considered that in this case even if the expropriation could promote economic development, job creation and other important objectives, these objectives still failed to justify the use of expropriation. The Mexican Supreme Court second-guessed the Mexico City Government and gave legal status to what could be a policy disagreement on what is the correct role of the government in promoting economic development. In this decision the Mexican Supreme Court failed to offer any guidance as to what would constitute public purpose, and what procedures should be followed, including what evidence would be acceptable.

5.7 Conclusion

This Chapter provides a detailed analysis of the most representative cases in the last ten years in which the Supreme Court has interpreted the public purpose requirement. *Pascual* and *Colima* are perfect examples of two of the main elements in the Court's interpretation of the public purpose requirement.

In *Pascual* the Court completely ignored the administrative discretion of the Mexico City government and with limited information made a policy decision. The Court made a decision which had a significant impact on urban planning, fiscal policy and economic development.

It is paradoxical that the judiciary in Mexico has developed a very substantive giving reasons requirement, which does not apply to its own rulings. In *Pascual* the Court failed to give any guidance about what was needed to justify public purpose or what kind of evidence the government needed to produce. This result gives the judiciary a great deal of discretion so

that judicial interpretation of which reasons are sufficient to justify an expropriation are likely to vary considerably among different courts.

The *Colima* case provides an example of the strong aversion of the Supreme Court to make general declarations or strike down legislation. By analysing the discussions and the Supreme Court's interpretation it is reasonable to predict that in reality the Court will strike down almost every application of the challenged sections of the Colima Expropriation Law as it did in *Pascual* because there was not a situation in which an expropriation in favour of a private company could be considered as a public purpose. The Court in *Pascual* avoided striking down legislation and preferred a more discrete approach, by which the judiciary was not required to demonstrate the same level of justification that it would have had if it declared legislation unconstitutional.

Finally *Pascual* provides evidence of the political and social impact of this approach, as reflected in its coverage in the media. The political left reinforced its suspicion that formal legal institutions could not be trusted. This strong judicial review of expropriation not only hinders the government's capacity to act, but also puts the judiciary at the centre of policy debates in which the court decides with no more justification than other actors. Furthermore, the approach of the Court magnifies the impact because it offers very little justification for its decision.

In the following two Chapters I evaluate how the Supreme Court decided in cases where expropriations orders were challenged because compensation was delayed or it was not considered to be sufficient.

Chapter 6.

The Compensation Requirement in Mexican Law and Practice: An Introduction

6.1 Introduction

In this Chapter I analyse the legal and constitutional framework of compensation for expropriation in Mexico and the evolution of the decisions and of the precedents of the Supreme Court. The compensation requirement is the second substantive limit to the power of governments to use expropriation. The academic discussion on compensation in international law and in most countries has been monopolized by the question of how to identify limitations of property so strong that even if there has not been formal transfer of property compensation has to be paid.[1] In Mexico the Supreme Court developed a substantive body of decisions interpreting the compensation requirement as a substantive limit to the use of expropriation between 1917 and 1968. During this period the Mexican Supreme Court interpreted compensation as a constitutional right of the owners that guaranteed that even if there was a good reason for taking their property, they would not be forced to carry an excessive burden for the greater good.

The compensation requirement can be generally understood as the obligation to pay fair compensation when property is taken by the state. There are two elements of compensation which are problematic and on which courts and tribunals can be asked to decide. The first is how to calculate the value of the property taken and therefore how much compensation should be paid. This involves aspects such as how to calculate the economic value of

[1] Also known as regulatory takings.

buildings, of productive units, such as mines, agricultural lands or factories. Related to this is the question of what kind of value should be taken into account if the current use or the use permitted by law or the average price of neighbouring buildings.

The second relates to the moment at which compensation is taken and the form of payment. For example, does compensation have to be paid before property is taken or can it be paid afterwards? And if it can be paid after property is taken, how long can it be delayed? Is compensation to be paid in cash or is another form of payment acceptable?

In the case of Mexico the Supreme Court has barely discussed the first element, but there was a very rich discussion of the circumstances of compensation up to 1968. After that the Supreme Court abandoned this discussion and compensation was not a relevant topic until the 2000s. Between 2002 and 2006 the Supreme Court had to deal with a series of cases which highlighted the importance of compensation in expropriation cases. These were not traditional cases in which an owner challenged an expropriation on the grounds that it did not comply with the compensation requirement. For different reasons which will be analysed in the next chapter, compensation for land taken more than twenty years ago had to be calculated and this forced the Supreme Court to rule for the first time on how compensation should be calculated. These cases also highlighted the economic impact of judicial review of expropriation and the economic impact of quashing expropriation orders.

6.2 Constitutional framework of compensation

One of the most important modifications to expropriation practice that were part of Article 27 of the 1917 Constitution was that in the 1857 Constitution compensation had to be paid

before property could be taken.[2] The new wording of article 27 only demanded that compensation had to be paid, but it did not have to be paid before the property was taken.[3] The main concern of the Constitutional Assembly when Article 27 of the new Constitution was discussed was land redistribution and the solution to the agrarian problem.[4] Expropriations as an ordinary policy instrument to build infrastructure or the inclusion of property as a protected right were not discussed at all.[5] Agrarian reform needed a strong expropriation power, but to achieve this program of land reform an alternative arrangement on compensation was needed because otherwise the government would not have had the financial capacity to undertake such a program.[6] This is one of the main reasons that the in the new Constitution the phrase 'with compensation' replaced the previous wording which was 'previous compensation'.[7] Article 27 of the Mexican Constitution included a dual system for compensation in expropriation cases. In those cases in which expropriation was intended for land redistribution, compensation could be paid in instalments over 20 years with no more than 5 percent interest, and the owner was forced to accept government bonds if necessary.[8] For ordinary expropriations rules of compensation were established in the relevant legislation and it was limited by the Court's interpretation of the compensation requirement.

[2] Branch and Rowe (n 244) 116.

[3] Constitución Política de los Estados Unidos Mexicanos. Article 27. As Originally Published in the Official Federation Diary February 5, 1917.

[4] Pastor Rouaix, *Génesis De Los Artículos 27 Y 123 De La Constitucón Política De 1917* (Instituo Nacional de Estudios Históricos de la Revolución Mexicana 1959) vol 16.

[5] See 3.2 Expropriation in the Mexican Constitution

[6] See 3.2.3 Article 27 and Agrarian Reform

[7] Rouaix (n 547).

[8] Constitución Política de los Estados Unidos Mexicanos. Article 27. Section d) and e). As Originally Published in the Official Federation Diary February 5, 1917.

There remained some debate about the correct interpretation of the changes to the compensation requirement, but eventually most authors, along with the courts, accepted that it authorized the government to delay compensation.[9] This interpretation of the compensation requirement has been criticized as rendering compensation as a guarantee meaningless,[10] but academic literature largely ignored the early rulings of the Supreme Court which demonstrate that the courts did not simply accept that the payment of compensation could be delayed.

Article 27 also defined the standard that should be used to pay compensation. It determined that compensation should be calculated by reference to the property's fiscal value as registered in cadastral or revenue offices.[11] The specific elements of compensation in ordinary expropriations were established in federal and state legislation.

6.3 Compensation in Agrarian Law

By 1940, Mexico was going through a period of accelerated economic growth and it was obvious that there were some cases in which the government needed to expropriate land from *ejidos* to build schools, housing or infrastructure. This scenario was not considered when agrarian legislation was passed because authorities tend to consider land distribution as a permanent arrangement: land had been given to peasants and it was unthinkable for the

[9] Lucio Mendieta y Núñez, *El sistema agrario constitucional: explicación e interpretación del Artículo 27 de la Constitución política de los estados Unidos Mexicanos, en sus preceptos agrarios* (Librería de Porrua hnos y cía 1940) 71–74; Ignacio Burgoa, *Las garantías individuales* (Editorial Porrúa 1968) 451–52; Gabino Fraga, *Derecho administrativo* (Editorial Porrúa 1968) 400; Andrés Serra Rojas, *Derecho administrativo: doctrina, legislación y jurisprudencia* (Librería de M Porrúa 1968) 1004–05.

[10] Martin Díaz y Díaz, 'Proceso constitucional y relaciones de propiedad. Notas para el análisis del caso mexicano' (1987) 11 Revista de Investigaciones Jurídicas de la Escuela Libre de Derecho 195; Martín Díaz y Díaz, 'Esbozo para el análisis comparativo de las leyes de expropiación de México, España y Argentina' (1987). 7 Alegatos, 8; German Fernandez del Castillo, *La Propiedad Y La Expropiacion En El Derecho Mexicano Actual* (Segunda edición, Escuela Libre de Derecho, Fondo para la Difusion del Derecho 1987); Elizondo Mayer-Serra, *La importancia de las reglas Gobierno y empresario despues de la nacionalización bancaria* (n 22) 68; Katz, 'La Constitución y los derechos privados de propiedad' (n 22).

[11] See 3.2.4 Constitutional framework of expropriation

government to take it away. Until October 1940 there was no procedure to expropriate agrarian land which had been given to *ejidos*.

The 1940 reform established a special procedure to expropriate *ejido* land.[12] Among the most important differences between expropriations on ordinary property and expropriations on agrarian[13] property was how compensation was calculated. For the first time there was a different criterion in the Mexican legal system on how to pay compensation. Compensation in expropriation orders of agrarian land was paid at 'economic value', which was higher than that paid in the case of ordinary expropriations and it had to be paid immediately.[14]

The rules of compensation in agrarian property remained unaltered until 1971 when the passing of the Agrarian Reform Statute changed radically the compensation rules for expropriations in this context.[15] According to these new rules, compensation had to be paid at market value, taking into account the purpose of the expropriation.[16]Apart from the technical complexities of calculating market values in the future, this new requirement modified the date of valuation, having a major impact on the amount of compensation paid. Importantly, this can be seen as unjust from the point of view of the public.[17] In particular, owners could benefit from the increase of value brought by a government project without having invested anything. These rules were not modified until 1992 in which the Constitution was reformed

[12] Código Agrario de los Estados Unidos Mexicanos. Published in the Official Federation Diary October 29, 1940. Capítulo IX.

[13] I will use agrarian as a synonym of *ejido*.

[14] Código Agrario de los Estados Unidos Mexicanos. Published in the Official Federation Diary October 29, 1940. Article 169.

[15] Ley Federal de Reforma Agraria. Published in the Official Federation Diary April 16, 1971. Título Segundo. Capítulo Tercero.

[16] Ley Federal de Reforma Agraria. Published in the Official Federation Diary April 16, 1971. Article 121.

[17] Donald W Glaves, 'Date Of Valuation In Eminent Domain: Irreverence For Unconstitutional Practice' (1962) 30 U Chi L Rev 319, 347.

to officially end the process of agrarian reform and modify the legal regime of agrarian land.[18] A new agrarian law was passed which established that compensation had to be paid at market value.[19] Following the reforms to the Federal Expropriation Law in 1993,[20] there were no longer any substantive differences between the methods for calculating compensation for expropriations on agrarian land and all other land.

6.4 Compensation in Federal Expropriation Law

When the first Federal Expropriation Law was passed it authorised the government to pay compensation in instalments over a period of up to ten years.[21] This provision contradicted settled precedent established by the Court since 1917. In fact just two months before the Federal Expropriation Law was passed the Court had declared that the Veracruz Expropriation Statute was unconstitutional because it authorized paying compensation in instalments during a 20 year period.[22] The federal legislation went against the Court's interpretation of the Constitution and in fact the Court would later declare it unconstitutional on the same grounds as the Veracruz statute.[23] The legislation also confirmed that compensation had to be paid at a fiscal value. In theory this legislation prohibited judicial review, but it became obvious that the Mexican courts decided to sidestep this prohibition, although the rationale for ignoring this prohibition was never expressly articulated.

[18] See 3.2.3 Article 27 and Agrarian Reform

[19] Ley Agraria. Published in the Official Federation Diary February 26, 1992. Article 94.

[20] Ley Federal de Expropiación. Article 20. Published in the Official Federation Diary November 25, 1936. Reformed December 22, 1993.

[21] Ley Federal de Expropiación. Article 20. As Originally Published in the Official Federation Diary November 25, 1936. Last reformed January 27, 2012.

[22] *Amparo* en Revisión. 6403/1935. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 21 September 1936.

[23] *Amparo* en Revisión. 2318/1942. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 19 September 1946.

The Federal Expropriation Law remained unchanged for almost sixty years, but it was modified just before the North American Free Trade Agreement (NAFTA) came into effect. These two modifications to the compensation regime went largely unnoticed at the time, but they radically changed the nature of compensation. Article 10 of the Federal Expropriation Law was modified and it redefined the standard of compensation without having to reform the Constitution. The modified article 10 stated:[24]

> The price to be fixed as compensation for the expropriated good will be equivalent to the commercial value established and in no case can it be inferior in the case of real property, to the fiscal value recorded in the cadastral or revenue offices.

This new standard of compensation was based upon market value rather than fiscal value. Commercial value was much higher because owners did not declare the full value of their properties to reduce their taxes and the municipal governments who were responsible for collecting property taxes did not have the institutional capacity to keep an updated record of property values.[25] Article 20 of the Federal Expropriation Law was also modified and it forced the government to pay no later than a year after the property was taken. The new article 20 stated that:[26] 'Compensation must be paid in national currency in no more than a year after the order is published.' Article 20 of the Federal Expropriation Law was modified again in 2009 to reduce to forty five days the delay between the time property is taken and the payment of compensation.[27]

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[24] Ley Federal de Expropiación. Article 10. Published in the Official Federation Diary November 25, 1936. Last reformed December 22, 1993 .

[25] Erasmo Arceta Morales, 'Entrevista con el Ingeniero Erasmo Arceta Morales' (In person, 4 March 2013)

[26] Ley Federal de Expropiación. Article 20. Published in the Official Federation Diary November 25, 1936. Reformed December 22, 1993.

[27] Ley Federal de Expropiación. Article 20. Originally Published in the Official Federation Diary November 25, 1936. Reformed June 5, 2009.

The result of these changes meant that the legal framework in Mexico has evolved towards granting stronger protection to property rights. There is a common assumption that until 1994 property rights in Mexico were poorly protected and that this increased protection was necessary due to the inability of courts to defy government orders.[28] However, there has been little attention paid to how the courts actually decided in these types of cases.

6.5 The compensation requirement in the Supreme Court

There were two basic debates in the early cases which reached the Supreme Court. The first concerned whether compensation needed to be paid immediately. The second was whether compensation had to be paid in cash. The majority of the cases in which the compensation requirement was challenged were expropriation orders to break large estates and distribute land among peasants.

The Supreme Court's rulings on the compensation requirement are less varied than public purpose requirement rulings as can be seen in Figure 10

[28] Patrick Del Duca, 'The Rule Of Law: Mexico's Approach To Expropriation Disputes In The Face Of Investment Globalization' (2003) 51 UCLA L Rev 35.

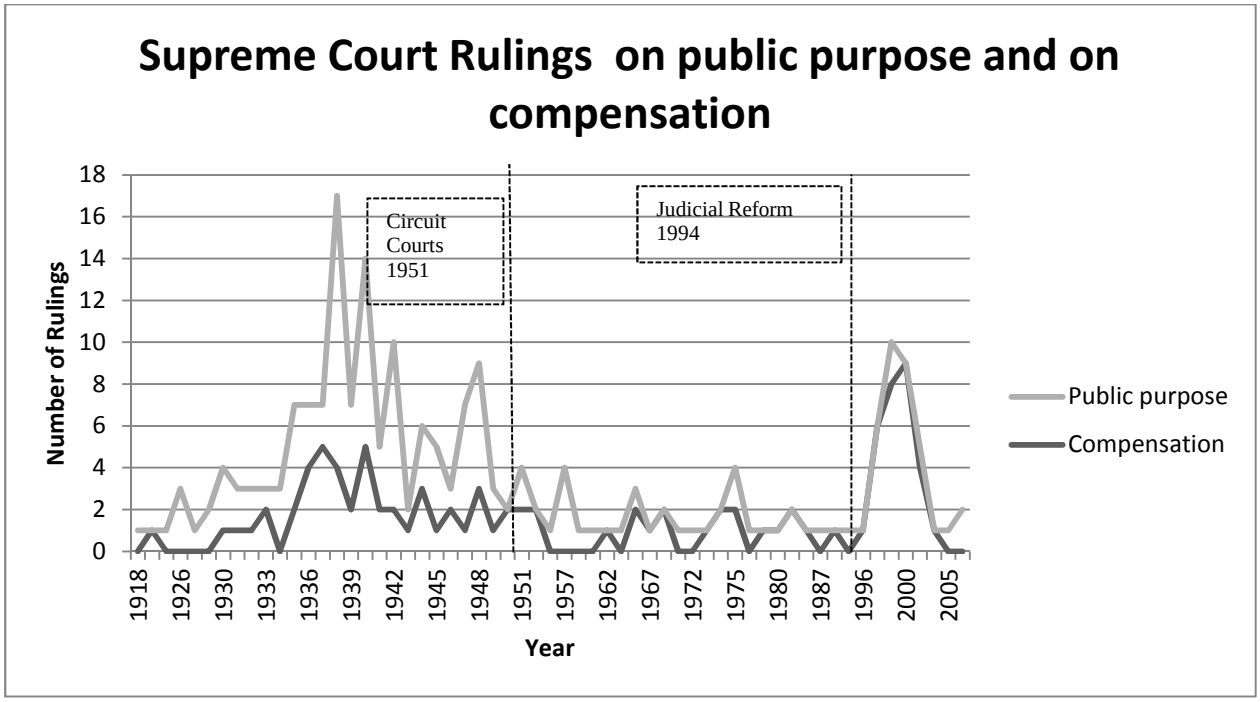

Figure 10

In the majority of cases, the Supreme Court had to decide on the circumstances of compensation. As I mentioned previously, the most relevant question was if compensation could be paid in instalments and if it could be paid using credit instruments instead of cash.

Compensation cases were much more likely to deal with the constitutionality of legislation as can be seen in Figure 11.

