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Democracy, judicialisation and the emergence of the  
Supreme Court as a policy-maker in Mexico

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## **Abstract**

In 1994, four days after taking office, Ernesto Zedillo, the last president to govern Mexico emerging from the once hegemonic National Revolutionary Party, promoted a major redesign of the Supreme Court of Justice that substantially expanded its constitutional review powers and reduced its size from 26 to 11 members. The operation of this more compact and powerful body was left in charge of 11 justices nominated by Zedillo. During the period 1917-1994, the Supreme Court adjudicated only 63 constitutional cases of its exclusive jurisdiction. In contrast, since the reform came into force in 1995, it has been the arena in which more than two thousand constitutional cases have been ultimately settled.

Why do courts established under authoritarian rule become effective policy-makers as democracy develops? Using Mexico as a case study and drawing on the strategic approach for the study of courts, this thesis argues that the Supreme Court turned into an effective policy-maker as a result of the convergence of three factors: institutional change (from judicial reform), political fragmentation (from democratisation) and an unprecedented internal stability. Judicial reform set a new institutional framework; political fragmentation triggered the use of constitutional review by political actors; and stability enhanced experience within the Court and prompted justices to more proactively engage in policy-making.

Through an appealing case study, a novel research strategy and original evidence consisting of four original datasets and thirty-five elite-interviews, this thesis contributes, first, to the comparative analysis of courts by offering a systematic and comprehensive account of judicial rulings and precedents and their impact both within and beyond judicial boundaries; second, to the judicialisation literature by highlighting the effects of the delegation of power to courts on judicial performance; and third, to the Mexican politics scholarship by providing a re-assessment of the role of the Supreme Court in regime dynamics.

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# 1. Introduction

“They have already plundered us. But Mexico has not ended. And they shall not plunder us again”, said President Jose Lopez Portillo after announcing the expropriation of fifty-one private banks during his sixth and last address to the nation given three months before leaving office, on the first of September 1982 (Adams, 1997). The combination of *presidencialismo* with the hegemony of the Revolutionary Institutional Party (PRI, for its Spanish abbreviation) allowed presidents in post-revolutionary Mexico to make and enforce such discretionary, far-reaching decisions. Yet, to eliminate the chance of losing in the judicial arena, Lopez Portillo promoted a constitutional reform to specify in the charter that the provision of public banking services was of the exclusive competence of the state (Elizondo Mayer-Serra, 2001).

Expropriation played a major role in the construction and maintenance of the undemocratic hegemonic-party regime that ruled Mexico from 1929 to 2000. It was the tool presidents employed to execute a virtually permanent land-redistribution program and later, as the country became urbanised, to conduct an equally enduring land regularisation policy (Varley, 1998). In 1938 President Lazaro Cardenas issued the decree that expropriated from foreign private owners the facilities and assets of the oil industry. This event has ever since been celebrated as a national civic holiday and epitomised as one of the most relevant symbols of Mexican nationalism. As of 2012, the public-owned oil industry provides 40% of the government’s revenue (Segal, 2012).

The Supreme Court has not been left out of the conflict emerging from the use of expropriation. In 1939, justices ruled the oil nationalisation decree as constitutional and established that the right to prior hearing was inapplicable in cases of expropriation. In 1982, the Supreme Court again endorsed the nationalisation of the banking system, dismissing the demand submitted by twenty-one bank owners on the grounds established by Lopez Portillo’s

constitutional reform (Elizondo Mayer-Serra, 2001). The saga that came about in 1982 proved that political actors no longer conceived the Supreme Court as an unproblematic arena, thus announcing the more active role the Supreme Court would soon play in Mexico's political system.

The more fragmented political environment that democratisation gradually established set a new scenario for expropriations. Two decades after the bank nationalisation, Vicente Fox, the president that marked the end of fourteen consecutive PRI administrations, resorted to expropriation to advance his own nationalisation enterprise, the expropriation of the sugar-mill industry, as well as to obtain the land needed for the development of his government's most important infrastructure project: a new airport for Mexico City. The mobilisation of the peasants, owners of the 10,000 expropriated acres, along with the high prospects of losing in the Supreme Court compelled President Fox to repeal the decree and cancel the project (Azuela, 2010).

The Supreme Court has gradually abandoned its traditionally restrained role for a more proactive engagement in the making of policy and law. In 2006, justices ruled unconstitutional the expropriation of sugar mills and established as binding precedent –known in Mexico as *jurisprudencia*<sup>1</sup>– that

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<sup>1</sup> In Mexico, *jurisprudencia* alludes to both the precedent that certain courts create and becomes binding for lower courts and to the precedent that plays a persuasive role but is not binding in formal terms. Therefore, *jurisprudencia* is more related to the concept of case law (although the precedent created by judges are formally binding only within the judicial realm) than to the notion of jurisprudence as the theoretical study of law. As Zamora et al put it, “[...] there exists a general misconception that the doctrine of *stare decisis*, adherence to established precedent, play no role or only a *de minis* role in the Mexican legal system. While it is true that the term *stare decisis* is not used in Mexico and has none of the talismanic effects that the doctrine had in the early common law, in fact Mexican judges at administrative tribunal level routinely adopt, follow and feel themselves bound by prior judicial rulings. This practice occurs in Mexico at two levels, one formal and the other informal. In the formal sense, Mexican law expressly authorizes certain courts to issue decisions that are binding upon judges in subsequent cases, through the issuance of *jurisprudencia obligatoria* by federal courts of appeals. In such instances, the latter have no choice but to adhere to precedent. In the informal sense, Mexican judges often follow prior rulings of other courts and judges voluntarily, not because Mexican law or legal doctrine mandates that they do so but because doing so serves other purposes. These other purposes may include a desire on the part of judges to build security and certainty into Mexican law or the desire to ensure self-preservation or promotion within the judiciary” (2004: 83).

public authorities must guarantee the protection of the right to prior hearing when using expropriations. Since then, eight out of the thirty-two states composing Mexico's federation<sup>2</sup> have passed reforms to adapt their local expropriation rules to the precedent. The impact of the Supreme Court's rulings and precedents has had far-reaching consequences not restricted to expropriation matters. For instance, after justices confirmed in 2008 the constitutionality of Mexico City's first-trimester abortion legalisation and held that legislating on ordinary criminal matters, abortion included, is the competence of state-level authorities, seventeen states also amended their local constitutions to explicitly determine that the right to life is protected from conception (GIRE, 2012).

The emergence of more proactive judges has taken place at a global level. Courts have progressively become more influential players at the expense of executive and legislative institutions (Tate and Vallinder, 1995). The legal status of abortion in Colombia and Poland (Kulczycki, 2011), the protection of gay rights in Canada, South Africa and India (Siegel, 2012), or the confirmation of general-election results in the United States and Italy (Newell, 2005), are all issues that, as in Mexico, have been ultimately defined inside the courtroom for the last two decades. Judicialisation, as this expansion of judicial power has come to be known (Vallinder, 1994), has implied that courts and judges deal in a more critical way with an increasing number of more complex cases (Koopmans, 2003).

Judicialisation has been linked to a diverse array of factors, from the dissemination of human rights discourse (Epp, 1998; ten Kate and van Koppen, 1994) and the creation of supra-national judicial institutions (Stone Sweet and

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<sup>2</sup> In formal terms, Mexico's federal system is composed of thirty-one states plus the Federal District of Mexico City. The Federal District is not officially a state but in recent years its autonomy has considerably increased, for example, through the re-establishment of direct elections as the method for choosing the local executive and legislative authorities. Although it does not have a proper local constitution, it has been given autonomy for creating its own local regulations on a vast array of legal matters.

Brunell, 1998), to judicial activism itself (Smithey and Ishiyama, 2002; Holland, 1991), to name just a few of the more prominent factors. The literature on comparative judicial politics has particularly underlined the role that the adoption of stronger constitutional judicial review mechanisms has played as an institutional source of judicial empowerment at the domestic level (Couso et al., 2010; Epstein et al., 2001; Ferejohn and Pasquino, 2003; Ginsburg and Moustafa, 2008; Hirschl, 2008; Shapiro, 2002; Sieder et al., 2005; Stone Sweet, 2000). Yet, substantial differences distinguish the experiences of consolidated democracies from those of countries undergoing processes of democratisation.

Although under different constitutional judicial review systems, courts and judges have traditionally played an influential role in consolidated democracies. In the United States, for instance, the Supreme Court arrogated the power of judicial review in 1803 (Knight and Epstein, 1996), and has employed it to shape policy and law ever since (Dahl, 1957; Whittington, 2009)<sup>3</sup>. Likewise, under the centralised design providing them with a monopoly over constitutional review, the German *Bundesverfassungsgericht* and the French *Conseil Constitutionnel* have both also been relevant players in the creation and implementation of national policies such as the liberalisation of abortion in the case of the former, and the nationalisation of industry in the case of the latter (Stone Sweet, 2007).