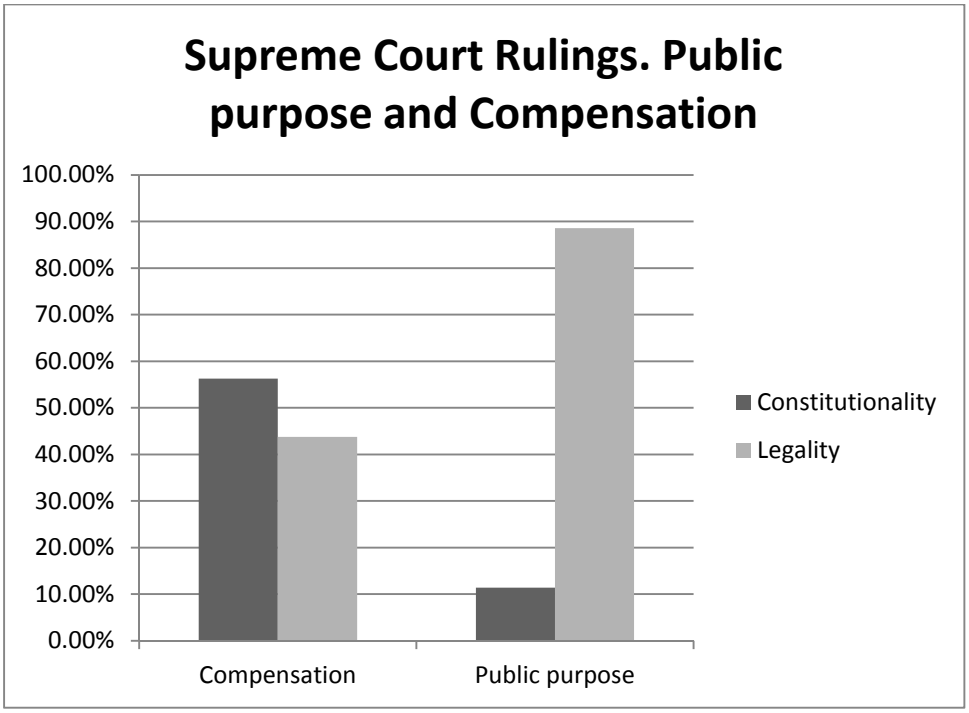

Figure 11

Until 1968 the Supreme Court upheld the criteria that statutes that authorized payment of compensation in instalments in ordinary expropriations were unconstitutional and that counts for the majority of cases in which the Supreme Court decided on constitutionality grounds. In all of these cases the legislation that established how compensation had to be paid was challenged. There is therefore a considerable difference when we compare how the Supreme Court decided in cases where it was asked to strike down legislation and in those cases in which the claimants challenged only the expropriation order as can be seen in Table 9.

Supreme Court Rulings in Compensation Cases. Difference between constitutionality and legality			(N)
	Upholds expropriation order	**Quashes expropriation order**	
Constitutionality	53.70%	46.30%	51
Legality	30.95%	69.05%	45
Total	**43.75%**	**56.25%**	**96**

Table 9

In the cases in which only the expropriation order was challenged surprisingly there was no debate about how to assess compensation. Therefore the Supreme Court never ruled on the standards that should be used to pay compensation. Claimants who challenged expropriation orders on the grounds that they did not comply with the compensation requirement could argue only that the statute was unconstitutional or that no compensation had been paid. If only the expropriation order was challenged, there was no room for interpretation. Such cases did not pose any complex legal questions because the questions on which the Supreme Court had to rule in these cases were if compensation had been paid or if compensation had been established in the expropriation decree. The following analysis focuses on the evolution of the Supreme Court's decisions on such matters.

6.5.1 Land redistribution and compensation 1917-1933

The 1917 Mexican Constitution established special rules for compensation when expropriation was used for land redistribution, but in the early years after the Constitution was passed there was little clarity about who could undertake land redistribution programs, and what were the requirements that these programs had to meet. State and Federal Governments had different and sometimes contradictory approaches to land redistribution in

these early years.[29] It was evident that in land redistribution cases compensation could be paid in instalments over a long period of time, but State and Federal governments tried to delay compensation even in those cases in which expropriation was not used for land redistribution.

The first precedent on the compensation requirement was published by the Supreme Court in 1919, and this stated that compensation had to be paid before property was taken. According to the Supreme Court: 'Expropriation can be understood as a compulsory sale and it is natural law that in contracts of sale, the exchange of the price and goods is done simultaneously and any modification to this has to be agreed by the parties.'[30] This interpretation meant that the government had to pay compensation before taking possession of the expropriated property, or at least at the same time. The Supreme Court continued this line of interpretation in the next precedent published in 1921 in which it declared that 'the compensation requirement means that when an expropriation is ordered there can be no uncertainty about compensation, and it has to be covered at the same time that expropriation takes place. Those statutes that order something different violate constitutional rights.'[31] Accordingly, even if the Constitution had been modified and it no longer required compensation to be paid before property was taken by the government, it still had to be simultaneous with the transfer of property. The Supreme Court declared in 1921:

> Even if Article 27 of the Constitution does not require compensation to be paid before property is taken, it also does not authorize indefinite delays, and as a result it must be inferred that, in fact, expropriation and payment of compensation have to be simultaneous. Even if we assume mistakenly that the payment of compensation could be delayed, it is evident that it should be guaranteed in a precise and real way because

[29] See 3.2.3 Article 27 and Agrarian Reform
[30] EXPROPIACIÓN, Pleno, Semanario Judicial de la Federación, Quinta Época, Registro No. 810,381.
[31] EXPROPIACIÓN, Pleno, Semanario Judicial de la Federación, Quinta Época, Registro No. 810,244.

without this guarantee, expropriation would be a confiscation that our Constitution does not authorize.[32]

The Supreme Court continued to struggle to develop a consistent interpretation of the compensation requirement in the following years. It started to accept that in the case of expropriations involving the redistribution of land, compensation did not have to be paid simultaneously when property was taken and could be paid in instalments. For example, in 1930, the Supreme Court ruled that a Zacatecas statute, which established that compensation could be paid in instalments over 20 years for expropriations for land distribution was constitutional and, therefore, it upheld the expropriation order based on this statute.[33] This interpretation was confirmed in 1933 in a case concerning the State Government of Veracruz's expropriation of a large land-holding for the purpose of redistribution: the Supreme Court ruled that compensation could be paid in instalments over a 20 year period.[34]

6.5.2 Defending the compensation requirement as a constitutional right: 1933-1968

Article 27 of the Mexican Constitution underwent a major reform in January 1934. The reform centralized the process of agrarian reform and land redistribution which became federal jurisdiction with the President as the supreme agrarian authority. Following this only the Federal Government could expropriate land for the purpose of its redistribution, thus making the difference between ordinary expropriations and those for land redistribution much clearer.[35] This reform also limited the jurisdiction of the courts to review expropriation orders

[32] *Amparo* en Revisión. 267/1918. Pleno de la Suprema Corte de Justicia de la Nación. Decided 9 March 1921.

[33] *Amparo* en Revisión. 2647/1922. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 16 August 1930.

[34] *Amparo* en Revisión. 302/1927. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 15 August 1933.

[35] Decreto que Reforma el Artículo 27 de la Constitución Política de los Estados Unidos Mexicanos. Published in the Official Federation Diary 10 January 1934.

for land redistribution.[36] The Supreme Court reacted to this limitation to their jurisdiction by returning to distinguishing between ordinary expropriations and those for land redistribution. It accepted that it did not have jurisdiction in expropriations for land redistribution but in ordinary expropriations it adopted a stricter interpretation of the compensation requirement. Initially it ruled that compensation had to be, at least, established in expropriation order.

The Supreme Court continued to adopt this interpretation of the compensation requirement as a formal requirement, even if compensation was not paid simultaneously with the property transfer, as can be seen in a series of cases between 1933 and 1935. [37] According to the Supreme Court, the fact that an expropriation order did not expressly acknowledge that compensation had to be paid or how it was going to be paid was a violation of the compensation requirement.[38]

In 1936, the Supreme Court took a further step in its restrictive interpretation of the compensation requirement moving away from an understanding of it as a formality to a more substantive understanding, by requiring that in ordinary expropriations compensation had to be paid at the same time that property was taken. For instance, the Supreme Court quashed an expropriation order made by the Veracruz State Government to build an educational centre on the grounds that the State's Expropriation Law was unconstitutional. In its ruling, the Court held that this was the case because it authorized the government to pay compensation in instalments over a 20 year period. The Supreme Court reasoned that the compensation

[36] See 3.2.3 Article 27 and Agrarian Reform

[37] *Amparo* en Revisión. 1056/1932. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 January 1933.

Amparo en Revisión. 2143/1932. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 14 June 1935.

Amparo en Revisión. 2894/1933. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 30 November 1935.

[38] *Amparo* en Revisión. 1056/1932. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 January 1933.

requirement was a constitutional right that protected property owners, guaranteeing that they were indemnified for their loss. If compensation was paid in small instalments over a 20 year period, compensation would become meaningless because the owner would have access to only small quantities every year, which would not allow him to restore fully his assets. The Supreme Court admitted that the Constitution allowed payment of compensation in instalments, but considered it an exception which the Court would allow only in those cases expressly authorized by the Constitution.[39] This case marked the adoption of a very restrictive reading of the compensation requirement by the Supreme Court. According to this interpretation, all statutes that did not order compensation to be paid simultaneously to the expropriation order were unconstitutional. Applying this criterion, the Supreme Court declared unconstitutional several state statutes and two federal ones as can be seen in Table 10.

[39] *Amparo* en Revisión. 6403/1935. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 21 September 1936.

State	Legislation Declared Unconstitutional
Nuevo Leon	*Ley de Expropriación por Causa de Utilidad Pública*[40]
Sinaloa	*Decreto Número 90 expedido por el Congreso del Estado de Sinaloa*[41]
Tlaxcala	*Ley de Expropiación del Estado de Tlaxcala*[42]
Veracruz	*Ley de Expropiación del Estado de Veracruz*[43]
Zacatecas	*Ley de dotaciones del Fundo Legal a los Centros Poblados Solicitantes de Ejidos o de Fraccionamientos*[44]
Federation	*Ley de Planificación y Zonificación para el Distrito Federal y Territorios Federales*[45] *Ley de Federal de Expropiación*[46]

Table 10

[40] *Amparo* en Revisión. 1868/1945. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 18 February 1946.

[41] *Amparo* en Revisión. 6793/1937. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 6 May 1938.

[42] *Amparo* en Revisión. 2002/1938. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 26 August 1938.

[43] *Amparo* en Revisión. 6403/1935. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 21 September 1936.

Amparo en Revisión. 8498/1936. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 7 July 1937

Amparo en Revisión. 1706/1933. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 3 August 1937.

Amparo en Revisión. 3773/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 23 October 1939.

Amparo en Revisión. 2976/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 7 December 1939.

Amparo en Revisión. 7630/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 13 May 1940

Amparo en Revisión. 4566/1940. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 20 September 1940

Amparo en Revisión. 4562/1940. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 17 March 1941

Amparo en Revisión. 615/1943. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 23 August 1944

[44] *Amparo* en Revisión. 246/1936. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 22 October 1936.

[45] *Amparo* en Revisión. 3040/1934. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 1 April 1938.

Amparo en Revisión. 5552/1948. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 11 October 1948.

Amparo en Revisión. 9482/1949. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 3 May 1950.

[46] *Amparo* en Revisión. 2318/1942. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 19 September 1946.

Amparo en Revisión. 7735/1945. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 19 November 1948.

Amparo en Revisión. 2443/1960. Pleno de la Suprema Corte de Justicia de la Nación. Decided 26 April 1966.

Amparo en Revisión. 1556/1995. Primera Sala de la Suprema Corte de Justicia de la Nación. Decided 29 March 1996.

The impact of these declarations of unconstitutionality was limited because, as previously explained,[47] the effects of *amparo* suits were limited to the petitioners. The federal judiciary could only declare that legislation was unconstitutional and quash the challenged expropriation decree, but it was for congress to modify legislation. In the meantime such legislation remained effective. The federal judiciary interpretation published as precedent was, however, mandatory for all federal courts. This meant that if anyone challenged an expropriation order on the same grounds, the expropriation order would be declared invalid or compensation would have to be paid immediately.

In the cases in which the Court had to review an expropriation order on the grounds that compensation had not been properly calculated, the only identifiable trend was that the Supreme Court interpreted the value established as compensation in the Constitution as a minimum, but in certain cases other criteria which paid more to the owners could be applied. In some cases, the Court ruled that the government had to pay market value because it had started negotiations with the owners and failed to present evidence that they were refusing to sell.[48] In others, the Court held that the government had to pay market value when the owners presented evidence that their neighbours had received compensation calculated with this value.[49]

On 18 March 1938 President Lazaro Cárdenas ordered the expropriation of all foreign oil companies in Mexico, which were American, British and Dutch, culminating a protracted dispute between oil workers and oil companies in which the defining moment was the refusal

[47] See 3.4 Judicial review in Mexico

[48] EXPROPIACIÓN EN JALISCO, VALOR DE LOS CONVENIOS PARA EL PAGO DE LOS TERRENOS MOTIVO DE LA. Segunda Sala, Semanario Judicial de la Federación, Quinta Época, Registro No. 325,460.

[49] EXPROPIACIÓN, FORMA DE PAGO. Segunda Sala, Semanario Judicial de la Federación, Quinta Época, Registro No. 267,083.

of the companies to comply with a labour ruling from the Mexican Supreme Court.[50] The companies challenged the expropriation order and in its ruling the Supreme Court had to compromise its interpretation of the compensation requirement.[51] The Court had to justify why compensation could be paid in instalments after they had clearly established that this could be done only in those cases expressly authorized by the Constitution.[52] The Supreme Court was aware that declaring this expropriation as constitutional contradicted its previous interpretation, meaning that it was forced to make a substantial effort to justify its decision.

In its ruling in this case, the Supreme Court introduced three categories of public purpose,[53] and it declared that if an expropriation was made to promote social or national interest, compensation could be delayed because the national interest could not be limited by economic considerations.[54] The Supreme Court supported this position by citing extensively from rulings in American Courts[55] and from German doctrine and legislation.[56] A simplistic reading of this ruling is that the Supreme Court was too weak to challenge the executive branch. This does not explain, however, why it considered it necessary to give such an extensive justification of a decision which was not only supported by the Federal

[50] Jesús Silva Herzog, *Historia De La Expropiación De Las Empresas Petroleras* (Instituto mexicano de investigaciones económicas 1973); Alan Knight, 'Cardenismo: Juggernaut Or Jalopy?' (1994) 26 Journal of Latin American Studies 73, 87.

[51] *Amparo* en Revision. 2902/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 2 December 1939.

[52] Only in expropriations for agrarian reform.

[53] See 4.4.3 The great expropriations and the stabilization of the interpretation of the public purpose requirement 1934-1940These three categories are discussed in Chapter 4.

[54] *Amparo* en Revision. 2902/1939. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 2 December 1939. P 37.

[55] These were the cases cited by the Supreme Court: '*Cherokee Nation V. Southern Kansas R. Co.*' (1890) 135 641 (note); '*Sweet V. Rechel*' (1895) 159 380 (note); '*Backus V. Fort Street Union Depot Co.*' (1898) 169 557 (note); '*Williams V. Parker*' (1903) 188 491 (note); '*Crozier V. Krupp AG*' (1912) 224 290 (note); '*Joslin Mfg. Co. V. Providence*' (1923) 262 668 (note); '*Haverhill Bridge Props. V. Essex Country Commrs.*' (no date) 103 120 (note).

[56] The court relied upon and quoted material from this book: Fritz Fleiner, *Instituciones de derecho administrativo* (Labor 1933).

Government, but was also genuinely popular.[57] This effort to justify its decision is consistent with the position held by the Court throughout the Cardenas administration in which it constantly quashed expropriation orders made by the Federal and State governments. The Court accepted the validity of the oil expropriation, whilst simultaneously continuing to decide against the government in other expropriation cases, including declaring that the Federal Expropriation Law was unconstitutional because it allowed compensation to be paid over a period of up to 20 years.[58]

6.5.3 The defeat of the interpretation of the compensation requirement as a constitutional right: From 1968

President Cardenas tried to control the Supreme Court by dismissing all the existing Justices and appointing new ones in 1934,[59] but the Court continued ruling against the government in expropriation cases and even daring to declare the unconstitutionality of federal statutes. Magaloni presents an account of the evolution of the compensation requirement in which it would appear she contends that after President Cardenas appointed all the new members of the Court it abandoned its interpretation of the compensation requirement. She writes '[A]fter numerous conflicts that entailed the government's refusal to adequately compensate property owners whose lands were expropriated, the Court established the criterion that it was legal to expropriate with a mere promise to compensate, leaving citizens at the mercy of government abuse.'[60] This assertion is inexact because the Court upheld the criteria that compensation had to be paid simultaneously until 1968, which is 28 years after President Cardenas finished his

[57] Knight, 'Cardenismo' (n 595) 87–88.

[58] *Amparo* en Revisión. 2318/1942. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 19 September 1946.

[59] Domingo (n 20) 712–13.

[60] ibid 193.

term.[61] Additionally Magaloni's account of the evolution of the compensation requirement is inaccurate. She writes the following account of the evolution of Article 27 of the Constitution:

> 'The original wording of article 27 was that expropriation should be carried out *previa indemnizacion* (through compensation that should be given prior to the expropriation).The Court established, however, that expropriations could be carried out *mediante indemnizacion* (through compensation). The constitutional article was later changed to adjust this subtle wording difference, which would allow ample leeway to expropriate by promising a noncredible and unenforceable future compensation'.[62]

In fact the 1917 Constitution from the moment it was passed stated that expropriations could be carried out through compensation and this wording has not been modified since 1917.[63] In fact the process was exactly the opposite as has been described in this chapter. The Constitution established that compensation could be delayed, but until 1968 the Supreme Court interpreted the compensation requirement as a constitutional right and restricted the capacity of the government to delay compensation. This is evidence of the complex and at times tense relationship between the judiciary and other branches of government.

In 1958 a constitutional reform was passed that modified the internal structure of the Supreme Court to make it more difficult for it to declare statutes unconstitutional.[64] This time the attempt to limit the power of the Supreme Court was more successful and this is

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[61] *Amparo* en Revisión. 964/1965. Pleno de la Suprema Corte de Justicia de la Nación. Decided 1 October 1968.

[62] Ginsburg, 'Administrative Law and the Judicial Control of Agents in Authoritarian Regimes' (n 302) 193.

[63] The original versión of the 1917 Constitution can be consulted at: Cámara de Diputados, 'Constitución Política De Los Estados Unidos Mexicanos. Publicación Original' (5 February 1917) <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum/CPEUM_orig_05feb1917.pdf> accessed 19 May 2014.

[64] See 3.4.1 Organization of federal judiciary

particularly evident in compensation requirement cases. For example, in 1966, the Court's interpretation of the compensation requirement, that compensation had to be paid simultaneously to the transfer of property in ordinary expropriations, was on the brink of being abandoned. In a ruling also in that year, the interpretation that held that a statute authorising payment of compensation in instalments over 20 years was unconstitutional barely survived. In this case a district judge applied the criterion developed by the Court and quashed an expropriation order. The Federal Government appealed this decision and the majority upheld the decision of the lower court on a technicality. They argued that the appeal had some formal errors and in this way they avoided having to declare whether they still considered that the Federal Expropriation Law was unconstitutional. There were two strong dissenting opinions which argued that the Court should not hide behind technicalities and that they should abandon the previous interpretation and declare that the Federal Expropriation Law was constitutional.[65]

In 1968 an owner challenged an expropriation order issued by the state of Veracruz to build an industrial school on the grounds that the Veracruz Expropriation Law was unconstitutional because it authorized the payment of compensation in instalments over a period of up to 10 years. The Court ruled on the contrary, upholding the expropriation order as valid even if compensation was deferred. In its ruling the Court finally modified its previous criteria and accepted that a statute that authorized payment of compensation in instalments over 10 years was constitutional. The Court did not offer much justification for its decision. Its argument was that: 'expropriation is an instrument used when there is an urgent social need and this cannot be limited by the financial capacity of the State. If the government cannot pay

[65] *Amparo* en Revisión. 2443/1960. Pleno de la Suprema Corte de Justicia de la Nación. Decided 26 April 1966.

immediately, the collective benefit that the expropriation will achieve overrides the individual interest of the owner.'[66] The Court therefore abandoned its interpretation of the compensation requirement as protection for property owners and from then on the Court accepted that the government could defer paying compensation. The Court never modified this deferential interpretation of the compensation requirement and it refused to declare legislation unconstitutional on account of its failure comply with the compensation requirement, even though the Court continued adjudicating cases in which the same issue was challenged as can be seen in Figure 12.

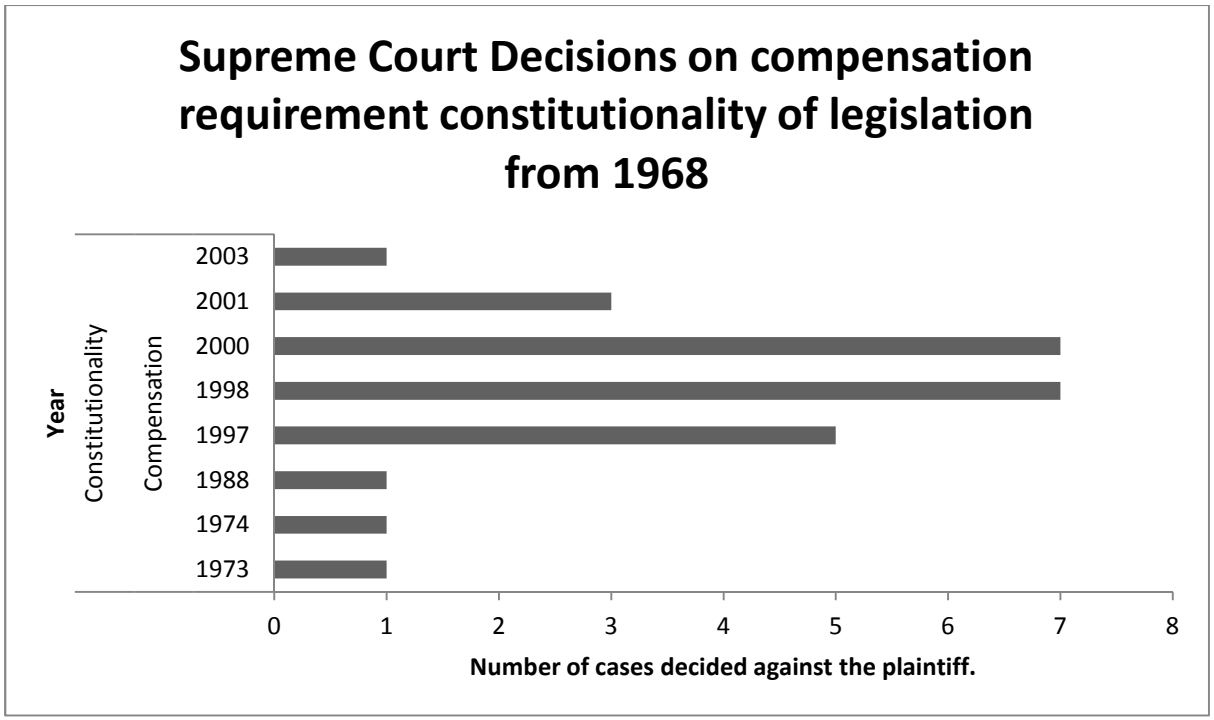

Figure 12

In 1994, the Federal Expropriation Law was modified to establish the obligation of the government to pay compensation within a year of the formalization of the expropriation

[66] *Amparo* en Revisión. 964/1965. Pleno de la Suprema Corte de Justicia de la Nación. Decided 1 October 1968.

order[67] as part of the sweeping program of reforms brought by the incorporation of Mexico to the North American Free Trade Agreement.[68]

6.5.4 The transformation of the compensation requirement into a political instrument

During this period the Court avoided any substantive interpretation of the compensation requirement. The only limit was that compensation had to be paid at some point and the minimum value was that established for tax purposes. The Court was extremely deferential in its interpretation of the compensation requirement. However the judiciary still played a major role because in those cases in which owners disagreed with the compensation they could still challenge it and in the end collegiate circuit courts had to decide what was to be paid as compensation. This was a very technical discussion, in which different methods of valuation were applied with very different outcomes arrived at.

The interviews I have conducted suggest that the compensation requirement was transformed from a legal into a political problem by the government and therefore it was solved politically. The interviews conducted with various actors who had a role in determining compensation confirm that there was a constant struggle to adjust the compensation requirement to political necessities. Dr. Ramírez Favela who had a major role[69] in determining compensations in expropriation cases for the federal government, described several cases in which he was summoned by government officials and asked to increase the valuation to increase what would be paid as compensation to avoid political problems. He explained that when the Aguamilpa Dam was built and the government had to pay

[67] *Ley Federal de Expropiación*. Article 20. Published in the Official Federation Diary November 25, 1936. Last reformed June 5, 2009.
[68] David Schneiderman, 'Investment Rules And The New Constitutionalism' (2000) 25 Law & Social Inquiry 757, 765.
[69] Ramírez Favela interview (n 311).

compensation, it faced a major problem because the land, owned by Huichol Communities, consisted of only steep ravines with no market value. The government had arrived at a number which was small, but which was still higher than what he considered could be justifiably paid for the land which had no value in commercial terms. However, he received a call from the Nayarit Governor because the communities were unhappy with the compensation and they were supported by government officials from the National Indigenous Institute. He was asked and agreed to attend a meeting with the communities to hear their complaints, but refused to pay a higher level of compensation because that would create a precedent. However, he found a way to get past this obstacle by asking the National Electrical Commission, who were in charge of building the dam, to give a donation to the community as support. This meant that he could avoid setting a precedent of valuation being increased in such cases.

In general terms, the interviewee explains that he came under pressure to increase the valuation to pay more compensation because the majority of government officials, when faced with opposition, tried to increase the amount to be paid. More compensation was likely to be paid when they were facing organized communities as was the case with the Aguamilpa Dam, or when they had lost a case, for example when the courts had declared that an expropriation order was invalid, as was the case of the earthquake expropriations.[70] In such cases it was politically impossible to comply with these rulings because property had already been transferred, so the government increased the compensation paid to reach an unofficial settlement with the owners.

[70] See 3.7 Impact of Judicial Review of Expropriation.

In the following years compensation became an important issue in two types of cases and for the same reasons. First there were rulings in which the federal judiciary had quashed expropriation orders and therefore the government, in theory, had to restore the property in question to the original owner. The problem was that these cases had sometimes been decided after ten or more years and in the majority of cases had been built upon; demolishing buildings prior to giving the land back was highly unlikely. Calculating what was the commercial value of the land twenty or more years ago is an incredibly complex task, as seen in the case of the National School of Anthropology, discussed in the following chapter.

The second types of cases are those in which compensation had not been paid or where there was no register that compensation had been paid. Salvador Lucio[71] explained that this problem was faced by the Federal Transport Ministry, with communities claiming that they had never been compensated for the taking of their land to build highways. Even if such expropriations took place more than 40 years ago, according to agrarian law communities can still seek judicial review. The interviewee accepted that 'it may be true that compensation was never paid, or maybe we paid, but we kept no record of it.' Erasmo Arceta Morales also confirmed that compensation for old expropriations was a major problem for the federal government: 'we are working on valuations of expropriations that took place in the 30s. The truth is that if the federal government was asked to pay all that it owes in compensation for expropriation, the whole federal budget would not be enough.'[72] Such cases sometimes reach the courts which are then faced with the challenge of calculating compensation in these complex situations which have little to do with traditional compensation requirement cases.

[71] Lucio interview (n 318).

[72] Arceta Morales interview (n 568).

6.6 Conclusions

The Supreme Court interpreted the compensation requirement as a means of protecting property until 1968, thus declaring unconstitutional several state and federal laws. This approach highlighted the limited power of the judiciary in an authoritarian context, because the political system eventually forced the Court to modify its interpretation and accept that compensation could be paid in instalments over a ten year period.

The Court appeared to accept that striking down legislation was too confrontational and that government officials would not allow this type of review. As a result, the Supreme Court exercised ‘strategic deference’, abandoning any attempt to adopt a substantive interpretation of the compensation requirement. Instead, the Court seems to accept that compensation was more a political than a legal question and therefore they avoided dealing with it, whilst at the same time adopting a strong standard of review of the public purpose requirement and of adherence to procedural requirements. The Court reacted to the pressure being applied by the political system by moving towards more formalistic interpretations. This strategy was successful up to a point and the judiciary was able to maintain a certain degree of independence and to develop an effective system of judicial review. The problem was that this formalistic approach meant that the judiciary was unwilling to consider the implications and the impact of their decisions. The lack of awareness of the impact of their decisions was evident in three cases analysed in detail in the following Chapter.

Chapter 7.

Case Studies on Compensation: Legal and Media – Based Analysis

7.1 Introduction

In the previous Chapter I explained how the Supreme Court abandoned its interpretation of the compensation requirement as a substantive limitation to the government's power to use expropriation. However, this does not necessarily mean that the judiciary had no role to play in establishing the level, type and date of compensation awards. Owners could still challenge the amount of compensation paid but the judiciary failed to establish any general criteria on how it should be paid and these cases in any event never reached the Supreme Court.

After being forced to abandon its substantive interpretation of the compensation requirement in 1968 the Supreme Court did not produce a major ruling on compensation in the next thirty years. It just followed the official governmental line that compensation could be paid in instalments. The Supreme Court was never called to decide exactly what should be included as part of the compensation award, an important issue which, in contrast, has been commonly discussed in judicial proceedings in other jurisdictions. This raises the question to what type of compensation should owners of expropriated lands be entitled?

The importance of the discussion on how to calculate compensation became apparent in a series of cases decided by the Supreme Court between 2001 and 2006 in which the payment of exorbitant compensation was at stake. These cases have had major political and social implications. These cases did not reach the Supreme Court following the traditional path of judicial review, in which an expropriation order was challenged because it did not comply with the compensation requirement. Rather, the three cases analysed in this chapter reached

the Supreme Court through a special procedure called 'non-compliance incident'. This procedure was established to deal with those cases in which the authorities have not complied with a ruling. In this procedure, the Supreme Court had to decide if the authorities had complied or not with the ruling. This procedure was often used as a final threat to force authorities to comply. The government never openly defied a ruling before 1994; it just delayed its implementation and in the majority of cases tried to negotiate with the owners to get them to accept compensation instead of giving the land back. In two such cases, expropriation orders had been quashed for procedural reasons by federal courts and therefore the property had to be given back to the owners.[1] In the other case, the ruling only ordered the government to pay compensation.[2] These three cases reached the Supreme Court as non-compliance incidents because the authorities could not pay or were not willing to pay the high level of compensation awarded by the judiciary. In two of the cases the authorities—for the first time—openly defied a judicial ruling. This increased the tensions and distrust between elected left-wing politicians and the judiciary, leading to accusations that the left-wing political parties and their candidate for the presidential elections were not committed to the rule of law.

In the first section of this Chapter I explain two key features of these cases: the problem of non-compliance and the nature of urban development and the use of expropriation. In the second section I analyse the cases in detail. In the third section I examine the representations

[1] Incidente de Inejecución de Sentencia. 62/2000 Pleno de la Suprema Corte de Justicia de la Nación. Decided 24 March 2004.

Incidente de Inejecución de Sentencia 53/2002. Pleno de la Suprema Corte de Justicia de la Nación. Decided 21 February 2005.

[2] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 2002.

of these cases in the media as a means to appreciate their political impact and understand the connections between their legal and political implications.

7.2 The problem of non-compliance

Either as a form of constitutional control or as a form of judicial review, one of the major challenges in the *amparo* procedure has been how to enforce rulings made by the courts.

The most common remedy granted by the federal judiciary in expropriation cases when it ruled against the government was restitution. Anecdotal evidence suggests that the compliance in expropriation cases was often delayed. As a result, non-compliance incidents were initiated in many cases to try to force the authorities to comply with the courts' rulings. The 1917 Mexican Federal Constitution contained a strong sanction in cases in which government officials failed to enforce an *amparo* ruling. In those cases in which an authority did not comply with a court judgment, the government official responsible would be removed from their post and brought before a district judge for arraignment on charges of crimes against the administration of justice.[3] This punishment followed a special procedure in which once all appeals had been exhausted, the district judge, who had originally decided the case, had to verify that the ruling was enforced.[4] If it was not enforced, the judge required the respective authorities to comply;[5] if this was unsuccessful, the judge referred the incident to the Supreme Court. The Supreme Court then decided if the authority should be removed from

[3] Constitución Política de los Estados Unidos Mexicanos. Article 107. Section XI. As Originally Published in the Official Federation Diary 5 February 1917.

[4] The procedure described has remained relatively unchanged since 1936 and it is regulated in articles 104-106 of the *Amparo* Federal Law. As originally published January 10, 1936.

[5] Richard D Baker, *Judicial Review In Mexico : A Study Of The Amparo Suit* (Latin American monographs / University of Texas at Austin. Institute of Latin American Studies, Published for the Institute of Latin American studies by the University of Texas P 1971) 241; Stephen Zamora and others, *Mexican Law* (Oxford University Press 2005) 273.

her post and placed under the jurisdiction of the public prosecutor to be consigned on charges of crimes against the administration of justice.[6]

There have been only two major modifications to the procedure described above. In 1980, a reform was passed which, for the first time, allowed claimants to ask for compensation in those cases in which a decision could not be enforced because the damages to society provoked by the enforcement of the decision would be greater than the benefits to the claimant.[7] This reform gave the courts some flexibility in dealing with cases in which it was almost impossible to comply with the ruling; for example, in one case an expropriation order was declared invalid, but a university had already been built on the expropriated land.[8]

One of the major challenges to ensuring the compliance with courts' decisions came from the expropriation orders made to deal with those left homeless by the 1985 earthquake in Mexico City.[9] Many property owners who suffered from the expropriation of their land challenged the decision using the *amparo* suit, most of them successfully.[10] The problem was that in most cases the government had already given the property to organizations which represented those affected by the earthquake, and it was very difficult in such circumstances to remove them and give the property back to the original owners. In most of these instances, the government negotiated with the owners and offered them higher levels of compensation

[6] Baker (n 5) 242; Zamora and others (n 5) 273.

[7] Ley de *Amparo*. Article 106. Published 7 January 1980.

[8] Incidente de Inejecución de Sentencia. 62/2000 Pleno de la Suprema Corte de Justicia de la Nación. Decided 24 March 2004.

[9] See Chapter 3 where the expropriations and the problems of non-compliance in such cases are described in great detail.

[10] Carlos Herrera Martin, Interview with Eduardo Ramírez Favela, 'Entrevista con el Doctor Eduardo Ramírez Favela' (In person, 1 March 2013).

instead of returning their land.[11] The government never openly disputed the legal soundness or the legitimacy of any of these rulings; it simply delayed and negotiated compliance.

The courts had to negotiate compliance with their rulings and they used non-compliance incidents as a threat to put pressure on the government to enforce them. The credibility of the threat is questionable because before 1994 sanctions for non-compliance were not imposed, but in an interview the former President of the Mexican Supreme Court mentioned that the procedure had been used successfully as a threat to force compliance by the Federal Government in cases related to expropriations after the 1985 earthquake.[12]

Even if the threat of sanctions was sometimes successful, there were still many non-compliance incidents pending resolution and therefore judicial rulings waiting to be carried out when the judicial reform of 1994 was passed.[13] Before the reform the Court had only two options when faced with cases in which expropriation orders were quashed: give the property back to the plaintiffs (i.e. restitution) or dismiss the government official and start criminal proceedings for contempt of court. These options seemed too severe in cases in which the land at issue included public buildings or social housing. Therefore, as part of this reform, a small modification to the rules of the non-compliance incident was introduced. Before dismissing a government official from office and charging them with contempt of court, the Supreme Court had to decide whether non-compliance was excusable. If it were, the Supreme Court could order payment of compensation on the grounds that complying with the ruling

[11] ibid.

[12] Carlos Herrera Martin, Interview with Ulises Schmill, 'Entrevista con el Ministro Ulises Schmill' (In person, 4 March 2013).

[13] This was the most ambitious reform to the federal judiciary since the Constitution was passed in 1917.

would damage the public interest more than what it would benefit the claimant.[14] This reform gave the Supreme Court the authority to order the payment of compensation when a ruling in an *amparo* suit could not be enforced without harm to the public interest, even against the will of the claimant. However, this constitutional reform included a transitory article that postponed the application of this section of the reform until the *Amparo* Law was modified in accordance with the constitution. That reform was not passed until 2001.[15]

After 2001, the judiciary, faced with the dilemma of either recognizing that their rulings could not be enforced or ordering the demolition of roads, hospitals and schools in those cases in which the devolution of expropriated land had been ordered, started to use this alternative compliance mechanism to force the government to comply with those judgments which had been pending for a very long time. When rulings started to be enforced using substitute compliance and compensation awards were given accordingly, this had significant social and economic repercussions. There were three factors that came together to create the perfect storm that was impossible to ignore. The first was that, the political and social context had changed, making it easier for the courts to enforce their decisions. The political context was different; the court enjoyed much more public support, and as Staton has pointed out, they had started a communication strategy which increased transparency and made delays in enforcement of judicial rulings more costly for government authorities.[16] The second factor which made the impact of judicial review more apparent was that it forced the judiciary to deal with the most complex cases; the ones that it had been avoiding. A final factor was that

[14] *Reforma a la Constitución Política de los Estados Unidos Mexicanos.* Published in the Official Federation Diary 31 December 1994.

[15] *Decreto por el que se reforma la Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos y Ley Orgánica del Poder Judicial de la Federación.* Published in the Official Federation Diary 17 May 2001.

[16] Jeffrey K Staton, *Judicial Power And Strategic Communication In Mexico* (Cambridge University Press 2010) 53.

the judiciary's tradition of conducting a strong judicial review of expropriation orders meant that there were many more cases than expected in which the collegiate circuit courts had quashed expropriation orders, leaving the Supreme Court to deal with the implications of these judgments. In many of these cases, the limitations of the formalistic approach to judicial review, developed by the Supreme Court to protect its autonomy, became evident as the lower courts dealt poorly with the use of expropriation to solve complex social problems.

The most notorious effect of this perfect storm arose from three cases in which the Mexico City Government and the Federal Government were ordered to pay a massive amount of compensation. These cases received a great deal of public attention and led to the Mexico City Government being confronted by the Supreme Court.

In the following section I outline these three cases in detail and analyse their impact by examining their portrayal in the media, highlighting in particular the broader political impact created by this line of decisions.