In some third-wave democracies, on the other hand, judicialisation has particularly been linked to the establishment still under authoritarian rule of broader constitutional review powers (Ginsburg, 2003; Hirschl, 2004). Certainly, a piece of research published in 1978 found that provisions for conducting constitutional review existed in only 26% of the constitutional texts of the world (Van Maarseveen and Van der Tang, 1978 cited in Ginsburg 2003). The spread of constitutional judicial review has been especially

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<sup>3</sup> In the United States a backlash of forty-three states adopted stricter expropriation regulations after its Supreme Court held in 2005 that it is possible to employ eminent domain to transfer property from a private owner to another private owner for the purpose of promoting economic development (Somin, 2008).

noticeable in Latin America, a region in which sixteen countries modified their constitutional review systems between 1981 and 2001. As of 2005 seventeen countries in the region had at least one constitutional review procedure, but eleven of them had three (Navia and Rios-Figueroa, 2005).

The research devoted to the analysis of courts in the region has significantly flourished in the last fifteen years (Kapiszewski and Taylor, 2008). The optimism about the positive effects on the rule of law of fostering judicial independence through judicial reform that distinguished the seminal works on the subject (Mendez et al., 1999; Prillaman, 2000; Ungar, 2002), has gradually translated into a growing and more problematizing corpus of research focused on the empirical study of courts. This literature has shown that judicial institutions have indeed become more autonomous as democracy has developed (Rios Figueroa, 2006; Rodriguez et al., 2003; Taylor, 2008; Helmke, 2005; Iaryczower et al., 2002). Taken altogether, this body of scholarship has made it evident that in this region judicialisation has paradoxically converged with democratisation: as democratisation has fostered the development of genuine representative institutions, judicialisation has simultaneously expanded the authority of judicial power over them.

Do courts established under authoritarian rule become effective policy-makers as democracy develops? Although prolific and increasingly sophisticated, the scholarship on Latin American courts has not yet provided a comprehensive account of the way they engage in policy-making focused not only on the institutional and contextual determinants of decision-making but also on the effects and implications of judicial policy outcomes. For instance, a study sponsored by Inter-American Development Bank recently explained that the regulations on the effects of judicial rulings allow judiciaries to perform four different roles in the policy-making process: veto player, policy player, impartial referee and societal representative (Sousa, 2010). This piece of research, by underlining the relevance of institutional design, provided an

interesting framework for approaching the problem of policy-making by courts in the region, but failed in developing a substantive systematic analysis of the effects produced by both contextual conditions such as political fragmentation and internal factors like stability and experience on the way courts engage in policy-making.

Drawing on the separation-of-powers approach for the study of courts (Epstein and Knight, 1998; Ferejohn et al., 2004; Magaloni et al., 2011; Rios Figueroa, 2007) and by using Mexico as a case study, this dissertation aims to explain why courts established under authoritarian rule have become more effective policy makers as democracy has developed. Certainly, this thesis builds upon the strategic approach for the study of courts to analyse the Mexican experience. The notion of judges as strategic policy-seekers performing in a given institutional context posed by the separation-of-powers approach allows accounting for the effects of both judicial reform and democratisation, but also for the specific institutional mechanisms permitting them to advance their policy goals.

In particular, building upon a multivalent conceptualisation of judicial decisions (Hansford and Spriggs, 2006; Stone Sweet, 2002), this dissertation distinguishes between policy-making in terms of arbitration, essentially displayed in the dispositions whereby a court defines the party that prevails in a legal dispute; from policy-making in terms of normative-creation (rule-making), manifest fundamentally in the precedent that emerges from the reasoning supporting such dispositions. Accordingly, this research is focused on explaining both arbitration and rule-making; therefore it conducts an examination of judicial rulings, but also of precedents and their effects on the legislative production of norms.

Mexico was selected as a case study because of the convergence of several contextual and institutional factors. First, unlike what has occurred in most Latin American countries, in Mexico democratisation came from a hegemonic-party civil regime that never collapsed and was neither preceded nor followed

by the promulgation of a new constitution. Second, also in contrast to the regional trends, judicial reform preceded alternation and was controlled by former rulers that opted neither to create a constitutional court (or a specialised chamber within it) nor to reconfigure the court of last resort without expanding its adjudicative powers. Instead, judicial reform established a powerful body, head of the judiciary and with exclusive constitutional review powers. Third, a hegemonic party controlled the integration of the original court but established staggered terms in office coinciding with changes in the congress and in the presidency. Fourth, despite judicial reform replacing lifetime tenure with a 15-year fixed term for justices, it led to the first eight-year period without renovation in the Supreme Court's composition. Finally, the formal and informal rules governing the creation of case law provide judicial precedents with an authority atypical to civil-law systems.

The hypothesis guiding this research is that the emergence of effective policy-making by the Supreme Court resulted from the convergence of institutional change (from judicial reform), political fragmentation<sup>4</sup> (from democratisation), and stability in the bench (which led to a substantial increase in the experience of justices holding unprecedented constitutional review powers). Institutional change set a new framework for the activity of the Supreme Court; political fragmentation triggered the use of constitutional review by political actors; and stability prompted more experienced justices to more proactively seek to advance their policy goals.

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<sup>4</sup> Ferejohn (2002) explains that political fragmentation is a complex concept that can emerge in different forms. Federalism fragments political power horizontally, opening space for judicial action. Political power could be horizontally fragmented for example by establishing a presidential regime. Furthermore, political fragmentation can also be produced by non-institutional means such as divided governments or the multiplication of the political forces represented within a legislative body.



The evidence employed to test this hypothesis consists of three main components: four datasets expressly integrated for this thesis<sup>5</sup> -one of them comprising more than two-thousand constitutional cases filed in the Supreme Court in the period 1995-2010-; thirty-five interviews with key actors involved in both the judicial reform process and the application of the Supreme Court's new powers; and an in-depth analysis of the impact of the Supreme Court's performance in two policy areas, abortion and expropriation, through a systematic examination of the effects of judicial rulings on these subjects on subnational-level regulations.

Overall, a novel research strategy, the selection of an appealing case study and the use of original evidence allows this study to contribute with relevant insights to both the comparative study of courts and the literature on Mexican politics. In the first place, by emphasizing the relevance of the interrelation of legal institutions (i.e. constitutional review and precedent) and contextual factors (i.e. political fragmentation and stability) as well as by underlining the centrality of researching the aftermath of judicial decisions, the theoretical and methodological strategy employed in this thesis constitutes an innovative approach for the systematic study of policy-making by courts. Second, this research provides relevant evidence regarding both the effects of democratisation on judicialisation and the impact of judicialisation on the regime dynamics in democratising countries. Finally, this thesis contributes to the Mexican politics literature by providing re-assessment of the role the Supreme Court plays in the political system.

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<sup>5</sup> One of the datasets registers information for more than two-thousand judicial judgements handed down by the Supreme Court in the period 1995-2011; a second one includes data of constitutional litigation at state level along the same period; a third contains data for all the justices appointed to the Supreme Court in the period 1917-2011; and a fourth one includes information for every expropriation law passed by the legislature in every state of the federation, as well as for every precedent established by the Supreme Court in the same matter, also in the period 1917-2011

## 1.1 Democracy, Judicialisation and Courts

“Why, for instance, would two individuals want to form a legal marriage instead of simply cohabiting?” asks Elster (1988: 8) to illustrate the tension implied in the pre-commitment constitutionalism represents for democracy. Based on the rule of majority, democracy is a method of government envisioned to maximise popular participation in government. Constitutionalism, on the other hand, is a system of pre-established rules intended to guarantee the protection of individual rights as well as to restrict majorities from changing such well-entrenched norms. Constitutionalism provides democracy with stability by protecting a set of founding rules from the dynamics of everyday politics. The protection of constitutional supremacy is guaranteed through the establishment of complex standards that prevent the constitution from being easily amended, but also through the delegation of this responsibility in independent institutions like courts.

Constitutional judicial review, that is, “the power of courts to strike down incompatible legislation and administrative action” (Ginsburg, 2008: 81), implies the delegation of a considerable amount of political power to non-elected institutions with a legitimacy that is not founded in elections. This lack of representative legitimacy makes courts, in democracy, face what has been described as ‘the counter-majoritarian difficulty’ (Bickel, 1962). In undemocratic regimes, on the other hand, the ‘counter-majoritarian difficulty’ can be conceived as a condition that courts share with the executive and legislative branches of government. In an undemocratic context, it is highly feasible that constitutionalism and the protection of constitutional supremacy through constitutional review can be more related to the preservation of authoritarian rule than with expanding the prospects of a majoritarian government to emerge.

Over the last thirty years the world has witnessed the emergence of two processes, one that has extended democratic institutions and values to countries traditionally governed under authoritarian rule (Huntington, 1991);

and another that has transferred a considerable amount of power to courts and judges at the expense of legislative and executive institutions (Tate and Vallinder, 1995). This convergence of democratisation and judicialisation has paradoxically implied a diffusion of political power and the establishment of more legitimate representative institutions but, at the same time, it has also implied a re-centralisation of this political power in courts, institutions with a more complex connection to political representation. In the dynamic environment that the convergence of democratisation and judicialisation implies, courts are also subject to a transformation of their role in the political system.

From the 1970s to the 1990s a trend towards the establishment of more competitive political regimes took place at the global level. The third wave of democratisation brought about thirty new countries transiting from authoritarian rule to establish stable forms of democracy, including free elections and institutions able to check-and-balance the exercise of political power (Huntington, 1991). The consolidation of democracy or, at least, the advent of such stable forms of democracy has been attributed to different factors, such as social mobilisation (Collier and Mahoney, 1997) or divisions within the authoritarian regime from which transitions occurred (O'Donnell et al., 1986).

The literature on democracy and democratization has underlined the role that economic factors have played either in the emergence or maintenance of democracy across the different regions of the world (Geddes, 1999)<sup>6</sup>. Among the factors considered in this literature –perhaps due to the link it has to economic development- the rule of law has also had specific prominence (Linz and Stepan, 1996; O'Donnell, 2004)<sup>7</sup>. As an influential comparative scholar

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<sup>6</sup> The works of Londregan and Poole (1996), Przeworski et al (2000), Haggard and Kaufman (2012) exemplify the relevance the specialised literature has conceded to economic development as a factor particularly linked to the advent and maintenance of the democracy.

<sup>7</sup> According to Fallon (1997) the concept of the rule of law has itself become a discourse and employed in different and even mutually inconsistent ways. Rios Figueroa and Staton (2009),

mentioned, even though third wave democracies could be labelled as what Robert Dahl (1971) once considered ‘polyarchies’, they cannot be portrayed as consolidated because of their lack of instruments guaranteeing political power not only to be vertically accountable through elections, but horizontally accountable through genuine representative institutions and effective checks and balances (O'Donnell, 1998).

Judicial independence has been regarded by a significant corpus of research as the pillar for building the rule of law in third wave democracies (Diamond, 1994; LaPorta et al., 2003; Larkins, 1996; Prillaman, 2000; Ungar, 2002). Establishing independent courts with real capacities for checking the other branches of government as well as for securing and enforcing citizen rights has been conceived by some scholars as the decisive factor to enhance the rule of law and, thus, to increase the prospects for a democracy to become consolidated. Accordingly, the establishment of wider constitutional review powers has been a central piece in the promotion of institutional arrangements more favourable for constructing judicial independence (Hammergren, 2002; LaPorta et al., 2003; Laver, 2011).

The global spread of constitutional review has, like democratisation, gone through three different waves (Ginsburg, 2008). The first occurred in the late eighteenth and during the nineteenth centuries, and was especially inspired by the creation in the United States of judicial review as a result of the landmark decision its Supreme Court rendered in *Marbury v. Madison*<sup>8</sup>. The

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analysing different approaches developed to capture the concept, have proposed to abandon a broad, multidimensional notion of rule of law and replace it with individual concepts from which it is constituted.

<sup>8</sup> The origins of *Marbury v. Madison* go back to 1800 when Thomas Jefferson defeated incumbent John Adams in the presidential race. Lame-duck Adams nominated in December of that year John Marshall, his Secretary of State, as Chief Justice to the Supreme Court. Although the Senate ratified the nomination, Marshall remained in his administrative position until Jefferson's inauguration. Later on, the lame-duck Congress passed the Judiciary Act of 1801, which created new courts and gave the president the right to appoint the corresponding new judges. During his last day in office, Adams appointed a group of federal judges but not all the appointments were delivered before the new administration came into office. Under the rules established by the 1801 Judiciary Act, William Marbury,

second wave took place particularly in Europe as a result of the adoption of the Austrian- Kelsenian model of abstract constitutional review (Kelsen, 1942). The third coincided with the wave of democratisation that started at a global level in the 1970s and has been the one specifically fostered by the promotion of judicial reform. As mentioned above, this expansion of constitutional review through judicial reform has been particularly noticeable in Latin America, where the institutional design of sixteen different countries was modified in the years comprising the period 1981-2001 -in 2005, seventeen countries in the region had adopted at least one constitutional review procedure, eleven of them three, four countries two, and only Argentina and Uruguay had just one (Navia and Rios-Figueroa, 2005).

The analysis of the underpinnings of judicial reforms in countries in transition to democracy has provided evidence challenging the existence of an automatic connection between judicial independence and the rule of law (Helmke and Rosenbluth, 2009). Recent studies have pointed out that the origins of judicial reform in certain third wave democracies were more related to attempts by former rulers to establish friendly courts that might allow them to preserve their control over the most relevant aspects of law and policy processes, than with a genuine intention for contributing to the establishment of the rule of law (Ginsburg, 2003; Hirschl, 2004; Finkel, 2008).

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one of the judges whose appointments was not delivered, sued the new Secretary of the State, James Madison, provoking the Supreme Court presided by John Marshall to have jurisdiction upon the case. In February 1803, the Supreme Court handed down a decision written by Marshall that denied Marbury's request asking the judicial body to issue a *writ of mandamus* ordering its nomination to be delivered. Nonetheless, the most relevant outcome of that ruling was a reasoning determining that the Supreme Court has the duty of reviewing the constitutionality of the legislation. Therefore, while invalidating the specific provisions included in the Judiciary Act of 1801 that provided the Supreme Court with the capacity to issue a *writ of mandamus*, *Marbury v. Madison* established the power of judicial review in the United States. As Graber puts it, this was the "the first case in which the Supreme Court explicitly declared a federal law unconstitutional and explained why the Constitution vested the federal judiciary with that authority" (1999: 28).

The notions of ‘insurance policy’ and ‘hegemonic preservation’, proposed by Ginsburg (2003)<sup>9</sup> and Hirschl (2004)<sup>10</sup> respectively, have provided persuasive arguments to understand why former rulers decided to promote reforms to limit themselves by giving courts wider constitutional review powers. According to these authors, the introduction of stronger forms of constitutional review through judicial reform has been possible in scenarios where both authoritarian rulers and opposition forces have chances to get benefits: the former securing the emergence of a friendly court, which could be determinant in protecting their interests in the case of a future defeat; while the latter gaining a new arena for advancing their agendas and policy goals.

Broadly, judicial reform as ‘insurance policy’/‘hegemonic preservation’ implies a logic where courts are tools for achieving stability and protecting certain policies and laws from majorities: those established under

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<sup>9</sup> Tom Ginsburg, noticing that “it is not sufficient to describe constitutional review as a device to protect citizens from future politicians without explaining why it serves the interests of present politicians who serve as a veto gate for the constitutions” (2004: 23), explains that “by serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain. Just as the presence of insurance markets lowers the risks of contracting, and therefore allows contracts to be concluded that otherwise would be too risky, so the possibility of judicial review lowers the risk of constitution making to those drafters who believe they may not win power. Judicial review thus helps to conclude constitutional bargains that might otherwise fail” (Ibid: 25).

<sup>10</sup> Ran Hirschl proposes the notion of self-interested ‘hegemonic preservation’ to explain the reasons that led to judicial empowerment through constitutionalisation. He explains that his explanation is based on four particular assumptions: “(1) the expansion of judicial power is an integral part and an important manifestation of the concrete, social, political and economic struggles that shape a given political system and cannot be understood in isolation from them; (2) the political origins of constitutional reform cannot be studied in isolation from the political origins of constitutional stalemate and stagnation; (3) other variables being equal, prominent political, economic and judicial actors are likely to favour the establishment of institutional structures that will benefit them the most; and (4) constitutions and judicial review hold no purse strings and have no independent enforcement power, but nonetheless limit the institutional flexibility of political decision makers (2004; 11). Accordingly, Hirschl asserts that “[T]he most plausible explanation for voluntary, self-imposed judicial empowerment is therefore that political, economic and legal power-holders who either initiate or refrain from blocking such reforms estimate that it serves their interests to abide by the limits imposed by increased judicial intervention in the political sphere” (Ibid).

authoritarian rule. This scenario, however, instead of being static is subject to the changes that the dynamics of democratisation produce. Certainly, judicial reform and the expansion of constitutional review have created a context more favourable for judicialisation to develop in third wave democracies. Judicialisation, or the process whereby courts and judges have gained an unprecedented capacity for shaping policy and law at the expense of legislative and executives (Ferejohn, 2002; Guarneri and Pederzoli, 2002; Vallinder, 1994) has been attributed to different causes, from the rise of judicial activism (Smithey and Ishiyama, 2002) to the establishment of supra-national judicial bodies (Stone Sweet and Brunell, 1998).