7.3 Urban development and the use of expropriation

The Federal Government has used expropriation over the last thirty years as an essential part of one of the most ambitious land-titling programs in Latin America. Between 1968 and 2004, 51.35% of the total area expropriated by the Federal Government was used to regularize informal settlements.[17] In Mexico, the majority of low-income housing built since the 1940s has been irregular for different reasons: illegal subdivisions of private land, invasions of private or public property, or, the most common occurrence, building on land

[17] Camilo Saavedra-Herrera, 'Las Expropiaciones Federales De Suelo Urbano En México: 1968-2004.' (2006) 26.

belonging to agrarian communities. Very often, the owners of agrarian land close to urban centres sub-divided and sold their parcels even if this was not legal.[18]

It is hard to estimate the precise number of people living in irregular settlements, but according to some calculations, by 1998 between 10 and 15 million residents of urban areas had acquired land through illegal sales of *ejido* land.[19] Before the constitutional reform of 1992 in which the legal regime of *ejido* land was radically altered, the only way in which *ejido* property could be transferred to people that were not part of the *ejido* community was through expropriation. Only the Federal Government could expropriate *ejido* land to acquire property for planned urban development and from 1970 to regularize informal settlements. The procedure to give a legally enforceable property title to all those who had acquired land from *ejido*s was extremely complex. These sales were non-existent according to Agrarian Law, but it still was a major problem, which had to be solved because it affected almost 15% of urban residents in Mexico.[20] The only means by which the government addressed this growing problem was to expropriate the *ejido* land which had been illegally sold and which was already settled. The government did not demand responsibility from *ejidatarios*, acting as if the transaction had not taken place to avoid a conflict with *ejidos* and it paid them compensation; the Federal Government then resold the plots of land for an accessible price to

[18] Antonio Azuela de la Cueva, 'Los Asentamientos Populares Y El Orden Jurídico En La Urbanización Periférica De América Latina' (1993) 55 Revista Mexicana de Sociología 133, 155; Antonio Azuela and Emilio Duhau, 'Tenure Regularization, Private Property And Public Order In Mexico' in Edesio Fernandes and Ann Varley (eds), *Illegal Cities: Law and Urban Change in Developing Countries* (Zed Books Ltd 1998); D Hiernaux and A Lindon, 'Proceso De Ocupación Del Suelo, Mercado De Tierra Y Agentes Sociales. El Valle De Chalco, Ciudad De México 1978-1991' [1998] E Jiménez (comp) Análisis del Suelo Urbano Instituto Cultural de Aguascalientes, Aguascalientes, 256; Gareth A Jones and Peter M Ward, 'Privatizing The Commons: Reforming The Ejido And Urban Development In Mexico' (1998) 22 International Journal of Urban and Regional Research 76, 80.

[19] Jones and Ward (n 18) 77.

[20] ibid.

those already occupying the land.[21] The Federal Government even institutionalized this procedure and in 1973 created an organization[22] in charge of overseeing it, the CORETT. This organisation was in charge of identifying land over which the settlers had no property title, negotiating compensation with the *ejido* owners, expropriating, dividing the land, and then selling the land back to the current occupiers.[23] The CORETT still faced problems in conducting this procedure and there are some indications that expropriations for regularization procedures were challenged widely in the courts by *ejido*s.[24]As a result, expropriations for regularization were only authorized in those cases in which *ejido* owners were willing to accept and were satisfied with the level of compensation.[25]

The methodology developed by the CORETT was used as a blueprint for the regularization of other types of informal settlements as well.[26] In Mexico City there was a different institution in charge of regularization of informal settlements on private land. The informality arose because building regulations were not followed, as well as unauthorized subdivisions, or invasions. In a report published in 2002 it was mentioned that 'Mexico City's irregular settlements constitute roughly half of the urbanised area and house more than 60 per cent of the city's population.'[27] The process to regularize informal settlements on private land could be even more challenging than regularization of informal settlements on agrarian land

[21] Antonio Azuela de la Cueva, 'Low Income Settlements And The Law In Mexico City' (1987) 11 International Journal of Urban and Regional Research 522, 537.

[22] Comisión para la Regularización y la Tenencia de la Tierra (CORETT). Created by presidential decree August 20, 1973.

[23] Antonio Azuela, *La Ciudad, La Propiedad Privado Y El Derecho* (Colegio de México, Centro de Estudios Demográficos y de Desarrollo Urbano 1989) 124.

[24] Ann Varley, '"Ya Somos Dueños":*ejido* Land Development And Regularization In Mexico City.' (PhD, University College London 1985) 231.

[25] Carlos Herrera Martin, Interview with Fernando Portilla, 'Entrevista Con El Licenciado Fernando Portilla' (In person, 24 April 2007).

[26] I use the term informal as a synonym of illegal.

[27] Priscilla Connolly, 'The Case Of Mexico City, Mexico' (Understanding Slums: Case Studies for the Global Report 2003, 2002) 13.

because each irregular settlement faced different problems and it was more difficult to create a standard procedure. There were cases with simple illegal subdivisions, cases where the owners did not accept that they had sold the land or cases where the original chain of property could not be established adequately because the property registry was not very well organized[28]

Expropriation was used as a tool to deal with this multiplicity of issues, but these expropriations still faced major problems. For example, in those cases in which it was not clear who the original owner was, the government's publication of an expropriation order would lead to several persons claiming to be owners and applying for compensation and, in some cases, challenging the expropriation order in court. In other cases, the boundaries of the land to be expropriated were not clearly defined because of the land registry's limitations, and when expropriation orders were published, claimants would argue that the expropriated property did in fact belong to them.

Considering these convoluted scenarios, judicial review and the formalistic approach followed by the Mexican judiciary added yet another layer of complexity to the authorities' attempts to regularize informal settlements. In many of these cases, the expropriation orders were quashed by the courts and the remedy granted was that the property should be given back to its original owners. In most cases, however, this was impossible because the land was occupied by informal settlements and the government was forced to pay compensation instead.[29]

[28] María Soledad Cruz Rodríguez, *Propiedad, poblamiento y periferia rural en la zona metropolitana de la Ciudad de México* (2001).

[29] An example of this was the Ramos Millan case which will be discussed in the next section of this chapter.

In expropriations undertaken for regularization procedures the government charged irregular settlers for the compensation owed to the owners. This added to the dilemmas faced by the authorities or the courts when calculating compensation. In many cases, owners were receiving payment twice, paid for by low-income settlers,[30] but this was not considered by the courts when they were calculating compensation. Whilst judicial review cases allowed owners to confront the Federal Government, the interests of irregular occupiers were not taken into account.

In general terms, the courts, for the most part, were incapable of recognizing the social and political context of these expropriations, especially when they had to calculate compensation. This led to outrageous results in certain cases which form the basis of analysis in the next section. Such cases imposed so much pressure on the judiciary that the Supreme Court arguably had to perform 'procedural magic' to change what was a settled decision in order to modify the amount of compensation that had to be paid.

Below I examine the first of these controversial cases in which the Supreme Court, for the first time, had to violate the principle of *res judicata* in order to define a new way to calculate compensation.

7.4 Case studies on compensation

In the previous sections I have identified and analysed the key elements which contributed to the controversial cases which reached the Supreme Court in the 2000s in which massive

[30] Azuela (n 23) 124–25.

compensation awards were granted. Here, these cases are used to illustrate the economic impact of judicial review, the impact on the public support and legitimacy of the judiciary and the problems and the limitations inherent in the judicial review of expropriation cases. The economic impact of these cases is self-evident. The compensation award in the case of *Paraje de San Juan* was equivalent to 60% of the budget debt ceiling for that year for the Mexico City Government;[31] the compensation in the *ENAH* case was equal to *half* of the school budget for the whole year;[32] and in the *Ramos Millan* case, the compensation awarded was equal to more than the annual budget allocation for the Federal Ministry for Agrarian Reform which was in charge of paying that compensation.[33] Even if all these compensation awards were reduced at the last opportunity by the Supreme Court, these cases were only those which received most attention, many more cases were decided by collegiate circuit courts in which the federal and state governments were forced to pay compensation. Understanding how the courts calculated compensation in these three key cases will help to clarify the wider economic impact of judicial review of expropriation.

7.4.1 The *ENAH* Case

On 16 July 1968 the Federal Government ordered the expropriation of six hundred and ninety thousand square meters in the south of Mexico City for the regularization of informal settlements.[34] The decree was made in favour of the Federal District Department, responsible at the time for governing Mexico City and directly appointed by the President. The

[31] Centro de Estudios de Finanzas Públicas, 'Deuda Pública del Distrito Federal (1993-2006)'(October 2005) 13.

[32] Presupuesto de Egresos de la Federación para el ejercicio fiscal 2004. Published in the Official Federation Diary 31 December 2003. P. 93.

[33] Presupuesto de Egresos de la Federación para el ejercicio fiscal 2004. Published in the Official Federation Diary 31 December 2003. P. 91.

[34] DECRETO que declara de utilidad pública el mejoramiento del centro de población existente en la parte sur del Pedregal de Carrasco, D. F., expropiándose para tales fines, los terrenos cuya ubicación y colindancias se especifican.[1968] Published in the Official Federation Diary 16 July 1968/14-15.

expropriation order did not mention who the owner was or what compensation should be paid. The order stated that the land would be sold to its current occupiers and it also authorized the Federal District Department to create schools, parks and a public market on the site.[35] On 11 April 1969 the Federal District Department donated part of the expropriated land to build the National School of Anthropology and History and an archaeological park.[36] When the expropriation order was made, the owners affected by the expropriation order were not known, but Mr. Angel Veraza claimed that he owned part of the area which was expropriated. On 9 August 1974[37], Mr. Angel Veraza presented a request to the Federal District Department asking for the restitution of the expropriated land because five years had passed and the land had not been used for the public purpose stated in the expropriation order.[38]According to article 9 of the Federal Expropriation Law, owners affected by an expropriation order could request restitution of their property if the government did not complete the project that justified the expropriation order in five years.[39] This request was denied on 3 November 1975 by the Federal District Department[40], which was the institution that required the expropriation and was in charge of completing the project specified in the expropriation order.[41] Mr. Veraza appealed this decision in the local administrative tribunals, which on 7 July 1982 overturned the decision of the Federal District Department and remanded on the grounds that not all relevant considerations had been taken into account by

[35][1968] Published in the Official Federation Diary 16 July 1968/15.

[36] Incidente de Inejecución de Sentencia. 62/2000 Pleno de la Suprema Corte de Justicia de la Nación. Decided 24 March 2004. P. 54.

[37]Incidente de Inejecución de Sentencia. 62/2000 p. 54 .

[38] In the Mexican law of expropriation and in almost every legal system, if the expropriated land is not used for the public purpose stated in the expropriation, the owner can ask for the devolution of her property, providing she repays the compensation she received.

[39] *Ley Federal de Expropiación.* Article 9. As Originally Published in the Official Federation Diary 25 November 1936. Last reformed 27 January 2012.

[40] At that time Mexico City did not have an elected government. The Mexico City Department was part of the Federal Government.

[41] Incidente de Inejecución de Sentencia. 62/2000. Pleno de la Suprema Corte de Justicia de la Nación. Decided 23 March 2005. p. 55.

the authorities when they denied the petition.[42] The authorities reconsidered their decision taking into account the considerations required by the tribunals and once again denied the petition. The case went back and forth between the administrative tribunals and the government, with the tribunals overturning the decisions on the grounds that relevant considerations had not been adequately considered by the authorities, and the government formally complying and claiming that after having taking into account the considerations ordered by the tribunals, they still reached the same decision, which in turn resulted in a new appeal.

It took more than four different rulings from local administrative tribunals overturning decisions from the Federal District Department[43] until the case reached the Supreme Court. On 16 October 1998[44] the Court finally clarified the rulings of the administrative tribunals and ordered the Mexico City Government to restore to Mr. Veraza legal title to and possession of his property,[45] however this was not possible because the site was now home to the National School of Anthropology and History.[46] The claimant accepted to proceed with substitute compliance and after following the procedure, the district judge granted him a compensation of approximately US$18 million.[47] The Mexico City Government challenged this decision, and failed to comply arguing that they were not responsible because the

[42] Incidente de Inejecución de Sentencia. 62/2000. Pleno de la Suprema Corte de Justicia de la Nación. Decided 23 March 2005. p. 55.

[43] Incidente de Inejecución de Sentencia. 62/2000. Pleno de la Suprema Corte de Justicia de la Nación. Decided 23 March 2005 p. 55-56.

[44] Incidente de Inejecución de Sentencia. 279/98. Segunda Sala de la Suprema Corte de Justicia de la Nacion. Decided 16 October 1998.

[45] By now the original plaintiff had died and the case was taken by his estate executor.

[46] Incidente de Inejecución de Sentencia. 62/2000. Pleno de la Suprema Corte de Justicia de la Nación. Decided 23 March 2005. 62/2000 p. 5.

[47] Incidente de Inejecución de Sentencia. 62/2000. Pleno de la Suprema Corte de Justicia de la Nación. Decided 23 March 2005p. 26.

expropriation had been originally ordered by the Federal Government. The case reached the Supreme Court as a non-compliance incident on 10 February 2000.

The Supreme Court considered that two key legal questions needed to be addressed. The first was whether in this case non-compliance was excusable. The Court found this was so, because there was a mistake in the way compensation had been calculated, namely, by taking into account the value of the land in 1999, and including the value of buildings on the land such as the National School of Anthropology and History. In marked contrast, the Supreme Court determined that compensation had to be calculated from the moment the expropriation was ordered and that this should not include the value added by urban infrastructure undertaken by the government.[48] Therefore, in this case, compensation could be judged only on the basis of the value of the land. As a result, the compensation awarded was reduced from almost US$18 million to approximately US$4 million.

This interpretation by the Supreme Court was unprecedented because the incident of non-compliance was a procedure in which the Supreme Court could only decide if the authorities had enforced the ruling or if there was a valid excuse for the lack of enforcement. All other aspects of the ruling were settled and the Court, in theory, could not review any aspect of it. The Court's declaration that it could evaluate the legality of the ruling seems a very strained interpretation of its own powers and it went against the purpose of the non-compliance incident. This was the first case in which the Supreme Court adopted this interpretation, which arguably weakened the principle of legal certainty. The Court justified its radical

[48] Incidente de Inejecución de Sentencia. 62/2000 p. 69-70.

departure from the traditional understanding of its jurisdiction in non-compliance incidents writing that:

> [T]his position does not contravene technically the principle of res judicata, because as it has been said, the ruling is definitive for the parties and the analysis of its legality in this instance does not respond to the fact that one of them has asked for it (which would not be appropriate because there are no more appeals apart from the *recurso de queja* which has already been decided).[49]

The justification given by the Court is not very persuasive. Its only justification was that it was not reopening the case on a request from one of the parties. The Mexico City Government paid the compensation awarded. The confrontation over this case was not as controversial as in the following two cases and it received little media attention.

7.4.2 The *Ramos Millan* Case

On 20 December 1984 the Federal Government ordered the expropriation of two plots of land which covered 2.7 square kilometres in the south of Mexico City to regularize illegal housing settlements. According to the Federal Government the plots belonged to two *ejidos*, Santa Ursula and Santa Ursula Coapa and they were completely covered by irregular settlements which housed around 12,000 people.[50] The expropriation order was requested by the

[49] Incidente de Inejecución de Sentencia. 62/2000 p. 73 "Esta posición no contraviene técnicamente el principio de cosa juzgada, pues como se ha dicho la interlocutoria se encuentra firme para las partes y el análisis de su legalidad en esta instancia no obedece a que alguna de ellas lo haya solicitado (lo cual no sería procedente porque no existe instancia alguna a favour de ellas fuera del recurso de queja que ya se hizo valer),"

[50] Decreto por el que, por causa de utilidad pública, se expropia a favour de la Comisión para la Regularización de la Tenencia de la Tierra una superficie de 34-34-40 Has. perteneciente al *ejido* de Santa Ursula, ubicado en la Delegación de Coyoacán, D.F. (Reg.-5005). [1984] Published in the Official Federation Diary 20 December 1984/13.

Decreto por el que, por causa de utilidad pública, se expropia a favour de la Comisión para la Regularización de la Tenencia de la Tierra una superficie de 236-17-46.69 Has, perteneciente al poblado denominado Santa Ursula

CORETT and it followed the standard template of expropriations carried out to regularize informal settlements. Once the property was transferred to the CORETT, they would sell the land to its present occupiers at a subsidized price and provide plots of land to the local authorities to build urban infrastructure and public amenities.[51] The expropriation order specified that if there were empty plots included in the expropriated land they would be used to build social housing[52]which was representative of a widespread policy followed by the Mexican government to adopt regularization as the dominant policy to provide social housing since 1976.[53]

The expropriation decree also stipulated the amount of compensation to be paid. The amount was twice the commercial agricultural value plus 20% of the benefits resulting of the regularization process. The government considered that the commercial value per square meter of the expropriated land was approximately twenty five dollars,[54] but the government sold the land to its occupiers at a subsidized price of seventy five cents on dollar which resulted from applying a coefficient of 0.032 to the commercial price.[55] This had a direct impact on the amount of compensation paid because the owners had the right to receive 20% of the benefits of the regularization process. The Federal Government calculated that the compensation to be paid just for the commercial agricultural value was US$ 190 thousand.[56]

On 11 January 1985, Mr Armando Bernal Estrada acting in his own right, and Mr Gabriel Ramos Fernandez as executor of the estate of Mr Gabriel Ramos Millan sought judicial

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Coapa, ubicado en la Delegación de Coyoacán, D.F. (Reg.-5006). [1984] Published in the Official Federation Diary 20 December 1984/13-16.

[51] (Reg.-5006) [1984] DOF 20 December 1984/17.

[52] (Reg.-5006) [1984] DOF 20 December 1984/17.

[53] Ann Varley, 'The Relationship Between Tenure Legalization And Housing Improvements: Evidence From Mexico City' (1987) 18 Development and Change 463, 472.

[54] (Reg.-5006) [1984] Published in the Official Federation Diary 20 December 1984/18.

[55] (Reg.-5006) [1984] Published in the Official Federation Diary 20 December 1984/18.

[56] (Reg.-5006) [1984] Published in the Official Federation Diary 20 December 1984/18.

review. In their claim they argued that on 9 February 1945 Mr. Gabriel Ramos Millan and Mr. Armando Bernal Estrada bought 100 hectares in the south of Mexico City.[57] The acquisition of this plot of land was dogged by suspicions of an improper use of political power for economic gains.[58] At the time of the purchase the area was a worthless and remote plot of land covered by volcanic rock. However, Mr. Ramos Millan was an influential businessman who had vast experience undertaking new urban developments[59] with the support of government authorities and who boasted a close friendship with a rising politician and soon to be Mexican President, Mr. Miguel Aleman.[60] When Miguel Aleman became president, Mr. Ramos Millan was elected senator of the State of Mexico.[61] It is reasonable to assume that he had great plans for that plot of land in the south of Mexico City, but he died on a plane crash in 1949, long before the area was developed.[62]

The owners were represented by the law firm in which Diego Fernandez de Cevallos, a leading politician in the centre-right party and former presidential candidate, was a managing partner. In their petition for judicial review the claimants contended that thirty three hectares of the area included in the expropriation decree belonged to them and therefore they contested the validity of the expropriation because they had been deprived of property

[57] *Amparo* en Revision. 1340/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided on 25 January 2005. P. 59

[58] Miguel Ángel Granados Chapa, 'Plaza Pública/ Poder y Negocios', *Reforma*, Opinión (México D. F., 27 June 2002).

[59] Felicitas López Portillo, 'Las Glorias Del Desarrollismo: El Gobierno De Miguel Alemán' (1991) 0 Secuencia 061, 62.

[60] Jorge Gil and others, 'La Red De Poder Mexicana. El Caso De Miguel Alemán' (1993) 55 Revista Mexicana de Sociología 103, 110.

[61] ibid.

[62] ibid.

without legal basis or justification and this was a violation of the guarantee contained in article 16 of the Mexican Constitution[63], which declares that

> no one shall be molested in his person, family, domicile papers, or possessions except on the authority of a written order issued by the competent authority stating the legal basis and justification for the action taken.[64]

On 23 May 1991 the district judge ruled in favour of the claimants and declared that the expropriation decree was invalid.[65] The basis of the ruling was that according to the expert witnesses it was a proven fact that the claimant's property had been included as part of the expropriated land. Therefore the judge ordered the Federal Government to return the wrongful expropriated land to its owners.[66] The Federal Government appealed against this ruling, but the Second Collegiate Administrative Court of the First Circuit confirmed the decision made by the lower court on 3 December 1992.[67] The first major consequence of the ruling was that even if the courts insisted that an *amparo* suit could not deal with property issues, in this case the court was solving a property question and in its decision it was declaring that the owners of those thirty three hectares were the claimants. In a closely related case the Supreme Court had declared that:

> the effects of final rulings in which constitutional protection is granted against an expropriation decree, have to do with its unconstitutionality, but it shall not be construed as a definitive pronouncement on the rights that the claimants allege to have

[63]Incidente de Inejecución de Sentencia 53/2002. Pleno de la Suprema Corte de Justicia de la Nación. Decided 21 February 2005. P. 24.

[64] Baker (n 5) 123.

[65] Incidente de Inejecución de Sentencia. 53/2002 p.24.

[66]Incidente de Inejecución de Sentencia. 53/2002 p.29 .

[67] Incidente de Inejecución de Sentencia. 53/2002 p. 33.

> over the affected plot by a decree of this nature, because in that case, the *amparo* judge, before analysing the constitutionality of the challenged act, limits itself to verifying that the claimants have some right over the affected real estate.[68]

In spite of this declaration, in *Ramos Millan* the collegiate circuit court was deciding who had the better title if the *ejido,* who the government considered as the owners of the land, or the plaintiffs.

The second consequence was that the collegiate circuit court constructed a legal fiction in which the government expropriated a *vacant* plot of land. As a result, the Federal Government was obliged to return such a plot of land to the owners to comply with the ruling because the expropriation was declared invalid. The collegiate circuit court did not acknowledged that when the expropriation took place, the plot was occupied by informal settlements and the Federal Government not only was unable to regularize it, but now it was also required to remove the irregular settlers who had probably bought the land from the same owners who were now asking for their empty plot of land to be returned to them.

On 12 January 1993 the district judge started the process to ensure compliance with the decision of the Federal Government.[69] Unable to enforce the ruling, the district judge sent the file to the Supreme Court to start a non-compliance incident. The Federal Government published a new decree in which the expropriation of the thirty three hectares property of Mr Bernal Estrada and Ramos Millán was declared null and void.[70] The Federal Government argued that:

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[68] *Amparo* en Revision 1340/2004. Pleno de la Suprema Corte de Justicia de la Nación. Decided 25 January 2005. P. 248.

[69] Incidente de Inejecución de Sentencia. 53/2002 p. 41.

[70] Incidente de Inejecución de Sentencia. 53/2002 p. 43.

> An exact compliance of the ruling means that the Agrarian Coordination simply has to declare null the execution of the decree, without it being legally necessary to restore the possession to the claimants of their plot of land because this was occupied by irregular settlements at the time of expropriation and therefore the claimants did not have the possession.[71]

The government was trying to explain the context in which the expropriation had taken place, but this did not fit with the formalist model of adjudication embraced by the Supreme Court and on 1 November 1996 the Supreme Court concluded that, since the Federal Government could not enforce the ruling and could not ensure the return of the possession of the plot to the claimants, the owners should decide if they wanted to receive compensation instead.[72]

On 16 December 1996 the district judge started this process[73] and on 14 January 1997 the claimants accepted substitute compliance,[74] initiating a long procedure to determine the exact amount to be paid as compensation. On 14 January 1998, the district judged ordered the Federal Government to pay $319,454,600.00 Mexican Pesos approximately US$30 million.[75]The valuation was made by an expert brought by the claimants, but the authorities were not given the opportunity to present their own expert. The government appealed against this decision and it was overturned by the Third Administrative Collegiate Circuit Court from the First Circuit.[76]A new valuation procedure, in which the authorities had the chance to present their own expert witness, was initiated. On 4 September 2000, the district judge ordered the Federal Government to pay $472,346,320.00 Mexican Pesos (approximately

[71] Incidente de Inejecución de Sentencia. 53/2002 p. 46.
[72] Incidente de Inejecución de Sentencia. 53/2002 p. 41.
[73] Incidente de Inejecución de Sentencia. 53/2002 p. 48.
[74] Incidente de Inejecución de Sentencia. 53/2002 p. 50.
[75] Incidente de Inejecución de Sentencia. 53/2002 p. 62.
[76] Incidente de Inejecución de Sentencia. 53/2002 p. 89.

US$40 million).[77] This valuation was made by the district judge after he was not satisfied by the expert witnesses' valuation. He decided to make his own calculation using as a basis the tax value of the expropriated lands in 1997.

Both parties appealed against this decision and once again the Third Administrative Collegiate Circuit Court from the First Circuit[78] overturned it and ordered the district judge to make a new calculation taking into account this time the lack of exploitation of the basaltic rock deposits that supposedly were in the plot of land expropriated. On 1 March 2001 the district judge ruled that the Federal Government had to pay a compensation of $1,214,174,040.00 Mexican Pesos (equivalent to a little more than of US$100 million).[79]The government appealed, but this time its appeal was unsuccessful and the ruling was final.

The Ministry of Agrarian Reform, which was responsible for paying this compensation, found itself in a desperate situation because the award was more than their budget for the whole year[80] (the budget of the Ministry for 2002 was $1,042,800,000.00 Mexican pesos).[81] The Ministry tried to negotiate with the claimants to pay compensation in instalments, but they declined. Advised by the former presidential candidate and at that time federal senator, Diego Fernandez de Cevallos, the claimants were confident that they could put pressure on the Federal Government and get full compensation paid at once. Unexpectedly, this ended up being counterproductive because it provoked a negative reaction in the media and forced the Supreme Court to take a closer look at the case. The following statement is representative of the outrage provoked by the Senator's behaviour: 'Diego Fernández de Cevallos reappeared

[77] Incidente de Inejecución de Sentencia. 53/2002 p. 90.
[78] Incidente de Inejecución de Sentencia. 53/2002 p. 115.
[79] Incidente de Inejecución de Sentencia. 53/2002 p. 167.
[80] Incidente de Inejecución de Sentencia. 53/2002 p. 232.
[81] Incidente de Inejecución de Sentencia. 53/2002 p. 232.

protecting a corrupt businessman which earned him criticism even from his own party.'[82] The Federal Government did not follow a confrontation strategy, but the Ministry of Agrarian Reform was unable to comply with the ruling so it eventually reached the Supreme Court as a non-compliance incident.

On 4 June 2002 the Supreme Court received the non-compliance incident and started analysing it.[83] It decided the case, years later, on 21 February 2005. In the incident of non-compliance the Supreme Court had to determine if the Minister of Agrarian Reform was guilty of contempt of a court order because she had not paid compensation or if the lack of compliance was excusable.[84] To determine if non-compliance by the ministry was excusable, the Supreme Court analysed if compensation had been calculated correctly. The basis for the calculation of the compensation awarded was a valuation report prepared by the expert surveyor named by the district judge. This report should have been in the file due to its crucial role for the solution of the case, but apparently it was lost. The Court acknowledged this with a laconic statement: '[D]ue to its importance for this resolution, it would be pertinent to review directly the valuation report prepared by the court appointed expert, but this is not possible because it is not in the file.'[85]

After reviewing the case, the Supreme Court decided to modify the compensation awarded by the district judge. Using the criterion that compensation should be calculated using as a basis the value of the land when the expropriation was ordered, compensation was reduced from

[82]Sergio Aguayo'Diego y el PAN: El Accionista' *Reforma* (Mexico, 24 March 2005). "reapareció protegiendo a un empresario corrupto, lo que le ganó críticas hasta de su partido."

[83] Incidente de Inejecución de Sentencia. 53/2002 p. 340.

[84] Incidente de Inejecución de Sentencia. 53/2002 p. 410 (analizar y determinar si existe desacato del Secretario de la Reforma Agraria a la resolución de daños y perjuicios; en su caso, si el incumplimiento es excusable o inexcusable y, en consecuencia, si deben aplicársele o no, las prevenciones establecidas en la fracción XVI, del artículo 107 constitucional.).

[85] Incidente de Inejecución de Sentencia. 53/2002 p. 454.

110 million dollars to twenty million dollars. For the first time the Supreme Court recognized that the plot of land was occupied by irregular settlements and that this should be considered when determining how much compensation was to be paid because the land had no real commercial value on the open market.[86] The Court recognized that it made no sense to calculate compensation on the basis that the plot could be sold in the open market. Finally, the Court also mentioned that current values, by taking into account the urban infrastructure built by the government, improperly benefitted the claimants. In this case, the Supreme Court calculated the new compensation itself instead of remanding the case to the district judge. In calculating this, the Supreme Court used the values mentioned in the original expropriation decree.[87] The ruling passed by a slim majority of five versus four, which is surprising given the suspicions and media furore which surrounded this case.

This case did not prove to be a major source of confrontation between the executive branch and the judiciary. Public opinion concentrated more on the role of Senator Diego Fernandez de Cevallos and on the perceived conflict of interest between his role as lawyer and as President of the Senate. An aspect of the ruling that was not explored was that even if compensation was reduced, there was no substantive discussion on compensation and a clear standard of how to calculate compensation was not developed. In this case, the amount and the manner by which compensation was calculated was reviewed only because the claimants did not accept payment in instalments; otherwise the Federal Government would have been forced to pay almost six times more than it ended up paying.

[86]Incidente de Inejecución de Sentencia. 53/2002 p. 454.

[87] Incidente de Inejecución de Sentencia. 53/2002 p. 588.

A further important aspect which should be highlighted is the limitations of judicial review to deal with complex realities. The *amparo* suit not only affected the regularization process; it also gave an undeserved benefit to owners who, according to most studies on urbanization in Mexico City,[88] were responsible for the illegal subdivisions of urban land in the first place. Such a practice has been a major problem in Mexico, creating difficulties with land registry and land titling, but when the courts have decided cases involving expropriation, they seem unaware of the practical reality with which they are dealing and this only contributes to the complexity of such cases because it gives more power to certain actors such as the owners that sold the land originally and does not consider the interests of the current settlers.

7.4.3 The Case of *Paraje de San Juan*

On 26 July 1989, the Federal Government ordered the expropriation of four plots of land which covered almost eleven square kilometres in one of the poorest neighbourhoods of Mexico City to regularize informal housing settlements. The expropriation was ordered by the Federal Government because until a constitutional reform in 1997 Mexico City had a special status as seat of the federal powers and it did not have a directly elected government. It was governed by an official appointed directly by the Federal Government and therefore the Federal Government was in charge of regularization procedures, even in those settlements established in privately owned land. These expropriations were part of a massive campaign of land-titling started during the government of President Carlos Salinas de Gortari[89] to reinforce

[88] Cruz Rodríguez (n 28).

[89] Carlos Salinas de Gortari was the Mexican President from 1988-1994.

the legitimacy of the governing party and to establish clientelist networks by exchanging property titles for political support.[90]

Four different expropriation orders were issued, one for each plot of land. According to the expropriation decrees these four plots had been subdivided into 26,016 individual plots.[91] These were massive expropriations which benefitted thousands and probably even hundreds of thousands of poor urban dwellers. The tract of land most densely populated of the four was *Paraje de San Juan* in which there were nine thousand eight hundred sixty nine individual plots.

In the expropriation order for *Paraje de San Juan*, the government declared that the settlements were at least thirty years old and that since the first settlers arrived, the plots had been sold and resold and that urban growth had not complied with planning legislation and property transfers were conducted through 'verbal or private agreements'[92] that did not fulfil the required formal requisites of property transfers. According to the authorities such a lack

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[90] Ann Varley, 'The Political Uses Of Illegality: Evidence From Urban Mexico' in Edesio Fernandes and Ann Varley (eds), *Illegal Cities: Law and Urban Change in Developing Countries* (Zed Books Ltd 1998).

[91] DECRETO por el que se declaran de utilidad pública el mejoramiento y la regularización de la tenencia de la tierra, como acción para ordenar el desarrollo urbano del centro de población asentado en el predio denominado Paraje San Juan, Delegación Iztapalapa, D. F [1989] Published in the Official Federation Diary 26 July 1989/16.

DECRETO por el que se declaran de utilidad pública el mejoramiento y la regularización de la tenencia de la tierra, como acción para ordenar el desarrollo urbano del centro de población asentado en el predio denominado Desarrollo Urbano Quetzalcóatl, Delegación Iztapalapa, D. F [1989] Published in the Official Federation Diary 26 July 1989/19.

DECRETO por el que se declaran de utilidad pública el mejoramiento y la regularización de la tenencia de la tierra, como acción para ordenar el desarrollo urbano del centro de población asentado en el predio en el que se localiza la colonia Leyes de Reforma, Delegación Iztapalapa, D. F [1989] Published in the Official Federation Diary 26 July 1989/23.

DECRETO por el que se declaran de utilidad pública el mejoramiento y la regularización de la tenencia de la tierra, como acción para ordenar el desarrollo urbano del centro de población asentado en el predio denominado Ocho Barrios, Delegación Iztapalapa, D. F [1989] Published in the Official Federation Diary 26 July 1989/16.

[92] DECRETO por el que se declaran de utilidad pública el mejoramiento y la regularización de la tenencia de la tierra, como acción para ordenar el desarrollo urbano del centro de población asentado en el predio denominado Paraje San Juan, Delegación Iztapalapa, D. F [1989] Published in the Official Federation Diary 26 July 1989/16 (Decreto Paraje de San Juan).

of a formal property title: 'not only prevents planning and urban development, it also produces a lack of legal certainty, excessive land speculation, illegal trafficking of land and social pressures to those that inhabit it.'[93]

The expropriation decree made no mention of the amount of compensation to be paid or of the owners of the expropriated land. The decree only stated that 'The Federal District Department will pay compensation in accordance with the law.'[94] The owners of the plots were not mentioned in the expropriation order which was unremarkable because the land registry in Mexico was not very reliable and especially in these types of cases it was extremely difficult to discover with certainty who were the original owners. On 9 October of the same year, Mr Arturo Arcipreste Nouvel initiated the procedure to get compensation claiming he was the owner of *Paraje de San Juan*.[95] Allegedly, Arturo Arcipreste bought the plot known as *Paraje de San Juan* on 13 November 1947 and the transaction was registered by a justice of the peace the next day.[96] The property was inscribed in the land registry, but in the file, no date was given as to the date of registration. According to Miguel Angel Granados Chapas, an op-ed columnist very critical of this case, the property was not inscribed until 22 July 1975, almost thirty years after the original sale took place.[97] The fact that the registration of the property title took so long is important because in this case, there were serious doubts about the authenticity of that property title.

[93] Decreto Paraje de San Juan, p. 17.

[94] Decreto Paraje de San Juan,Article 3, p. 19.

[95] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 2002. p. 6.

[96] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 5 2002. p. 6.

[97]Miguel Angel Granados Chapa, Plaza Pública, "Industria de la Indemnización" Reforma, 12 Oct 2003.

More than ten years after the expropriation was ordered, and after being denied compensation by the authorities, heirs of Mr Arturo Arcipreste sought judicial review to receive compensation from the Mexico City Government. In his petition, Mr Enrique Arcipreste Abrego claimed that Arturo Arcipreste was the sole owner of *Paraje de San Juan* and that, as his sole heir, he was entitled to compensation. Furthermore, he claimed that the authorities in the Federal District Department had implicitly accepted that Arturo Arcipreste was the sole owner of this parcel of land.[98] The Mexico City Government responded that there was uncertainty as to who was the legitimate owner and, therefore, compensation could not be paid.

The district judge ruled in favour of the plaintiff on 26 October 1998, and one of the crucial elements in its decision was the fact that there were some documents in which the authorities had addressed Arturo Arcipreste as the sole owner of *Paraje de San Juan*. In his ruling, the judge declared that there was an official communication from the authorities in which Arturo Arcipreste's property rights over *Paraje de San Juan* were expressly acknowledged, and this was sufficient proof of ownership.[99] The Mexico City Government appealed the decision.

The Administrative Fourth Collegiate Circuit Court of the First Circuit dismissed the appeal on 23 June 1999. The Court considered that the official communication in which the authorities accepted that Mr. Arcipreste was the owner was enough proof that he was the

[98]Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 2002. p. 6.

[99] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 2002. p. 12.

owner.[100] In its ruling, the collegiate court ordered the district judge to enforce the ruling and order the Mexico City government to pay compensation to Mr Arcipreste's heirs.[101] The lack of compliance from the Mexico City government forced the district judge to start a non-compliance incident on 14 January 2000 and send the case to the Supreme Court for them to decide if, in this case, the lack of compliance was excusable.[102] On 5 June 2002 the Supreme Court held that non-compliance was excusable because the compensation award had not been established and ordered the district judge to specify how much compensation should be awarded. The district judge started the procedure to calculate compensation on 5 July 2002 and on 24 September 2003 ruled that the amount was $1,810,314,500.00 Mexican Pesos (US$180 million).[103]This ruling provoked a major scandal because the Mexico City Mayor, Andres Manuel Lopez Obrador, who was by far the most popular politician of the main centre-left party in Mexico, took a very public stance against this decision. According to some commentators, more than 80% of Mexico City's population supported the mayor in his resistance to pay the compensation awarded by the district judge.[104]

The crucial argument from the point of view of the Mexico City Government was that Mr Arcipreste was not the real owner, and therefore he was not entitled to compensation. Granados Chapa, a well-known op-ed columnist in the national newspaper *Reforma*,, identified all the questionable elements in the case. First, the property transfer was not certified by a notary public as the civil legislation of the time required; second, the contract

[100] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 2002. p. 18.

[101] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 2002. p. 21.

[102] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 2002. p. 22.

[103] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 29 November 2006. p. 8.

[104] Sergio Sarmiento, 'La Expropiación', *Reforma*, Opinión (México D. F., 24 October 2003).

that formalized the property transfer describes two hundred and ninety eight square hectares which is a unit that does not exist.[105] There were even open calls from some columnists to disobey the judicial ruling. In one op-ed titled 'Don't pay them anything, Andres Manuel',[106] the writer ends with the following plead: 'Andrés Manuel, waiting for Justice, with a capital letter, to appear in this desolate scenery of corruption, we are with you. Don't pay them anything.'[107]

Counting on a strong public support, the Mexico City Government pressured the Supreme Court to find a way to review the case. The Supreme Court had to face an overwhelming negative reaction to the decision and this, combined with the strategic use of the media by the Mexico City Government, forced the Supreme Court to review the case. The Mexico City government filed a *recurso de queja*[108] on 10 October 2003.[109] The *queja* was supposed to be decided by the Fourth Administrative Collegiate Court of the First Circuit, however, due to the relevance of the case and its political implications, the Supreme Court decided to use its discretional powers and heard the case on 4 November 2005.[110] The Supreme Court discussed and decided the case in a public session on 1 March 2005. In its discussion, the Court had to address the doubts cast on the legitimacy of the property title presented by the plaintiff. The collegiate circuit court in its ruling had declared that: '[I]n the file it has been proven that the property right of the plaintiff over the plot of land has been recognized by the authorities

[105] Miguel Ángel Granados Chapa, 'Plaza Pública/ Industria de la Indemnización', *Reforma*, Opinión (México D. F., 12 October 2003).