In emerging democracies though, institutional and political factors seem to have been decisive to the advent of judicialisation. On the one hand, the adoption of broader constitutional review powers established by judicial reform has expanded the jurisdiction of courts to areas that were previously considered the exclusive realm of the so-called representative branches (Koopmans, 2003; Shapiro, 2002). On the other, democratisation caused political power to become less centralised, thus creating more complex scenarios for the creation and implementation of law and policy (Ferejohn, 2002).

In the case of Latin America, different studies have tested the 'insurance policy'/'hegemonic preservation' and the 'democratisation' hypotheses. Finkel (2008), in a piece of research analysing the judicial reforms processes in Argentina, Mexico and Peru, found that former rulers did promote changes to the judicial system as a hegemonic preservation strategy. A different strand of research, focused on the operation of courts rather than the underpinnings of judicial reform, has regarded the political context as a decisive factor fostering the development of more independent judiciaries (Ansolabehere, 2007; Domingo, 2000; Scribner, 2010; Magaloni and Sanchez, 2006; Rios Figueroa, 2007).

The field of comparative judicial politics has substantially developed over the last two decades providing a more robust understanding of judicial independence and, in general, the performance of courts in democracy. This evolution has permitted researchers working in this field to produce persuasive and increasingly sophisticated explanations about independence as autonomy from the other branches of government, and as impartiality from the parties involved in the cases justices have at hand (Rios Figueroa, 2006). Nonetheless, as Kapiszewski and Taylor (2008) have underlined, there is still a lack of research devoted to analysing the role of legal institutions on the performance of courts and judges, the aftermath of judicial decisions, as well as on the changes in regime dynamics judicialisation and the new role of courts might be producing. Moreover, despite the special attention the literature has paid to tenure as source of judicial autonomy (Feld and Voigt, 2003; LaPorta et al., 2003; Rios Figueroa and Staton, 2008), there still exists the need to develop a more in-depth understanding of the effects of formal legal rules on high courts' judges performances.

The purpose of this research is to provide a systematic and comprehensive account of why courts established under authoritarian rule become effective policy-makers in democracy by analysing the case of Mexico in-depth. To provide this comprehensive explanation, this research seeks not only to assess the effects of democracy and institutional change on the performance of courts, but also to provide an explanation of how legal institutions such as precedent and the rules of standing determine decision-making, as well as how these institutions are employed by judges to produce both short and long-term outcomes. Overall, this research aims to gather solid, original evidence and reach robust findings in order to contribute to the debate regarding how policy-making courts are influencing regime dynamics in countries where judicialisation and democratisation have converged.



## 1.2 Constitutional Judicial Review and Policy-Making

In *The Federalist* No. 78 Alexander Hamilton described the judiciary as the ‘least dangerous branch’ since, unlike the executive and legislatures, “[it] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever” (Hamilton, 2008 [1788]: 380). It is true that the absence of direct control over the sword or the purse limits the enforcement power of courts but this, as this section will explain, by no means indicates that they do not have the capacity for exercising political power and creating rules that become of general application.

The understanding of courts as policy-makers has been the subject of a significant debate about whether they are institutions limited to arbitrate conflict by simply interpreting law or, as legislators and executives, principals with powers for developing public policy (Gerhardt, 2008). This debate is linked to other discussions, from the abstract examination of the very nature of law and its impact on the activity of judging (Cardozo, 1921; Dworkin, 1978; Hart, 1965; Posner, 1993), to more practical considerations about whether judicial rulings have the efficacy needed to constitute policies (Feeley and Rubin, 2000; Schubert and Shapiro, 1974; Tarr, 2009).

Among all issues involved in this debate, there are two particularly relevant to this thesis: the divergence in the conceptualisation of policy itself and the controversy surrounding the capacity of courts to produce effective policy decisions. In social science literature the term ‘policy’ is employed to denote a collection of different questions: government measures, legal dispositions, ideological orientations, to name just a few. This problem of conceptualising ‘policy’ is present in the judicial politics literature and is particularly linked to a debate regarding the empirical analysis of the policy content implied in judicial rulings.

In order to provide a more detailed conceptualisation of policy, this thesis relies on the distinction developed by Page (2008) that, by differentiating between ‘policies’ as ‘intentions’ from ‘policies’ as ‘actions’, proposes four levels of abstraction from which the concept can be comprehended: a) ‘principles’, or general views regarding how public issues should be conducted; b) ‘policy lines’, or the strategies related to such specific public issues; c) ‘measures’, or the concrete instruments that display policy lines; d) ‘practices’, or the behaviour of the officials in charge of putting into effect policy measures. The four levels distinguished by Page underline the degree of specificity of the action/intention needed as what ‘policy’ refers to is a crucial aspect to understanding its meaning. It can at the same time refer to either an ideological perspective towards public affairs or to a very specific measure created to deal with a concrete, narrowly defined issue. This distinction proves particularly enlightening for this thesis as it provides a plausible framework to explain in what ways judicial rulings involve making a policy decision.

The second issue is the controversy regarding the capacity of courts to produce effective policy decisions. On one hand, it has been claimed that courts lack real enforcement powers, so they have to rely on other public institutions to have their decisions complied with (Rosenberg, 2008). On the other hand, it has been considered that the scope of action for courts to make policy is restricted by the judicial process design, where the rules determining agenda-setting, monitoring and information capacities are established (McGuire, 2006).

Certainly, courts do rely on other authorities to make their decisions enforceable. However, as they have the capacity to establish authoritative rules, for example through declarations of unconstitutionality and precedents, they are also in a position to establish formal and persuasive policies that encourage social and political actors to follow them in order to avoid further inconveniences such as constant legal battles over repeated matters.

Furthermore, courts are able to track the evolution of law in a series of cases; they also have competences -like *certiorari*<sup>11</sup>- which, by allowing judges to select cases and thus the policy areas where they want to get involved, grants them substantial agenda-setting capacities; finally, they frequently gain access to relevant information that reduces uncertainty in their decision-making processes.

Courts are policy-makers in the sense that they do have the capacity to exercise political power to benefit one of the parties involved in a legal conflict but also to establish rules susceptible to becoming binding not just for the parties in a specific conflict. As policy-seekers, judges employ the different tools they have available to minimise political costs, simultaneously seeking to maximise the effects of their decisions (Epstein and Knight, 1998). The relevant question, thus, is to determine how judicial policy-making is materialised through the decisions courts render to the cases at hand.

According to Dahl, a policy decision is “an effective choice among alternatives about which there is, at least initially some uncertainty” (1957: 279). The essence of adjudication –the primary function of courts- is to settle specific disputes and define the party that prevails (McGuire, 2006). In this sense, judicial rulings constitute policy decisions insofar as they involve making effective choices among alternatives that constitute specific measures to which the parties in conflict are bound to follow. Furthermore, the ways legal systems operate determine the possibility for judicial rulings to produce effects that transcend the parties in conflict and become generally applicable rules (Stone Sweet, 2002).

The judgements courts render to constitutional review cases produce two main policy outcomes: a specific disposition settling a legal dispute and a reason supporting such a disposition. By establishing a concrete, particular

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<sup>11</sup> The *writ of certiorari* is the procedure in the United States that allows the parties involved in a trial to request the Supreme Court to bring a case before its jurisdiction (Thompson and Wachtell, 2009).

and retrospective rule (a disposition), courts define between the parties involved in the case the one that prevails; whereas by justifying the reasons that support such dispositions courts create another rule, this one of an abstract, general and prospective nature (Hansford and Spriggs, 2006). Hence, constitutional review allows court to perform two core policy-making roles: arbitration through the dispositions they establish, and rule-making through the rules founding such dispositions that become of general application.

In the case of courts performing the arbitration and rule-making roles constitutional review allows for them to have the capacity to make three levels of policy decisions. The dispositions established in the cases at hand constitute measures binding for the parties implied in those specific legal cases. Dispositions therefore are the most blatant evidence of a courts' policy-making role. However, under certain institutional frameworks judicial decisions have the potential of turning into principles -such as establishing that right to life must be protected from conception - or policy lines -such as determining that the protection of the right to hearing in expropriations has to be guaranteed before the consummation of the taking.