[106] Román Revueltas Retes, La Semana, "No les pagues nada Andrés Manuel", Milenio, 12 Oct 2003.

[107] Román Revueltas Retes, La Semana, "No les pagues nada Andrés Manuel", Milenio, 12 Oct 2003.

[108] Recurso de queja is a special appeal in *amparo* law. It is described in Chapter 2.

[109]Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 29 November 2006. p. 9.

[110]Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided 29 November 2006. p. 9.

from the Federal District.'[111] The Supreme Court was forced to address the existing questions over ownership, which despite what the lower courts had said, had not been clearly settled.

In the public discussion of the case, the Court offered two justifications to deal with the ownership question. Chief Justice Mariano Azuela declared that:

> Here I believe it is very clear that *amparo* suits cannot address a property problem and there is nothing, in the legislation, that says that if an authority in an official communication mentions that someone is an owner, that can be considered as a property title.[112]

Chief Justice Azuela tried to separate the constitutional questions, which are addressed in *amparo* suits, as an essential element of constitutional judicial review and questions of ownership, which according to his reasoning, should be decided in a different procedure. The weakness of this assertion was that the main evidence accepted by the district judge and the circuit courts as proof of ownership was an official communication which seems to contradict his statement. Additionally, the attempt to separate the ownership question is unconvincing because the whole case depended on demonstrating who the owner was and who was entitled to compensation.

The other line of argument was that the authorities had not challenged the property question when they had a chance to do so. Justice Diaz Romero declared: 'The property question has received considerable attention in recent times, but in reality the *amparo* suit did not address this and it cannot be addressed now. This should have been discussed in the inferior court and

[111] Incidente de Inejecución de Sentencia. 76/2000. Segunda Sala de la Suprema Corte de Justicia de la Nación. Decided on 5 June 2002. p. 18.

[112] Versión Taquigráfica de la Sesión Pública Ordinaria del Pleno De La Suprema Corte de Justicia de la Nación celebrada el martes 1 de marzo de dos mil cinco. p. 10.

it was not done.'[113] Once again, the argument is not entirely convincing taking into account that this question was addressed by the district judge and the circuit courts and they had concluded that Mr. Arcipestre was in fact the owner of the land in question. The questions posed by the Mexico City Government about the ownership of the tract of land were understandable. The property title was not well established and there were many reasons to suspect that it was falsified as was highlighted by Granados Chapa.[114] The Court placed the Mexico City government in a very difficult position because it stated that questions of ownership could not be settled in *amparo*, but at the same time, by awarding compensation the Court was settling a question of ownership even if this was not acknowledged.

The Supreme Court decided to modify the calculation of compensation made by the district judge. The district judge had made the award of 180 million dollars taking into account the current value of the expropriated land, including streets, houses and other infrastructure. The Supreme Court decided, using the criteria applied in previous cases, to order the valuation of the land from the moment the expropriation was ordered, instead of when the case was decided, thus following the applicable legislation which was in force at the moment of the expropriation. The Supreme Court ordered the district judge to calculate compensation using this new criterion. On 6 December 2005 the district judge passed a new resolution in which he calculated compensation using the stricter parameters established by the Supreme Court. As a result the new compensation awarded was $60,481,112.92 Mexican Pesos (approximately US$6 million), thirty times less than the original award of compensation.

[113] Versión Taquigráfica de la Sesión Pública Ordinaria del Pleno de la Suprema Corte de Justicia de la Nación, Celebrada el martes 1 de marzo de dos mil cinco. P. 12.

[114] Granados Chapa, 'Plaza Pública/ Industria de la Indemnización' (n 105).

Overall this case had a detrimental impact on the popular image of the judiciary, with almost all media coverage of the case being negative. The majority of public opinion supported the Mexico City mayor, even when he was threatening disobedience of a judicial ruling.

This case also provides good example of the opacity of compensation calculations and the discrepancies in calculating which can arise as a result. Finally, in this case, a further notorious aspect is the lack of interest in the conditions under which the expropriation took place. The fact that there were more than 9,000 families living in the expropriated land and that they benefited from the expropriation goes unnoticed. There are also unasked questions, such as what was the owner doing while his land was being illegally subdivided and sold? It is the courts' inability to reflect on issues such as this which points to the current limitations of judicial review of expropriation as it is currently practiced in Mexico.

In the following section I highlight how these three cases provide evidence of the social and political impact of judicial review of cases of expropriation.

7.5 Symbolic Impact and the Media

In his work on the symbolic importance of rights and legal mobilization Stuart Scheingold[115] emphasizes the importance of indirect effects of judicial review and the importance of their *symbolic value* to bring about social change.[116]

Legal mobilization and strategic litigation has also been used by conservative groups trying to promote greater protection of property rights in the United States.[117] These efforts have

[115] Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (University of Michigan Press 2010).

[116] Helena Silverstein, 'The Symbolic Life of Law: The Instrumental and the Constitutive in Scheingold's The Politics of Rights' (2003) 16 International Journal for the Semiotics of Law 407, 413.

concentrated on litigation on takings cases and a recent example of how the symbolic impact of such a decision can be considerably more important than the decision itself is the *Kelo* decision of the US Supreme Court.[118] In that case conservative groups were able to shape the narrative of *Kelo* in the media as an example of lack of protection of property rights,[119] even after the case was lost. By controlling the narrative in this way, they were able to maximize the political impact of the decision which led to legislative changes in 42 states,[120] and further limitations on the use of expropriation for economic development.[121] This is a strong example of the symbolic importance of judicial decisions and of the importance of understanding the indirect impact of judicial review.

In contrast judicial review of expropriation cases in Mexico has not been used as an integral part of a larger program of social change. Judicial review of expropriation was conceptualized as a strictly legal procedure having no political or social implications. It received no attention from the media until the series of notorious cases detailed above, reached the Supreme Court from 2001 to 2006. These cases, for the first time, exposed the political and economic implications of strong judicial review of expropriation, but even these did not form part of a larger program to pursue or arrest certain social reforms. Close analysis

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[117] Wayne V McIntosh and Laura J Hatcher (eds), *Property Rights And Neoliberalism: Cultural Demands And Legal Actions* (Ashgate Publishing, Ltd 2010).

[118] Stevens, '*Kelo V. New London (Opinion Of The Court)*' (23 June 2005) 545 US 469 (note).

[119] David Schultz, 'Courts Matter: The Supreme Court, Social Chang, And The Mobilization Of Property Rights Interests' in Wayne V McIntosh and Laura J Hatcher (eds), *Property Rights and Neoliberalism: Cultural Demands and Legal Actions* (Ashgate Publishing, Ltd 2010) 26; William R Wilkerson, 'Kelo V. New London, The Institute For Justice, And The Idea Of Economic Development Takings' in Wayne V McIntosh and Laura J Hatcher (eds), *Property Rights and Neoliberalism: Cultural Demands and Legal Actions* (Ashgate Publishing, Ltd 2010) 68.

[120] Andrew P Morriss, 'Symbol Or Substance? An Empirical Assessment Of State Responses To Kelo' (2009) 17 Supreme Court Economic Review 237, 240.

[121] Ilya Somin, 'Limits Of Backlash: Assessing The Political Response To Kelo, The' (2008) 93 Minn L Rev 2100; Edward J Lopez and others, 'Pass A Law, Any Law, Fast! State Legislative Responses To The Kelo Backlash' (2009) 5 Review of Law and Economics 99.

of the representation of these cases in the media illuminates the social and political understanding of judicial review and helps in assessing the impact of these decisions.

7.5.1 Grounded theory and media analysis

To understand the symbolic impact of these decisions I collected and analysed op-ed pieces published on each of these cases in one of the following newspapers: *Milenio, La Crónica, La Jornada, Reforma, El Universal* between 2001 and 2006. These five national newspapers are representative of a wide range of political ideologies. I identified 89 op-ed pieces from these five newspapers. The papers with the highest number of op-ed pieces in which these cases were discussed were *Reforma* and *Milenio* with the other three devoting a similar number of pieces as can be seen in Figure 14.

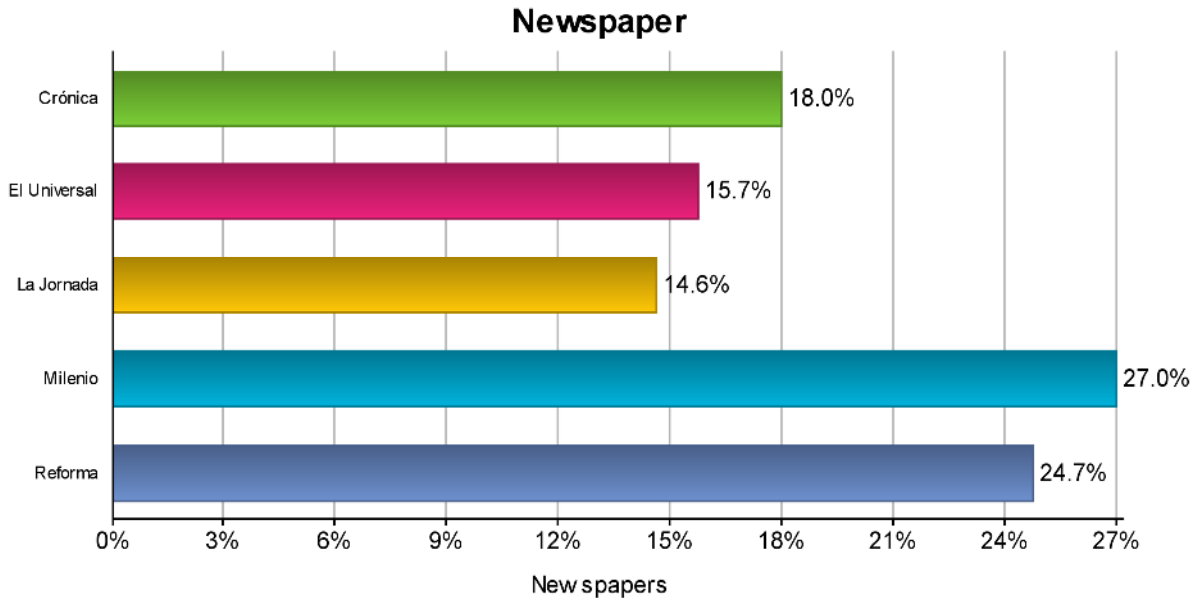

Figure 13

The most widely discussed case was *Paraje de San Juan* which concentrated 75% of the total number of op-eds collected as can be seen in Figure 15.

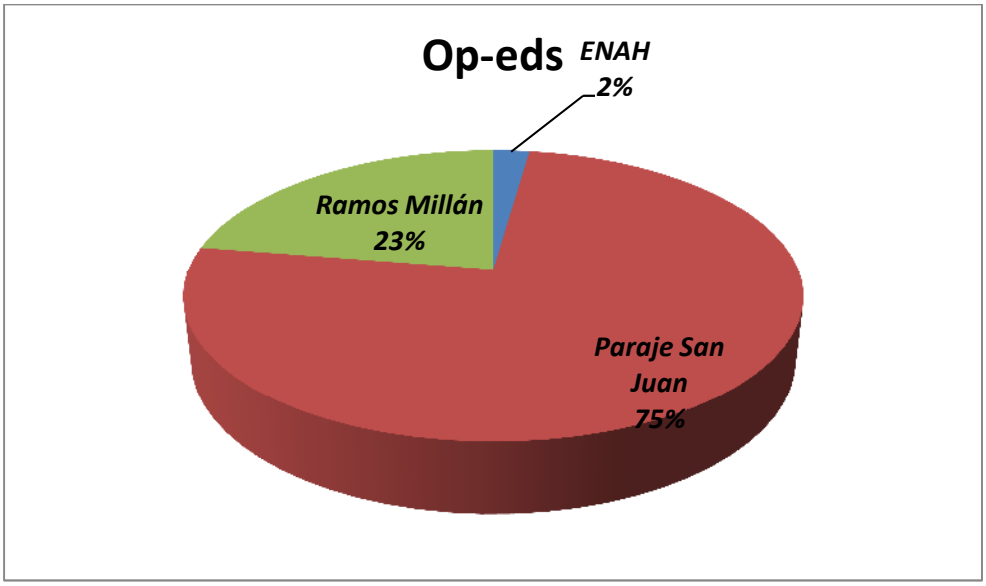

Figure 14

Once these articles had been identified I employed grounded theory methods to analyse these documents and to understand their social and political impact. Grounded theory has been described as theory that is 'derived from data systematically gathered and analysed through the research process.'[122] Coding is an essential element of grounded theory and there are three categories of coding practice: open coding, axial coding and selective coding.[123] In grounded theory methods coding categories come from the data and are not standardized.[124] Once the data has been coded the next step is to start identifying categories and concepts that might help explain it. With the op-ed pieces I coded the data and identified the categories shared by different accounts and opinions on these rulings to explore the narratives and representation of the court that emerge from them.

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[122] Anselm Strauss and Juliet M Corbin, *Basics Of Qualitative Research: Techniques And Procedures For Developing Grounded Theory* (SAGE Publications 1998) 12.

[123] Juliet M Corbin and Anselm Strauss, 'Grounded Theory Research: Procedures, Canons, And Evaluative Criteria' (1990) 13 Qual Sociol 3, 12–13.

[124] Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Pine Forge Press 2006) 43.

7.5.2 Op-ed pieces and the *Ramos Millan* Case

There were 20 op-eds in which this case was discussed in the five newspapers. The distribution of codes and categories identified is presented in Figure 15.

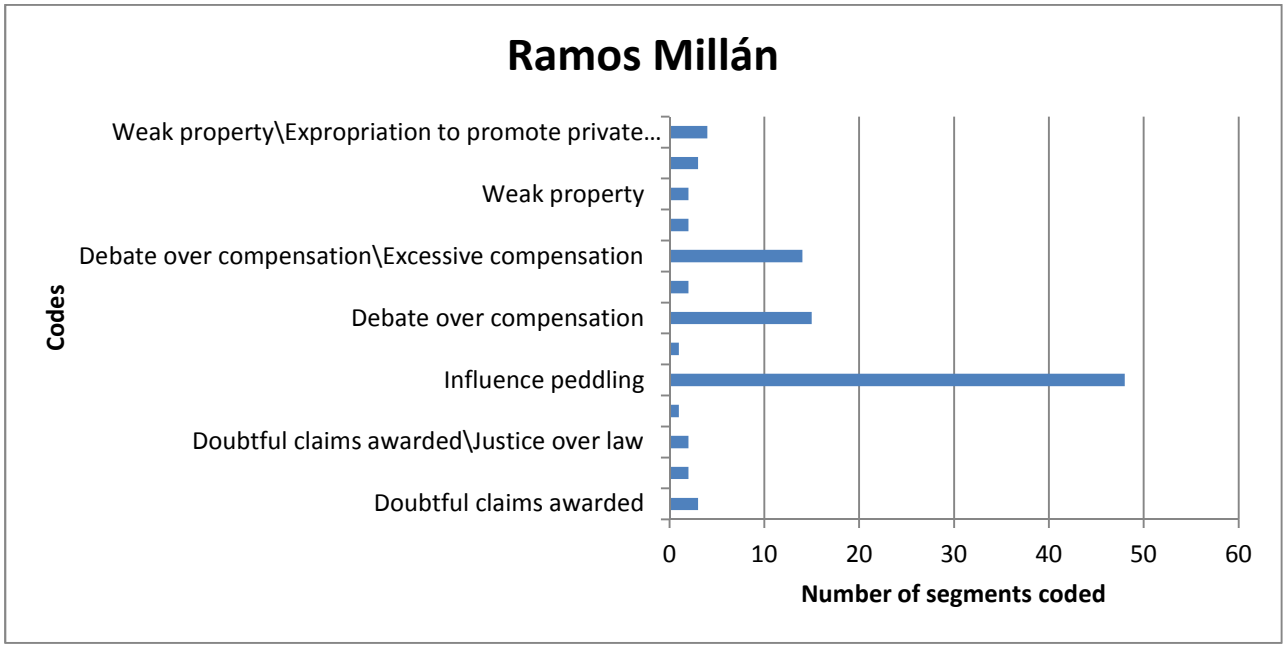

Figure 15

The majority of op-eds that discussed the case were extremely critical of the role of Senator Diego Fernandez de Cevallos as legal counsel for the plaintiffs. Senator Fernandez de Cevallos is a well-known politician, former presidential candidate for the National Action Party and also one of the most successful and well-known lawyers in Mexico. He had previously won a tax case in which the company he represented was awarded US$160 million.[125] However in this case the ruling was impossible to execute because the

[125] Granados Chapa, 'Plaza Pública/ Poder y Negocios' (n 58).

compensation awarded was greater than the budget of the Federal Ministry responsible for paying it. In short, the compensation awarded was regarded as so lavish and disproportionate that it became a national scandal. According to some newspaper reports there were reasons to be suspicious of the role that Fernandez de Cevallos played in the award of the compensation. In 1997 the same plaintiffs, who at the time were not represented by the Senator, accepted a compensation of US$1.5 million for a plot of land of 25 hectares next to the one for which they were awarded one hundred times more five years later.[126] The difference between the two awards seems to confirm the accusation that the influence or the outstanding legal expertise of Diego Fernandez de Cevallos had a significant role on this ruling.

Under the idea of '[I]nfluence peddling' there are three clearly identifiable perspectives adopted in the op-ed pieces. The first one, as mentioned above is that there was a conflict of interests which was unethical. The second perspective expressly recognized that even if it was unethical, there was nothing illegal in Fernandez de Cevallos' actions. Finally the third perspective considered that the examples of conflict of interests mentioned were illegal. The following table includes an example of each of these perspectives:

[126] Andrea Becerril, 'Herederos de Ramos Millán obtuvieron en 97 una indemnización de $11 millones por 25 hectáreas', *La Jornada* (Mexico City, 6 July 2002) <http://www.jornada.unam.mx/2002/07/06/007n1pol.php?origen=index.html> accessed 20 April 2014.

Perspective	Extract
Evidence of conflict of interests	'This case will be widely commented, not because of the issue of non-compliance, or because the US$120 million dollars awarded as compensation, but because Fernandez de Cevallos represented the plaintiff.'[127]
It was legal, but unethical	'Stopping Diego means changing the law that allows him to represent the Ramos Millan family against the Agrarian Reform Ministry and get paid to do so. Stopping Diego would involve preventing a representative of the country from representing private interests, using his political influence to support them.'[128]
It was illegal	'The outrage generated when it became known that Senator Fernandez de Cevallos has worked as a lawyer while holding a public office, which goes against our constitutional framework…'[129]

Table 11

The second relevant category identified in the op-ed pieces was the *debate over compensation*. The majority of articles mentioned just that the compensation award was excessive and that this could have serious consequences for the government, but no consideration was given to the fairness of the award. A minority of extracts coded as being concerned with excessive levels of compensation considered that compensation awarded was unjustified because the owners were benefitting from the construction of urban infrastructure carried out by the government. The following table includes examples of both opinions:

[127] Crónica, 'Revive el caso Coapa', *Crónica*, Opinión (Mexico City, 28 January 2005).
[128] Denise Dresser, 'Detener a Diego', *Reforma*, Opinion (Mexico City, 12 May 2003).
[129] Luis Javier Garrido, 'El tráfico', *La Jornada*, Opinión (Mexico City, 5 July 2002).