Consider for example, three landmark decisions by the Supreme Court of the United States: *Marbury v. Madison*, *Brown v. Board of Education of Topeka* and *Roe v. Wade*<sup>12</sup>. In all these three cases, the most relevant outcome was not the short-term disposition but the long-term, generally applicable rule that emerged from them (i.e. the creation of judicial review and invalidation of both *de jure* racial segregation and performance of induced abortions). The judicial process in the United States allows the Supreme Court to make such far-reaching decisions, first, because the regulations regarding the access to courts (standing) permit the extensive use of litigation in a vast array of legal

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<sup>12</sup> *Marbury v. Madison* was already explained in *supra* note 7. In *Brown vs. Board of Education*, the United States Supreme Court held unconstitutional all state laws establishing public schools for black students and others for white students (Kluger, 2011), while in *Roe v. Wade*, it disallowed the establishment of certain state and federal restrictions on abortion matters (Epstein and Kobyłka, 1992).

matters; and second, because the formal and informal rules governing the effects of judicial rulings gave the precedent the authority required to do so.

The institutional design of constitutional review is decisive for judicial policy-making because it shapes both the scope of action of courts over specific policy issues and their power to generate effects beyond concrete cases. In particular, two elements are more relevant to explain at this stage of this work (chapter two develops a more detailed analysis on this matter): the access to courts implied in the rules of standing, the allocation of constitutional review of courts in one or multiple jurisdictions, and the capacity of their rulings to produce general effects. The possibility for courts to make policy decisions depends on the cases presented to their jurisdiction, so they largely rely on the use of litigation to assume a position of producing outcomes of a rule-making nature. In like manner, the capacity of their rulings to produce policy effects largely leans on the capacity of their interpretations of constitution and law to turn into generally applicable rules.

In the first place, to clarify the relevance of legal standing, consider again the case of the United States. In that country the de-criminalisation of abortion resulting from *Roe v. Wade* was possible only after a constant, gradual and strategic use of litigation (Epstein and Kobylka, 1992). The relevance of litigation and its relationship to the rules of standing has been interpreted as decisive for the consolidation of the United States Supreme Court as a national policy-maker. In his study of the role of the Supreme Court during the nineteenth century, Gillman explained the Republican Party employed federal courts “to promote and entrench a policy of economic nationalism during a time when the agenda was vulnerable to electoral politics” (2002: 511). By the same token, Whittington has also shown that in the United States “when current elected officials are obstructed from fully implementing their own policy agendas, they may favour the active exercise of constitutional review by a sympathetic judiciary to overcome those obstructions and disrupt the status quo” (2005: 583).

In the case of Latin America, recent studies have suggested that changes in the rules of standing have, in the last decades, fostered the use of courts by civil society in matters as different as public health (Langston, 2006), housing (Cook, 1993), indigenous rights (Sieder, 2007) and gay rights (Undurraga and Cook, 2010). Both the evidence regarding the United States and Latin America illustrate that not only does judicial policy-making rely on inputs from social and political actors, but also on the incentives these actors have for resorting to courts. Certainly, litigation can be employed by public authorities to delegate controversial policy decisions to judicial institutions, but also by social and economic actors to either promote or contend the application of equally relevant policies.

In the end, the capacity of courts to make policy largely depends on contextual and institutional factors like those which democratisation and judicial reform create by implying, respectively, a process whereby political power becomes less concentrated and more accountable, and the incorporation of a new framework for the use of constitutional review. On one hand, democratisation has not only increased the incentives political and social actors have for introducing political conflict into the courtroom, but those of judges composing courts in charge of constitutional review to engage in more proactive policy-making decisions (Helmke, 2005; Iaryczower et al., 2002; Rios Figueroa, 2007). On the other hand, judicial reform has established a new framework that has produced effects within and without the judicial realm.

For instance, using game theory both Vanberg (1998) and Shipan (2000) argue that the capacity to litigate at the constitutional level has provoked legislators to change their behaviour in legislative bargaining processes under the assumption that they have stronger tools for reacting to eventual majority decisions. In the same vein, Stone Sweet (2000) has concluded that the expansion of constitutional review has strengthened courts as it has also empowered those actors holding the legal standing to submit constitutional

claims. From a different perspective, in an analysis of the case of the United States, Smith has underlined that “members of Congress strategically manipulate statutory rules governing the role of courts in regulatory policymaking to help their political supporters and to advance their own policy goals” (2005: 139). By the same token, Howard (2007) has claimed that in more conservative times the congress of the United States has also encouraged taxpayers to sue in the courts.

Turning to the generalizability of judicial rulings, it is important to bear in mind that in constitutional review cases they have the capacity to establish two interrelated outcomes in rule-making terms. First, judicial rulings can produce *inter partes* (‘between the parties’) or *erga omnes* (‘towards everyone’) effects, meaning that formal dispositions established in case can be applicable just to the actors involved or to the society in general. In constitutional review cases, however, courts are confronted with cases that involve two parties in conflict, but which also imply a question over the constitutionality of a specific piece of legislation or government act. Hence, when courts can render *erga omnes* rulings they have the power to act as negative legislators defining whether a legal act or norm is compatible with the constitution as supreme rule. This power gives them considerable influence over the rule-making processes undertaken in given polity and thus an equal chance to play a meaningful policy-making role.

The effects of judicial rulings, however, are not only restricted by the dispositions defining that they can be either *inter partes* or *erga omnes*. They also depend on the formal and informal rules establishing the authority of judicial precedents. In common law systems, the principle of *stare decisis* determines that, in order to guarantee equality before the law and legal uniformity, similar cases must be solved according to the precedent established in previous cases (Bankowski et al., 1997). In practice, *stare decisis* enhances the authority of precedent, expanding their scope of influence beyond the specificities of a given case (Shapiro, 1972).

Over the last decades, however, the convergence of civil and common law systems (Del Duca, 1991; Markesinis, 1994; Merryman, 1985) –which has included the aforementioned global expansion of constitutional review– contributed to vanishing the difference in the way judicial precedents operate in either of them. In spite of the formal rules governing the effects of judicial rulings, precedents in civil law systems have in practice gained an authority, which in some cases resembles the way precedents operate in common law countries. The relevance of precedents and, in general, the significance of the effects of judicial rulings, contrasts with the lack of empirical research that has been produced on the subject. In the case of Mexico, this thesis particularly seeks to test if, together with the invigoration of constitutional review from judicial reform, precedent has become a tool employed by the Supreme Court to more proactively get involved in the making of policy.

To sum up: courts are policy-makers as they have the capacity to exercise political power to determine the parties that prevail in legal disputes but also to advance the policy goals of the judges composing them. Constitutional review expands their scope for making policy because it does not only imply for them the ability to establish a disposition determining the winner of a legal case but to define whether legislation and government action is compatible with constitutional norms. By deciding constitutional review cases, courts interpret the constitution and establish rules founding the dispositions established in the cases they have at hand. Such rules have, under certain institutional arrangements, the power to produce general effects and become norms of general application. Altogether, courts with constitutional review powers have the capacity to play two interrelated policy-making roles: arbitration and rule-making. The way they play such roles in practice largely depends on institutional factors such as those that judicial reform have substantially modified in Latin America; and also on contextual factors like those that democratisation has been transforming in the polities where this process has taken place.



### **1.3 Decision-Making and Policy-Making by Courts**

In the last century, legal and social science scholarship has extensively researched law and courts. From this empirical endeavour persuasive conclusions challenging the description of the judiciary as ‘the least dangerous branch’ that Alexander Hamilton delivered by the time the Constitution of the United States was in the process of drafting have emerged. Courts might have no direct control over the sword or the purse but, as the previous section explained, they do have the capacity to accomplish policy goals.

The influence and visibility the Supreme Court enjoys in the United States has encouraged different generations of political science scholars to dedicate considerable efforts to examine from an empirical perspective the role courts play in the political system. Seminal works within this field, approaching judging as an inherently political task rather than as an exclusively law-applying activity, provided relevant insights for the comprehension of courts, for instance, revealing judges as policy-seeking and ideologically-oriented players (Pritchett, 1948), which interact with each other and hand down decisions in strategic ways in order to achieve self-interested goals (Murphy, 1973).