Perspective	Extract
Excessive compensation	'The Ministry of Agrarian Reform has to pay a compensation award that exceeds its complete operational budget for one year.'[130]
Unfair compensation	'The next question is obvious: is it fair and legal to pay speculators for the increase in the price of their land when they had done nothing to deserve it?'[131]

Table 12

In all of the op-ed pieces the common thread is that the original ruling, which awarded compensation of US$120 million, was deeply unsatisfactory, even if strictly legal in formal terms. There was widespread agreement with the intervention of the Supreme Court to reduce the award even if its legal propriety was questionable. This conflict between fairness and legality was particularly relevant in the *Paraje de San Juan* Case.

7.5.3 Media representation of the *ENAH* and *Paraje San Juan* cases

There were 67 op-eds in which *Paraje San Juan* was discussed, but only two in which the *ENAH* case was considered. Taken together the distribution of codes and categories identified is presented in Figure 16.

[130] Granados Chapa, 'Plaza Pública/ Poder y Negocios' (n 58).

[131] Bernardo Bátiz, 'La Suprema Corte y su oportunidad', *La Jornada*, Opinión (Mexico City, 2 February 2005).

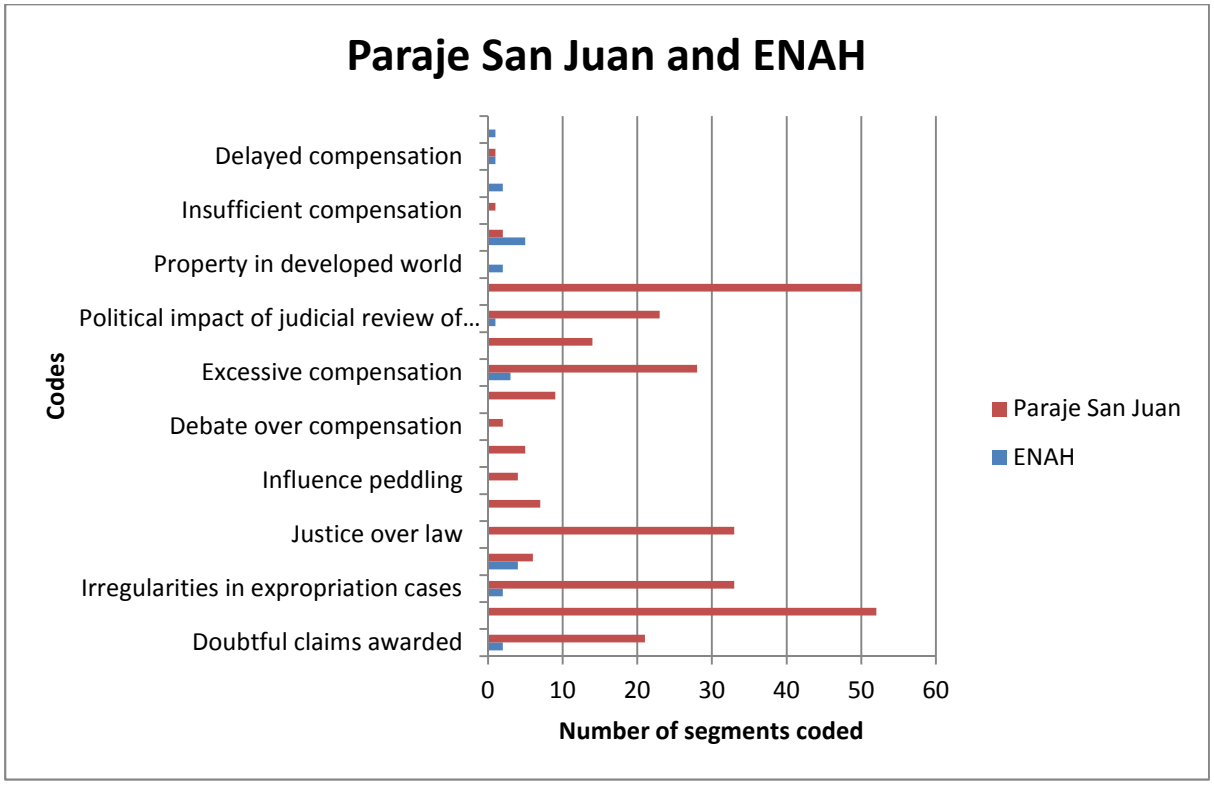

Figure 16

The most discussed aspect identified in the op-ed pieces was that the ruling which awarded compensation in both cases was questionable. There were many irregularities in the procedure. Under the code of *doubtful claims awarded* there were three distinguishable categories of opinions as can be seen in Figure 18.

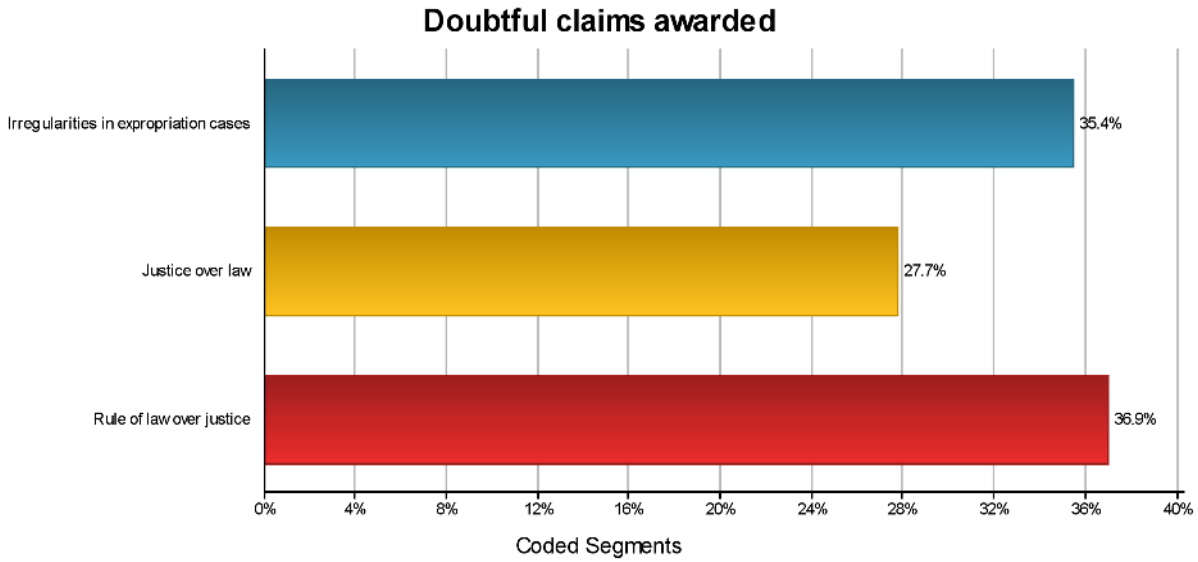

Figure 17

I identified the issue of *irregularities in expropriation cases* to describe those segments in which evidence of irregularities in the cases are mentioned or acknowledged. The second sub-code identified segments in which the op-ed columnists consider that even if there are irregularities the ruling has to be enforced, constituting the '*Rule of Law over Justice'* category. The third sub-code identifies those that contend that enforcing the ruling when there were so many irregularities would be unacceptable and that if the legal system was unable to remedy this then the Mexico City Government has the legitimacy to refuse to comply.

These categories are closely related to the political impact of this case which was the second most discussed element in the op-ed pieces. The columnists focused on the confrontation between the Supreme Court and the Mexico City Government. The open defiance of the Mexico City Mayor put a lot of pressure on the Supreme Court and this undermined its legitimacy and public support. For example, one columnist wrote that: '[E]very survey confirms that Lopez Obrador is extremely popular. According to a recent survey Lopez

Obrador enjoys a 74% approval rate nationally and of 89% in Mexico City.'[132] On the impact of this ruling on the legitimacy of the Supreme Court another columnist wrote: 'The judiciary cannot keep dealing with scandal after scandal damaging public confidence in the courts and undermining its institutional image.'[133]

The *debate over compensation* code in these cases was closely related to the previous issue with doubtful claims awarded. Compensation was considered excessive because ownership over the expropriated land was questioned. Some columnists considered that the judiciary should have acknowledged the complexity of the situation when calculating how much compensation to award; for example, one columnist wrote: 'Evidently those that demand compensation had already sold the land to its current occupiers. When the expropriation took place the area was settled and there were no attempts to remove the occupiers from the land.'[134]

In this case the *debate over compensation* code was closely linked with the *economic impact* code. This code identifies segments in which the economic impact of the compensation award is considered. In *Paraje de San Juan*, the Mexico City Mayor emphasized the economic impact of the compensation award in his confrontation with the Supreme Court to justify his refusal to comply with the ruling. The mayor specifically claimed that if he complied with the ruling he would have to increase public transport fees by more than 100%.[135]

A dichotomy between the rule of law and justice emerges from the analysis of the op-ed pieces. This split is consistent with the evolution of the rulings of the Supreme Court

[132] Leo Zuckermann, '¿Entre Platón y Hobbes?', *El Universal*, Opinión (Mexico City, 29 October 2003).
[133] Humberto Musacchio, 'El entrampado Poder Judicial', *Reforma*, Opinión (Mexico City, 28 October 2003).
[134] Carlos Marín, 'Triunfó la sensatez en el Caso San Juan', *Milenio*, Firmas (Mexico City, 5 November 2003).
[135] Raúl Trejo Delarbre, 'Paraje San Juan', *Crónica*, Opinión (Mexico City, 23 October 2003).

described in the previous chapters. The Supreme Court judges adopted a formalistic approach towards judicial review of expropriation to protect their autonomy when the Court was forced to operate under an authoritarian regime. The Court increasingly avoided developing substantive standards of judicial review of expropriation from 1968 onwards. Adopting increasingly technical standards of review allowed the judiciary to decide against the government, thereby avoiding a strong reaction from an authoritarian regime. This practice allowed the courts to maintain a certain degree of autonomy and arguably to protect a very limited version of the rule of law which Shapiro identifies as the first step to adopt a strong form of constitutional review.[136] This contradicts the traditional narrative according to which the Mexican judiciary offered no protection from expropriation before 1994 and that there was no rule of law.[137]

But this practice also meant that the courts were very reluctant to consider social or political contexts in their rulings. 'Outside' factors could not be taken into account when considering a case and law was interpreted strictly, and without regard for the consequences. Procedural requirements in particular were interpreted in formal terms and an expropriation order could be quashed if it was not signed by the proper authorities, if the order did not cite all the relevant statutes, or if the owner was not served with the order. This approach to adjudication was extremely useful in an authoritarian context because it protected the courts from political pressures. However, the cost of this was that the courts also developed a very simplistic model of expropriation. This simplistic model of expropriation was poorly prepared to deal with the complexities of the use of expropriation for urban development and regularization and many expropriation orders were quashed and compensations awarded with no regard to

[136] Martin Shapiro, 'Judicial Review In Developed Democracies' (2003) 10 Democratization 7, 24.

[137] Patrick Del Duca, 'The Rule Of Law: Mexico's Approach To Expropriation Disputes In The Face Of Investment Globalization' (2003) 51 UCLA L Rev 35.

the social circumstances of the case. In the cases analysed in this chapter the Supreme Court managed to make adjustments to its rulings using an unorthodox procedures such as non-compliance incidents, but it was forced to make these emergency adjustments because of decisions taken by inferior courts. The Court only responded in those cases in which there was strong political pressure and it only made minor adjustments to how compensation was calculated in cases in which property had been transferred a long time ago. For example, the Court did not adjust its approach to judicial review of expropriations for regularization even when it was obvious that ruling in favour of the owners that had illegally subdivided their property would reward illegal acts. The Court could have given a more serious consideration to the objectives of compensation in the new democratic context, but it made minor modifications to how compensation was calculated and stuck to its traditional interpretation.

After the judicial reform of 1994 and with a more democratic process this approach to adjudication was increasingly unsatisfactory, especially for left-wing political parties. There was a growing divide, reflected in the op-ed pieces between those who defend the rule of law, irrespective of its consequences, and those who criticize controversial outcomes reached in some cases and who consider that concepts such as fairness were more important than a rigid understanding of the rule of law.

In these op-ed pieces there are members of both groups who seem to share a belief that the rule of law is sometimes incompatible with fairness and that conflict is inevitable and choices need to be made. This image undermines the legitimacy of the judiciary because, predictably, there is more public support for outcomes that are viewed as fair than outcomes that are simply legal and these cases would seem to imply that support for the courts meant that legal but outrageous decisions had to be accepted.

Even if in these three cases the Supreme Court responded sensitively to social and political pressure and reduced the compensation awarded, the Court did not make a substantial change to its standards of judicial review of expropriation and it retained its formalistic approach to the interpretation of the public purpose and procedural requirements and importantly, it still avoided a substantive discussion on how to calculate compensation. This idea that the rule of law and fairness are incompatible only undermines public support for the rule of law and, according to Stanton's model of judicial enforcement, seriously undermines the power of the Supreme Court.

7.6 Conclusions

In this Chapter I have analysed in close detail three cases that illustrate the impact and the limitations of formalistic approaches to judicial review of expropriation. The government is at the mercy of valuators and because there was no substantive discussion on what should be included as part of the compensation award, it is very difficult for the courts to have control of the valuation process. Compensation was reduced dramatically in at least two of the cases in part because the Mexico City government refused to pay the amount originally calculated as compensation. In *Ramos Millan* it was only because the plaintiff refused to accept the offer made by the Federal Government to pay the compensation in instalments that the compensation awarded was reduced. However governments in other cases may not be willing to confront the courts. Even if these massive compensations awards are outliers, they are still a good example of the uncertainty brought by the judicial review of expropriation. The impossibility of determining how compensation will be paid and therefore the uncertainty associated with judicial review of expropriation, which was glaringly evident in these three cases, drives up massively the costs of public works. It does not matter if it is the construction of a road or a land-titling program; judicial review of expropriation as has been exercised in

Mexico by the Supreme Court, has had the consequence of bringing uncertainty and great costs (economic and social).

Chapter 8.

Conclusions

8.1 Introduction

The emergence of a more visible and powerful judiciary in Mexico in the last 20 years fits a pattern seen in new democracies all over the world. Democratization and judicialization in post-authoritarian regimes seem to converge, at times acting as mutually reinforcing processes.[1] As part of the strengthening of the courts, the role of judicial review of administrative action has expanded considerably and it has given them a bigger role determining the boundaries of the relationship between citizens and the administration. This thesis looks at one instance of judicialization of administrative law using judicial review of expropriation in Mexico as a case study. This chapter summarizes the results of my research; it presents the contributions of the research to the academic literature; and it considers the implications of its results for future research.

Mexico has had some form of constitutional review since the nineteenth century, but its role has been largely ignored because Mexico's system of government for the most part of the twentieth century can be described as a dominant party system in which a single party governed for almost 70 years; there were 'meaningful elections, but manifestly unfair.'[2] The Mexican political system was somewhere in between a full authoritarian regime and a democracy. In this context, formal judicial independence was severely limited and it was

[1] Shapiro, Martin, 'The Success Of Judicial Review And Democracy' in Martin M Shapiro and Alec Stone Sweet (eds), *On law, politics, and judicialization* (Oxford University Press 2002) 161.

[2] Kenneth F Greene, *Why Dominant Parties Lose: Mexico's Democratization In Comparative Perspective* (Cambridge University Press 2007) 12.

assumed that the courts never challenged the executive branch and were completely subordinate. In this research I analyse how the Supreme Court developed a strong standard of review of expropriation cases, and I examine the impact of that searching review. The analysis focused principally on the categories of the public purpose requirement and the compensation requirement.

8.2 Public Purpose Requirement

In Chapter 2 I presented approaches to judicial review of expropriation in different jurisdictions to highlight the distinctive nature of the Mexican Supreme Court's approach. The public purpose requirement is part of almost every constitution in the world, but the courts have rarely interpreted it as a substantive limitation to the power of government to use expropriation. Courts in other jurisdictions gave the administrative authorities broad discretion to determine what could be considered public purpose. International law also accepts that national governments have an almost unrestricted power to define what can be considered public purpose. Even in the United States, a country with particularly strong political support for property rights and a strong judiciary, the courts have given legislative and administrative authorities wide deference to determine what should be accepted as public purpose. The Mexican Supreme Court's interpretation of the public purpose requirement was very strong in comparative perspective. It evolved gradually from 1917.

The interpretation developed by the Supreme Court can be described as a three-tiered test. The first element was a test to verify if the public purpose stated in the expropriation order had a statutory basis; the second tier was a verification that the government had given reasons to justify that the specific expropriation would serve a public purpose; the third tier gave the courts the power to consider if the evidence presented to justify that the expropriation would

serve a public purpose was sufficient. The Supreme Court's interpretation of the public purpose requirement severely restricted administrative discretion to decide what could justify the use of expropriation because the Court demanded evidence that the use of expropriation was essential and that there was no other land which could be used for the same purpose. With this interpretation the Supreme Court could decide whether the facts were sufficient to justify the expropriation. Practically speaking, this meant it could second-guess the policy decisions made by the administrative authority. This increased the power not only of the Supreme Court, but of the Mexican judiciary in general, to review expropriation orders and to invalidate them.

The strategy followed by the Court allowed them to discreetly impose substantive standards of judicial review. The Court emphasized the procedural aspects of its review framing it as a debate over proof and evidence. For example, when the Court invalidated an expropriation order to build a school, which would seem a clear example of public purpose, the Court stated that the government had not presented enough evidence that a new school was needed. The unacknowledged implication of this reasoning was that the Court considered that the adequate number of schools was something that could be objectively determined, and that the courts were better positioned to decide it. This evolution of the interpretation of the public purpose requirement shares many traits with the evolution of the giving reasons requirement in the United States and the judicialization of administrative law.[3]

This approach did not require a direct interpretation of the constitutionality of statutes and this gave collegiate circuit courts an instrument to exercise a rigorous review of expropriation cases. Collegiate circuit courts were created in 1951 to reduce the workload of the Supreme

[3] Martin M Shapiro, *Who Guards The Guardians?: Judicial Control Of Administration* (University of Georgia Press 1988).

Court and they were the court of final appeal in all of those cases in which the constitutionality of statutes was not challenged. Therefore they had jurisdiction to pass judgement on most public purpose cases which usually challenged expropriation orders on the grounds that the government had not proven that the expropriation would serve a public purpose.

This interpretation of the public purpose requirement also had the advantages of the case-by-case decision making model which have been identified by Shapiro.[4] According to Shapiro, the advantages of this type of decision-making are that it reduces the potential of clashes with other institutions because the stakes involved in any particular case are generally low and the complexity of litigation and the language used in it does not generate public awareness. It also contributes to the institutional strength of the courts because it allows the courts to deal with unanticipated consequences of their decisions and change direction if needed.[5]

In a context in which the capacity of the Mexican courts to challenge the government was limited all the advantages of deciding on a case-by-case basis were particularly relevant. The Court had to adapt to preserve an institutional space of autonomy. For the Mexican courts it was extremely important to avoid as much as possible clashes with other branches of government because the judiciary was weak. Therefore, the Supreme Court avoided for the most part, striking down legislation and even developing general standards of the evidence necessary to justify that an expropriation would serve a public purpose. The Mexican Supreme Court avoided general pronouncements and the language and the content of its decisions was increasingly formalistic, as a strategy to avoid too much scrutiny from other

[4] Shapiro and Stone Sweet (n 1) 169.
[5] ibid 169–70.

branches of government. This allowed the courts to frame public purpose requirement rulings as purely technical and avoid the policy-making implications of its decisions.

Going back to the example of the school, the Court in its ruling only stated that in that particular case the government had not presented enough evidence to justify that a new school was needed, but it did not clarify what evidence would be acceptable to justify the expropriation. The Court could have made explicit a rule stating that only in those cases in which the governments presented evidence of crowding, would an expropriation for a school be considered justified, but it avoided this.

The evaluation of this interpretation of the public purpose requirement is not straightforward. The Mexican judiciary was acting under a dominant party system and accountability mechanisms were limited. Government abuses were often unpunished and this rigorous scrutiny of the public purpose requirement was an instrument to protect property rights against government's improper use of expropriation. On the other hand it benefitted mostly members of more privileged groups that were owners. The paradox of this approach was that the Supreme Court in some cases enforced the rule of law to protect rights of privileged groups against authoritarian progressive governments that tried to advance programs of social reform that were aimed at benefitting a larger number of people.

8.3 Compensation requirement

The compensation requirement was a battleground between government and the judiciary in the following years after the 1917 Constitution was passed. There was a tension between the needs of an ambitious program of land reform that could not afford to pay full compensation to large landholders, and the strict interpretation of the compensation requirement adopted by the Supreme Court. This discussion was similar to the conflict in India over the use of

expropriation for land reform described in Chapter 2 which caused a major conflict and forced the Indian government to remove property from the category of fundamental rights. The result in both countries was similar, and the Mexican and the Indian government were forced to make constitutional amendments to limit the jurisdiction of the courts in land reform cases and to authorize payment of compensation below market values in expropriations for land reform.

The difference was that the Mexican Supreme Court continued upholding an interpretation of the compensation requirement as a constitutional guarantee in those expropriations that were not undertaken for land reform. The main consequence of this interpretation was that the Supreme Court struck down statutes which authorized payment of compensation in instalments over periods of up to 20 years. This was a source of tension between the administration and the courts and eventually the Court caved in and modified its criterion in 1968. Since 1968 the Supreme Court abandoned any attempt to adopt a substantive interpretation of the compensation requirement. The Supreme Court realized that it could only construct a space of institutional autonomy in which it could rule against the government if it decided on case-by-case basis because striking down legislation triggered confrontations with other branches of government which the courts were unlikely to win.

Following the pattern already described in the analysis of the public purpose requirement, the Supreme Court adopted a formalistic interpretation of the compensation requirement because legal formalism was essential to protect its independence. This meant that the Court did not consider the nature of the justification of the compensation requirement, and therefore whether different circumstances merited different approaches to calculating compensation. This eventually caused problems because there was no difference in the method to calculate compensation when an expropriation was used to acquire someone's home to build a hospital

and when an expropriation was ordered because the owner had subdivided her land and sold it illegally, even if in the second scenario this meant that owners who sold their land illegally were benefitting because they received the same amount of compensation. The three cases analysed in Chapter 7 are representative of the consequences of calculating compensation without considering the circumstances in which the expropriation took place and the level of dissatisfaction it brought about.

The strength of judicial review of expropriation in Mexico is corroborated by the evidence from the dataset of Supreme Court rulings on expropriation created for this research which indicates that the government lost approximately 50% of the cases that reached the Supreme Court. This constitutes a very high number and it should not be very different from the rate of validation in cases decided by collegiate circuit courts.

8.4 Impact of judicial review of expropriation

The impact of a strong judicial review of expropriation is the other topic which this thesis addresses. The impact of judicial review of expropriation was analysed from two perspectives. I looked at the media reaction to four selected cases and analysed how they framed the conflict and how they portrayed the Supreme Court. These cases were portrayed as a conflict between law and justice. The judiciary was criticized for its blindness to the evidence of corruption in some of the cases analysed. The Supreme Court eventually managed to deal with the problems using unorthodox solutions, but the distrust between the judiciary and left-wing political parties that is evident in the media representations of these cases lingered on. The formalistic approach developed by the Court in its approach to judicial review of expropriation made dealing with these types of complex cases more difficult. In the

case of the *Pascual* Cooperative, the Court clashed with a democratically elected authority and it failed to acknowledge that it was getting involved in a policy issue. The reaction to the *Pascual* case represents a good example of the type of reaction the Court can expect when it decides that the judiciary has the power to decide what can be considered public purpose. The strong standards of judicial review of expropriation have an impact on the legitimacy of the judiciary because it puts it at the centre of relevant policy decisions, but because of the formalistic approach developed to protect judicial independence, the courts are poorly prepared to deal with an increased public visibility. These decisions have an impact on the legitimacy and the Court should acknowledge this. It cannot keep the pretence that it is only making decisions based on legal technicalities.

Apart from the impact on the judiciary, this research also looks at the impact of judicial review on government officials and on the use of expropriation. There is a direct impact of strong judicial review which is that in those cases in which the judiciary quashes an expropriation order, the original project cannot go ahead because land has to be given back to its owners.

To analyse the indirect impact of judicial review on the use of expropriation several interviews were conducted with government officials and relevant stakeholders in two areas: land titling and construction of roads and highways projects.

The impact of these strong standards according to the interviews, shares many similarities with the negative consequences of the American style of adversarial legalism described by Kagan.[6] The consequences included an increase of costs because government and developers in the case of roads, preferred to pay a higher compensation to avoid judicial review. There

[6] Robert A Kagan, 'Adversarial Legalism And American Government' (1991) 10 J Pol Anal Manage 369.

were also cases in which projects faced significant delays because the owners had challenged expropriation orders and they were granted temporary injunctions. In the case of expropriations for land titling the government only accepted expropriations in which the owners agreed to be expropriated because they wanted to avoid the risk of judicial review. All of these projects in which the government needs to acquire land are constantly threatened by judicial review. In fact, the Federal Expropriation Law was modified as a result of this constant threat to try to make it easier for the government to use expropriation. It is still too early to tell if these amendments will have any impact. Kagan described the consequences of adversarial legalism in the United States the following way: 'This adversarial legalism results in enormously costly, time-consuming, and erratic policy implementation and dispute resolution, conducted in courts or in the forbidding shadow of judicial review. Good policy ideas are thus transmuted into bad case-level outcomes.'[7] This description of the effects of adversarial legalism is very similar to the account gotten from the interviews in the research in Mexico.

8.5 The Courts and the President

The stability of the Mexican dominant party system between 1928 and 2000 is explained in part by the capacity of the regime to form a very broad coalition with many different factions.[8] The limits of presidential power and its relationship with different interests groups has been debated in the academic literature which in 1969 found different accounts of the role of the President in the Mexican political system.[9] In their account of the existing literature

[7] ibid 370.

[8] Joy Langston, 'Breaking Out is Hard to Do: Exit, Voice, and Loyalty in Mexico's One-Party Hegemonic Regime' (2002) 44 Latin American Politics and Society 61, 64.

[9] Carolyn Needleman and Martin Needleman, 'Who Rules Mexico? A Critique of Some Current Views on the Mexican Political Process' (1969) 31 The Journal of Politics 1011.

Needleman and Needleman identify four different models used to describe the role of the President: the omnipotent president, the stalemated president, the ascendant bureaucracy and the president as administrator.[10] Some accounts have highlighted the limits to the President's power. For example, Spalding analyses the implementation of a rural social security system during the government of President Echeverría (1970-1976) to argue that the power of the President was limited by the 'existence of bureaucratic enclaves which are not fully penetrated and controlled by the Executive'[11] and 'the vulnerability of the state to pressures emanating from the business elite.'[12] More recently Boix and Svolik have developed a model to explain the limitations of presidential power in Mexico.[13] They argue that:

> Although Mexican presidents had an extraordinary amount of control over the appointment of their cabinets and the nomination of their successors, the latter had to accommodate the interests of the party bureaucracy, its societal allies…and the governing class in the legislature and across state governments…Since all these social and political allies were incorporated into the policymaking and appointment processes through the PRI, Mexican presidents could not succeed in concentrating power in their hands to the point of upsetting the system of elite power-sharing put in place during the 1930s and 1940s.[14]

These accounts of the limits to the power of the President can be extremely useful to understand why successive presidents allowed the judiciary to override them. The plaintiffs

[10] ibid 1014.

[11] Rose J Spalding, 'State Power and Its Limits Corporatism in Mexico' (1981) 14 Comparative Political Studies 139, 155.

[12] Ibid.

[13] Carles Boix and Milan W Svolik, 'The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-Sharing in Dictatorships' (2013) 75 The Journal of Politics 300.

[14] ibid 313.

in these cases were property owners and in many cases belonged to powerful elites. Taking away judicial of expropriation or of administrative action could have led to a serious confrontation with business elites who used judicial review of administrative action to defend their interests. Accepting the autonomy of the courts in these cases avoided a confrontation with powerful groups and provided the regime with legitimacy. In addition to this, due to the nature of *amparo* suits in which the effects of the rulings were strictly limited to the plaintiffs the federal government could afford the luxury of allowing these adverse decisions knowing that their impact would be limited.

An important question is why did the courts decided against the government and why did they not change their approach after the judicial reform of 1994. The rulings do not fit traditional strategic models of judicial behaviour. The behaviour of the Mexican Supreme Court cannot be explained using traditional models of judicial behaviour which look only at the constraints imposed by its interaction with other political actors.[15] The Mexican Court had few incentives to decide against the government in the context of an authoritarian regime in which the judges were supposed to be supporters of the regime. A model of judicial behaviour that considers other motives for their actions is needed to explain this. There are two strong hypotheses that could explain the motivation of the courts. One possibility is that members of the judiciary belonged to more conservative factions of the ruling coalition and therefore they were just following their preferences when invalidating expropriation decrees. Another possibility is that the courts were motivated by other considerations such as real convictions about the law and their standing within the legal community as described by

[15] Gretchen Helmke and Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) 12 Annual Review of Political Science 345, 351.

Baum.[16] The judiciary was able to build an informal judicial career service controlled by the justices in the Supreme Court and this reinforced the role of the judicial and legal community as a motivator in the behaviour of the courts.[17] This concept is closely linked to the concept of judicial culture which includes 'the ideas and practices that judges and justices develop as they do their jobs.'[18] This also can explain why the courts did not change their behaviour after the judicial reform of 1994. The internal culture of the courts mediates the effects of great reforms as has been described by Kapiszewski in the case of Brazil.[19] In the case of Mexico after the judicial reform of 1994 seven of the new eleven justices had spent their whole professional lives working in the federal judiciary and therefore they shared the same legal culture and understanding of judicial review. This could explain why there was so little change after 1994.

8.6 Contributions of the thesis to the existing literature

Almost every analysis of the Mexican Supreme Court takes as its starting point the judicial reform of 1994. The role of the Mexican judiciary before the reform has been neglected. This research departs from conventional understandings of the role of the courts during the dominant party regime, but at the same time it is consistent with recent accounts of courts in other authoritarian regimes. This research tries to understand the role of the Supreme Court in the Mexican political system by analysing judicial review of expropriation.

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[16] Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2009) 104–17.

[17] See 3.4.1 Organization of federal judiciary.

[18] Diana Kapiszewski, 'How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal' in Javier Couso and others (eds), *Cultures of legality judicialization and political activism in Latin America* (Cambridge University Press 2010) 59.

[19] ibid 74.

Ginsburg has explored why authoritarian regimes use administrative law to control government agents.[20] In Mexico the regime used administrative law and at the same time, the evidence gathered from judicial review of expropriation cases seems to point to a wider trend of judicialization of administrative law.[21] Ginsburg argues that administrative law will be used to discipline government agents when the benefits are higher than the costs. In Mexico authorities could not rely on other alternatives such as party ideology because the dominant party had no clearly defined ideology; its ideology varied according to who was President. According to Ginsburg this lack of reliable alternatives favoured the adoption of administrative law to control agents such as state governments, because other strategies of control were more costly. An interesting aspect of the adoption of administrative law in Mexico was that once it had been installed as the preferred instrument of agent control, the government did not have much control over the evolution of the judiciary's decisions. The institutional dynamic led to a gradual increase in the power of the courts and the costs associated with eliminating judicial review or openly confronting it were increasingly higher as the courts developed an institutional space of autonomy. Another contributing factor that may explain why strong judicial review of expropriation was tolerated is because it allowed the government to maintain the support of elites who were the main beneficiaries of strong judicial review of expropriation.

This research using a comparative institutional framework also points to further limitations inherent in the judicialization of administrative law, in addition to those noticed by others,

[20] Tom Ginsburg, 'Administrative Law And The Judicial Control Of Agents In Authoritarian Regimes' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press Cambridge 2008).

[21] For an analysis of judicial review of tax law see: Carlos Elizondo Mayer-Serra, 'La Industria Del Amparo Fiscal' (2009) 16 Política y gobierno 349.

and raises strong doubts whether the courts should decide policy questions such as what should be considered public purpose.

In the context of authoritarian regimes this process could be interpreted as an essential instrument to protect a minimal version of the rule of law, although in reality it benefits mostly powerful interest groups who can challenge government regulations or expropriations. In the context of transitions to democracy strong judicialization of administrative law can become an obstacle to efficient government or it can prevent the government from undertaking necessary projects. This can also have an impact on the legitimacy of the courts.

8.7 Implications and future research

In spite of the impact of judicial review of expropriation in Mexico it is hard to judge the overall desirability of the Court's interpretation in these cases during the authoritarian regime. Judicial deference towards the administration in expropriation cases is justified mainly for two reasons: expertise and democratic legitimacy. In the case of Mexico during the hegemonic party regime the democratic legitimacy argument is not very convincing for obvious reasons and on the expertise it is hard to know which cases were justified and which cases were arbitrary uses of power. A justification of the interpretation of the Court during the authoritarian regime could be made on the grounds that it protected rights against government abuses. However it is clear that after the judicial reform of 1994 and in the context of democratization a different approach to judicial review of expropriation was required, but the Court was unable to provide it. This research highlights the importance of understanding the continuity of legal culture and its impact on reform. The 1994 reform transformed the institutional conditions of the Federal Judiciary and strengthened the

Supreme Court, but kept the same officials that had worked under the previous institutional conditions and as the study of judicial review of expropriation illuminates they continued deciding the same way they had done before. A more radical change could have been achieved appointing more justices from outside the Federal Judiciary after the 1994 reform.

The strength of the judiciary and its power to limit and control the Federal Government during the authoritarian regime should not be overstated. If a similar analysis is conducted in other areas of law, mainly criminal law, I would expect the results to be completely different. The courts did not limit the government in criminal law and offered very little protection to those accused of a crime. Protecting the rights of the accused in criminal procedures would have meant a stronger confrontation with the federal government and it would have been particularly unpopular.

Mexico can be considered as a deviant case and therefore the same results would not be expected in other jurisdictions. The nature of judicial review in Mexico in which the ruling only had effects for the person that challenged it, reduced the costs for the government of allowing adverse rulings and could explain why the government tolerated this form of independent judicial review. In spite of these limitations this research highlights the importance of understanding better the role of courts in authoritarian regimes in which at least in paper there was some form of constitutional review and in which legal formalities were respected.

Future research could examine the role of courts under a dominant party system in different areas to develop a model that explains the variables that conditioned the relationship between the courts and other political actors.

Another area to explore is the role of collegiate circuit courts. It is necessary to explore how consistent were collegiate circuit courts in their interpretations and if there were differences in their approach to judicial review of expropriation.

The recognition that the courts played a greater role can also modify the perception of the judicial reform of 1994. Instead of looking at judicial empowerment as a sudden break, it can be understood as a process. The decision to strengthen the Supreme Court in 1994 was consistent with previous decisions made by the regime in which it gradually empowered the judiciary. It is necessary to have a better understanding of the relationship between different actors to understand if the reform of 1994 was a radical break or if it was only an evolutionary move.

More comparative research on courts in new democracies and on how the role they played under authoritarian regimes conditions their behaviour is needed.

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Appendix I. Interviews

Interviewee	Description	Date
Erasmo Arceta Morales	Valuator with considerable experience in expropriation procedures	04/03/2013
Carlos Arreola	Private consultant working with the Federal Ministry of Transport to acquire land for infrastructure projects	19/04/2013
Mariano Azuela	Justice of the Mexican Supreme Court (1983-2009) Chief Justice (2003-2007)	13/03/2013
Leticia Bonifaz	Head of the Office of Legal Counsel of the Mexico City Government (2006-2012)	6/03/2013
Miguel Angel Cancino	Environmental and Urban Ombudsman in Mexico City	29/07/2010
Juan Díaz Romero	Justice of the Mexican Supreme Court (1986-2006)	12/03/2013
Francisco Xavier Dorantes	Government official working in the Culture Ministry in charge of listed buildings.	25/08/2010
Roberto Lara Chagoyan	Law clerk to Justice Jose Ramon Cossío	15/07/2010
Alfonso León	Executive Director of a Private Trust responsible for building several highways in the Gulf region.	07/03/2013
Vicente Lopantzi	Government official working at the Office of Legal Counsel of the Mexico City Government (2000-2013)	04/09/2010
Salvador Lucio	Government official working at the Federal Ministry of Transport in charge of overseeing public-private partnerships to build new highways.	28/02/2013
Bernardo Luna	Partner at the law firm Kuri, Breña y Asociados in Mexico City working with clients developing infrastructure projects for the Federal Government.	5/03/2013
Etienne Luquet	Law clerk to Justice Juan Silva Meza	20/07/2010
Raul Mejia	Law clerk to Justice Jose Ramon Cossío	15/07/2010
Raquel Navarro	Government official working at the Federal Ministry of Transport in charge of land acquisition for infrastructure projects.	13/03/2013
Jorge Ordoñez	Law clerk to Justice Sanchez Cordero	28/07/2010
Guillermo Ortiz Mayagoitia	Justice of the Mexican Supreme Court (1995-2012) Chief Justice (2007-2011)	11/03/2013
Fernando Portilla	Head of CORETT, the Federal institution in charge of land regularization. (2000-2006)	24/042013
Alejandra Rabasa	Government official working at the Environmental Ministry in charge of natural protected areas	11/08/2010

Eduardo Ramirez Favela	Head of the Federal Valuation Office Agency (1985-1993) Doyen of Mexican Valuators	01/03/2013
Dolores Rueda Aguilar	Law clerk to Justice Jose Ramon Cossio	15/07/2010
Gustavo Ruiz	Law clerk to Justice Sergio Valls	22/07/2010
Jorge Santoyo	General Counsel for ICA, one of the largest infrastructure and construction companies in Mexico.	05/03/2013
Ulises Schmill	Justice of the Mexican Supreme Court (1985-1994) Chief Justice (1991-1994)	04/03/2013
Daniel Tovilla	Private consultant working with the Federal Ministry of Transport to acquire land for infrastructure projects	19/04/2013

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