The evolution of political science as a discipline has shaped the way courts and, in general, all the institutions of law are conceived and empirically surveyed (Epstein and Knight, 2000; Smith, 1988; Whittington, 2000). The ‘behavioural revolution’ the discipline experienced in the 1950s (Almond, 1989) influenced judicial politics scholars to change the focus from the examination of courts as institutions, to the analysis of judges as individuals (Baum, 1994; Graber, 2005). This shift in the development of judicial studies fostered the emergence of methodologically more sophisticated approaches that shed light on ideological and strategic factors determining individual-level decisions but that failed to provide an account of the role of formal and informal institutions on judicial decision-making (Gillman, 2001). The

reassessment of the formal and informal rules new-institutionalism brought about in social sciences (Peters 2003), led to the consolidation of three dominant explanations of judicial decision-making: the attitudinal, strategic and legal models (Baum, 1997; Hansford and Spriggs, 2006; Maltzman et al., 2000).

The first one, drawing on Herman Pritchett's study of the United States Supreme Court (1948), has in general been characterised by advancing a conception of judicial decision making as the product of individual decisions' aggregation based on personal values and ideological orientations (Segal and Spaeth, 1992). By employing game theory and inferential statistics, attitudinal scholars have, for example, claimed that the justices' perceived ideology before confirmation processes is highly correlated with their votes once they come to the bench (Jeffrey A Segal and Cover 1989). Attitudinal scholars do not completely deny the effects of the environment on decision-making, but they do consider it is primarily and fundamentally driven by ideology (Segal and Spaeth, 2002).

The strategic model shares with the attitudinal a conception of judging as a self-interested and utility-maximizing activity but differs on the role of institutions in shaping decision-making. Strategic scholars consider that judges' own policy preferences do explain judicial behaviour but that they are also constrained by both the institutional context where they interact and by the environment surrounding courts. Accordingly, judicial decisions are shaped by the rules governing the interaction among justices, the assessments they make regarding external factors such as public opinion (Mishler and Sheehan, 1993), or the correlation of forces in the other branches of government (Epstein and Knight, 1998).

The legal model is less decision-centred than the attitudinal and strategic ones, but more connected to political regimes' dynamics (Clayton and May, 1999; Gillman, 2001) and historical institutionalism (Smith, 1988; Whittington, 2009). Legal principles established in constitutions, statutes and precedents

constrain behaviour, providing judges with a limited scope for deciding the cases at hand. Legal-model scholars do admit strategy is a force behind decision-making, but interpret it as a tool judges use to enhance coherence in the law (Baum, 2006).

Despite the theoretical and methodological differences among these three models, they all depart from the same premise: explaining judicial decision-making is fundamental because the outputs of courts are equally relevant in policy terms. Indeed, as Dahl (1957) put it in a seminal work focused on the United States experience, to conceive of courts as mere legal institutions is to underestimate the role they play as policy-makers. Researching the policy-making by courts implies the challenge of determining where exactly the policy content is located in lengthy and technical judicial rulings. Instead of dealing with this issue and constructing reliable and valid measures of policy content, judicial politics scholars have predominantly opted to employ the ideological direction of courts' rulings as a proxy for the rationale of the decision (McGuire et al., 2009). In the end, the emphasis that the judicial politics literature has made in explaining the process of judicial decision-making rather than its outcomes turns out to be paradoxical, to say the least.

Comparative judicial politics is a subfield that, as mentioned earlier, has flourished in the last twenty-five years (Ferejohn et al., 2004; Kapiszewski and Taylor, 2008). As the literature focused on the study of judicialisation has made evident, among the results of this comparative quest is a reinvigoration of research on the policy outcomes by courts. Although primarily devoted to explaining the process rather than the outcome, the judicial decision-making literature has delivered important theoretical and methodological insights for the emerging comparative study of courts. For the purpose of this thesis the theoretical foundations of the strategic model are particularly illuminating because they allow for three intriguing elements that may have had an effect in the Mexican case to be accounted for: the influence of individual-level

factors, the effects of formal and informal institutions and the impact of the political environment.

The first element is implied in the premise mentioned above: courts are important in policy terms because their decisions produce effects on society. Judges are policy-makers because, regardless of the forces determining their decisions, they are aware of their influence. This thesis in particular agrees with the strategic model and the premise that judges make decisions seeking to advance and maximise their own policy goals (Epstein and Knight, 1998). They behave strategically in order to attain such goals, but in the end individual-level features are factors that vitally determine their behaviour and, thus, shape judicial outcomes. Nonetheless, rather than focusing on ideological orientations, this dissertation embraces the idea that experience (from a more stable composition) constitutes a factor that greatly affects the behaviour of judges. Judges as members of collegial decision-making bodies become more prone to proactively seek to advance their own policy goals as they gain more experience on the bench<sup>13</sup>.

Second, under the influence of new-institutionalism (Peters, 2001), the literature on decision-making has paid special attention to formal and informal rules (Clayton & Gillman, 1999). Among all the institutional features this corpus of research has raised, the notion of law as indeterminate that is implicit in several strategic studies, and the centrality conceded to the rules governing adjudication, both contribute to the theoretical and methodological foundations in this thesis. In the first place, strategists advance a concept of law as an element exogenous to decision-making; the studies embracing this approach tacitly concede that judges have a great deal of autonomy from legal norms when deciding a case. Strategists tacitly embrace a conception of law as an element essentially indeterminate. In other words, in this literature law is

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<sup>13</sup> The goal of this thesis, however, is not to conduct an individual-level analysis of Mexico's Supreme Court Justices but to provide an account of the way factors such as experience and stability shape the performance of the Supreme Court as institution.

indeterminate in the sense that norms do not provide a univocal response to a legal dilemma, but also that such norms do not fully explain why judges decide in the ways that they do (Leiter, 2005) <sup>14</sup>.

The indeterminacy hypothesis is pertinent for this thesis because it establishes a connection between the evidence that this study seeks to provide with a wider discussion not only regarding courts but also about the very nature of law and its effects. This element is particularly interesting because, as will be analysed in the final chapter, judicial politics is distinguished for being a field prolific in empirical terms but one that has faced obstacles to develop a robust theoretical framework, particularly regarding its foundational concepts and premises (Graber, 2002).

Studies developed using a strategic framework have highlighted the relevance that the rules of the game have in decision-making and thus in the outcomes that courts produce. Within this strand of research, separation-of-powers approaches have paid remarkable attention to the institutional design of constitutional judicial review because the rules it establishes greatly determine the capacity the different branches of government have for overriding the decisions of the others (Dahl, 1957; Eskridge Jr, 1991; Ferejohn and Weingast, 1992).

The separation-of-powers approach has been successfully applied in studies analysing Latin American courts, such as those by Helmke (2005) and Iaryczower et al (2002) regarding the Argentinean experience, and by Scribner (2010) and Rodriguez-Raga (2011) respectively devoted to the study of

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<sup>14</sup> The concept of legal indeterminacy, proposed and endorsed by critical legal theorists, considers that “in any legal dispute with some social significance, whether that significance arises from the legal rules at issue or from the problem generating the dispute, the legal resources available in any reasonably well-developed legal system were sufficient to justify any socially significant outcome, where justify refers to practices of justification generally regarded as available to a person well-trained in the system’s methods of legal argument” (Tushnet, 2005: 81-82). The relevance of raising this notion originated in legal theory is that the analysis of courts from political science still lacks solid discussion regarding the implications of its claim in connection to the more general debates in legal theory.

constitutional courts in Chile and Colombia. The utility of this approach is that it allows researchers to consider the influence of different rules operating in the changing political environment which democratisation implies. In other words, the separation-of-powers approach does not only offer a good framework for understanding the effects of institutional change (i.e. judicial reform) but also for determining those created by the political environment (i.e. democratisation). In the case of Mexico, this framework is particularly useful to account for the effects of different forms of political fragmentation (from democratisation) in both the use of litigation by actors interacting in a more competitive environment and the policy-making by the Supreme Court.

To sum up: The relevance of courts as policy-making institutions has motivated different generations of scholars to research them. Ironically, however, instead of focusing on the policy outcomes produced by them, the judicial politics literature has concentrated its efforts on explaining decision-making in these collegial bodies. The literature on judicial decision-making has provided significant contributions for the study of courts, particularly related to the role of institutions and political environments as determinants of judicial decisions. Although originally intended to explain behaviour, the ideas advanced by the scholars explaining decision-making from a strategic approach have advanced persuasive arguments susceptible to be adapted to explain policy-making by courts. This thesis builds upon this literature to explain why the Mexican Supreme Court has turned into a more effective player in policy-making terms.

#### **1.4 The Supreme Court and Policy-Making in Mexico**

Mexico has significantly changed since the nationalisation of the banking system. It has gradually become a democratic regime with competitive elections, alternation in national and state governments, and an increasing pluralism within federal and state congresses (Lujambio, 2000). For instance, it passed from having a hegemonic-party system to become a competitive three-

party system with alternation in the presidency as well as in more than half of the 32 states. The PRI lost in 1988 the two-thirds qualified majority required to pass constitutional amendments, creating the first scenario where the declining hegemonic party was required to negotiate with the opposition to promote their policy agenda. The political system underwent an equally substantial transformation in 1997 when the PRI lost the majority in the Chamber of Deputies. Since then no single-party has managed to gain the majority in Congress and, as a result, presidents and their parties have had no other option but to negotiate legislation with opposition parties.

Democratisation inaugurated a new era for representative executive and legislative institutions as genuine sources of policy and law, prompting political actors to legislate on issues as controversial as abortion for example. As political power became more fragmented, the mechanisms of *presidencialismo* for processing political conflict became less effective. In this context the Supreme Court has emerged as a more visible political referee in charge of solving the legal disputes arising among an increasing number of more influential political players. This new role has certainly deserved renewed attention from social science. Still, there has not been a systematic and comprehensive account of its emergence as a source of policy and law.

On the 5<sup>th</sup> of December 1994, four days after taking office, Ernesto Zedillo, the last of the thirteen consecutive presidents to govern Mexico emerging from the PRI<sup>15</sup>, promoted the complete redesign of the Supreme Court of Justice that reduced its size from 26 to 11 justices and provided it with unprecedented wide-ranging constitutional review powers (Cossio Diaz, 2002;

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<sup>15</sup> The Revolutionary Institutional Party was created in 1929 as the National Revolutionary Party. Under this name it participated in the general elections of 1930 and 1934. In 1938 the National Revolutionary Party became the Party of the Mexican Revolution and eight years later, in 1946, it finally became the Revolutionary Institutional Party. The count of the presidencies began with Pascual Ortiz Rubio, the first president elected after the creation of the National Revolutionary Party, and concluded with Zedillo, who took office in 1994.

Fix-Fierro, 2003)<sup>16</sup>. Zedillo, however, left the operation of this body in the hands of 11 justices nominated by him and appointed by a Senate controlled by his party<sup>17</sup>. The Supreme Court gained the power to strike down legislation with general effects when the reform came in to force on the first day of 1995. However, the Supreme Court only employed this new power in June 1997, in the 78th case filed since its renovation, the first one submitted by president Zedillo.

The 1994 judicial reform significantly expanded the scope of constitutional review in Mexico, a function until then primarily carried out through the *juicio de amparo*, a procedure intended to enforce fundamental rights, which allows only individual petitions and that produces only *inter partes* effects (Zamora et al., 2004). In the first place, the reform created the action of unconstitutionality as the procedure whereby political actors could challenge the constitutionality of the laws passed by federal and legislative bodies (standing was given originally to legislative minorities and the Attorney General. Political parties and federal and state human rights commissions gained this ability in 1996 and 2006, respectively). Secondly, the reform also undertook a significant renovation of the constitutional controversy, a procedure intended to settle the disputes proper of the federal system. In particular, the reform expanded legal standing, which under the

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<sup>16</sup> The *Bill of Reforms to the Organs of Federal Judicial Branch* submitted by President Zedillo to the Senate on the 5<sup>th</sup> of December of 1994 explicitly stated that “a Supreme Court of Justice free, autonomous, strengthened and of excellence, is essential for the complete validity of the Constitution and of the rule of law enshrined in it (...) The strength, autonomy and interpretative capacity of the Supreme Court of Justice are essential for the adequate operation of the democratic regime and of the whole justice system (...) To consolidate the Supreme Court as a Constitutional Court requires the provision of more authority to its decisions; to expand its jurisdiction to issue declarations of unconstitutionality with general effects in order to solve controversies among authorities from the three levels of government and become the guardian of federalism”. Translated from Spanish from Fix Zamudio and Cossio Diaz (1996).

<sup>17</sup> In 1994, the PRI was in control of 94 out of the 128 seats of the Senate, nine more than the minimum needed to meet the two-third majority required for appointing justices. In spite of this fact, according to the information published in Magaloni et al. (2011), 7 out of the 11 justices were appointed with the support of the 25 senators from the PAN.



original 1917 Constitution was exclusive of national and subnational public institutions, to municipal authorities.

The Supreme Court emerged from the 1994 judicial reform as a more compact and powerful decision body, combining functions of last resort courts with others typical of constitutional courts. Only 63 constitutional controversies were filed in the Supreme Court before the reform came in to force on the first day of 1995 (Cossio Diaz, 2008); since then, a vast array of political actors have submitted more than two-thousand constitutional demands. As a result, a judicialisation process emerged creating a context more suitable for the emergence of a policy-making Supreme Court.

The literature on Mexican judicial politics has traditionally depicted the Supreme Court as a discreet political actor. Although some studies have claimed that the performance of the Supreme Court and in general of the federal judiciary had a certain degree of autonomy in Mexico's contemporary history (Gonzalez Casanova, 1967; Schwarz, 1972) the dominant perception of the role the Supreme Court played in the authoritarian period is of a weak institution, subordinated to presidential power (Magaloni, 2003; Magaloni, 2008), that lacked the appropriate tools to become an influential policy-maker (Cossio Diaz, 2002; Zamora and Cossio Diaz, 2006) and which was, most of the time, a source of legitimacy of the undemocratic regime (Domingo, 2000).

As in the case of other emerging democracies, the literature on Mexican judicial politics has in recent years addressed the question of why authoritarian rulers undermined their own power by strengthening the Supreme Court with stronger constitutional review powers. In the case of Mexico there has been some debate about the suitability of 'insurance policy'/'hegemonic preservation' as explanation of what occurred in 1994 with the judicial reform. Whereas some authors have argued that instead of being an insurance policy the 1994 judicial reform was intended to promote confidence in political and economic sectors, particularly after the signing of the North American Free Trade Agreement (Domingo, 2000; Inclan, 2004);

other scholars have disputed this perspective claiming that Zedillo and the PRI endorsed the reform in order to set up a powerful but loyal judiciary (Finkel, 2008; Magaloni and Sanchez, 2008; Magaloni and Sanchez, 2001)<sup>18</sup>.

The literature that has been focused on the analysis of the consequences rather than on the underpinnings of the 1994 judicial reform has predominantly explored the relationship between the changes in the political environment and the decision-making process in the Supreme Court. The positive effect of political pluralism on the development of a more active court has been a common conclusion in this corpus of research. In an article analysing the constitutional cases adjudicated between 1995 and 2003, Rios Figueroa (2007) shows that the probability of the Court ruling against the PRI has increased as political fragmentation at the federal level –in terms of divided government and alternation in the presidency- has also increased. This analysis allows this author to conclude that political fragmentation was decisive for the Supreme Court to emerge as an effective decision making body in Mexico.

On the other hand, in a study also analysing constitutional cases but in the period 1995-2006, Magaloni and Sanchez (2006) found that both before and after alternation in the presidency the Supreme Court has been inclined to rule in favour of the PRI, particularly in highly salient cases, and, on the contrary it has tended to strike down laws by non-PRI-controlled institutions.

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<sup>18</sup> The 1994 judicial reform was certainly related to an insurance policy / hegemonic preservation strategy, but as will be explained in more detail in chapter 2, it was also linked to factors of other kind. The interviews conducted for this thesis provided evidence confirming that, as authors like Inclan (2004) have claimed, economic factors and the search for legitimacy were also determinants for the emergence of the reform. In particular, two privileged actors of the process mentioned that there was also an interest within the Supreme Court to acquire stronger tools to deal with its increasing number of more complex cases. According to these key actors, by the time the reform was being analysed, high-ranking judicial officials approached members of the by then hegemonic Institutional Revolutionary Party in order to extend the influence of the judicial branch on the nature and scope of the reform.

In a 2011 article that employs virtually the same evidence, these authors - now in collaboration with Magar - provide a more detailed account (Magaloni et al., 2011). First, they argue that from 2000 the probability of the Supreme Court invalidating by means of the action of unconstitutionality procedure has considerably increased. Second, they hold that for constitutional controversies the Supreme Court has continued being biased in favour of the formerly hegemonic PRI. Third, through an individual-level analysis of non-unanimous decisions they argue justices' preferences have gone through an important realignment along a legalism-interpretativism dimension.

To some degree, there is a consensus in the scholarship devoted to the analysis of Mexican judicial politics about the effects of democratisation on the Supreme Court's decision-making. However, this consensus has not been accompanied by an agreement around partisan bias and autonomy. Besides, little attention has been paid to the effects of the transformation within the Supreme Court on its own decision-making processes. Additionally, in methodological terms there has been a reductionist conception of judicial rulings as sum-zero outcomes that affect only the parties in conflict. Altogether, the literature on Mexican judicial politics has fallen in to the same paradox as the one analysing the United States case: it has researched the Supreme Court because it is important in policy terms, but has not provided an in-depth account of its policy-making role.

As mentioned above, by using Mexico as a case study, this thesis aims to provide a comprehensive account of why courts established under authoritarian rule become effective policy-makers. In so doing, it does not only seek to assess the effects of democracy and institutional change on the performance of courts, but also to provide an explanation of how legal institutions such as precedent and the rules of standing determine decision-making, as well as how these institutions are employed by judges to produce both short and long-term outcomes. Building upon the comparative judicial politics literature -particularly the one targeting Mexico - this research seeks

to explain how the convergence of institutional change (from judicial reform) with political fragmentation (from democratisation) affected the Supreme Court so as to emerge as the effective policy-maker it has become.

To achieve such a goal, this thesis aims to develop a more comprehensive understanding of policy-making by courts, including an examination of the different elements courts have to arbitrate political conflict as well as to establish long-term rules. Overall, this research aims to contribute with original evidence to the debate regarding how policy-making courts are influencing regime dynamics in countries where judicialisation and democratisation have converged.

## **1.5 Research Strategy**

Why do courts established under authoritarian regimes become effective policy-makers in democracy? The hypothesis this thesis aims to explore is that the emergence of an effective policy-making court results from the convergence of institutional change (from judicial reform), political fragmentation (from democratisation), as well as from the experience gained by justices holding unprecedented constitutional review powers. The arguments supporting this hypothesis are that institutional change set a new framework for the activity of the Supreme Court; political fragmentation triggered the use of constitutional review by political actors; and experience prompted justices to more proactively seek to advance their policy goals.

In order to address the explanatory nature of the question and hypothesis guiding this research, it is fundamental to clarify the choices made about its scope and breadth, as well as of the methodological approach and tools employed to gather and analyse evidence regarding the performance of courts. This section explains why such specific choices were made and how they provide this research with the internal and external validity required for this research to deliver, by using descriptive and causal inferences, robust

conclusions and insightful contributions not only to the subfield of comparative judicial politics but also to the Mexican politics literature (Collier et al., 2004; King et al., 2001).

First, the objective of this thesis is to provide an in-depth explanatory account of judicial policy-making by courts in new democracies, so it opted to undertake “an intensive study of a single unit for the purpose of understanding a larger class of (similar) units” (Gerring, 2004: 342). The decision to select a case study to address the research question relies on the fact that, albeit making more complex its external validity (generalisation), this method allows one to conduct an in-depth understanding of the factors and causal mechanisms involved in a research problem, thus enhancing the internal validity of a research study. Following Gerring (2007), this research conducts a diachronic within-case analysis by researching different subunits (constitutional cases) across different periods, each of them distinguished by different degrees of political fragmentation. Accordingly, the use of this type of approach permits one to account for time-variable contextual factors operating in a constant institutional arrangement.

The selection of the case study is building upon the procedure proposed by Seawright and Gerring (2008) to distinguish a deviant case, that is, a case that allows one to seek for new explanations. Mexico, like other Latin American countries, underwent a process of democratisation that brought new rulers to the national government. Nonetheless, unlike the regional trends, in Mexico democratisation occurred from a hegemonic-party civil regime that never collapsed and was neither preceded nor followed by the promulgation of a new constitution. Secondly, and also in contrast to the regional pattern, judicial reform, and therefore the establishment of stronger forms of constitutional review, preceded alternation and was controlled by former rulers that neither created a constitutional court nor reconfigured the court of last resort but instead, judicial reform established an extremely powerful body, a head of the judiciary with exclusive constitutional review

powers. Third, a hegemonic party controlled the integration of the new court but established staggered terms of office coinciding with changes in the presidency. Fourth, in Mexico the formal and informal rules governing the creation of case law gave judicial precedents an authority atypical to civil-law systems that raised their capacity to establish generally applicable laws.

The strategy chosen to conduct this diachronic within-case analysis resorts to ‘triangulation’, that is, to increase the explanatory leverage of the research design by employing a mix of quantitative and qualitative tools (Jick, 1979; King et al., 1995; Olsen, 2004; Tarrow, 1995). As this study aims to present an in-depth analysis of policy-making by the Mexican Supreme Court in terms of arbitration and rule-making, it employs quantitative tools (descriptive as well as cross-sectional and longitudinal logistic and negative-binomial regression analyses) to provide a comprehensive and systematic view of how this decision-making body carries out both functions, but also to determine the influence of contextual (political fragmentation from democratisation) and personal-level (experience from stability in the composition of the Supreme Court) factors on its performance. Additionally, this study relies on qualitative techniques (process-tracing and elite interviewing) in order to gather further and more detailed evidence regarding specific aspects linked to judicial policy-making and its effects in Mexico.

The sources of the evidence employed in this study are integrated by the next main components:

1. *Constitutional review judgements dataset*: dataset registering the 2001 judgements handed down by the Mexican Supreme Court to constitutional cases of its exclusive competence in the period 1995-2011. The integration of this dataset was based on three different sources (Appendix I provides a more detailed explanation of the sources and procedures followed for its integration):

- a) *@lex (SCJN, 2012)*: the judicial statistics website by the Supreme Court of Mexico compiles information for every judgement rendered in cases originated from constitutional controversies

(concrete review procedure) and actions of unconstitutionality (abstract review procedure) petitions. It was the source of the judicial information analysed (file, dates, parties, decisions, and votes, among others).

- b) *IUS (SCJN, 2011a)*: this is an electronic compilation also published by the Supreme Court in Mexico that registers all the texts considered as binding and persuasive case law in Mexico. The information of this compilation was cross-referenced with the data included in the statistics website, in order to have complete data regarding the decisions and precedents which have emerged from constitutional review cases.
  - c) *Local Congresses Dataset (CIDAC, 2008)*: this dataset, which was created by Mexico City-based thin-tank *Centro de Investigacion para el Desarrollo*, provided the information regarding the political affiliation of the organs of government, at federal and state levels, and was employed for cross-referencing the information included in the Supreme Court's dataset, as well as for the calculations employed to calculate different indices of political fragmentation. As this source includes information up to 2008, it was complemented with data from the electoral agencies and local congress of every state of the federation.
2. *State/year constitutional litigation dataset*: an original dataset compiling political and litigation-related variables for every one of the 32 states of the Mexican federation in the period of this study 1995-2010. The elaboration of this dataset was based on the information provided by @lex and the *Local Congresses* dataset.
  3. *Mexico Supreme Court Justices Dataset 1917-2011*: an original dataset registering information of appointments and career paths of the 212 people appointed as justices to the Supreme Court in the period 1917-2011. For the elaboration of this three sources of information were employed: the biographical compilation published by the Supreme Court (SCJN, 2011b); the information regarding judicial appointments included in Fix Zamudio and Cossio Diaz (1996); and the data registered in *Mexican Political Biographies 1935-2009* (Camp, 2011).
  4. *State Expropriation Laws and Precedents Dataset 1917-2011*: this dataset registers every law passed by the legislature in every state of the federation, as well as every precedent established by the Supreme Court.

The information included in this dataset has its origins in two sources: in the case of the legal disposition it is based on a revision of the state-level reforms as secondary sources; while the data regarding judicial precedents relies on the compilation elaborated by Herrera (2006).

5. *Interviews*: thirty-five in-depth open-ended interviews were carried out with key actors, including justices and former justices to the Supreme Court, law-clerks, legislators, former members of the cabinet, among others (Appendix II provides a detailed list of the interviewees).

The information that these different sources provide is employed to achieve different specific objectives linked to the general question and hypothesis. In the first place, the state/year litigation dataset is utilized in the analysis of the relationship of political fragmentation, in the use of litigation by political actors. The utility of this analysis is twofold: it provides evidence about judicialisation as an effect of the diffusion of power from democratisation, but at the same time it contributes to explain why the policy outcomes of the Supreme Court are determined by the inputs implied in the way political actors use litigation.

Second, the constitutional review judgements dataset allows this thesis to present an analysis of the way political fragmentation and the development of a more stable and experienced Supreme Court shape the outcomes of this decision body in terms of arbitration and rule-making. This perspective is particularly useful because it makes it possible to elucidate whether or not there have been modifications in the patterns followed by the Supreme Court's policy performance and, if so, whether these patterns have been related to democratisation and the experience gained by the justices composing a more stable body.

Third, as this study aims to present a thorough analysis of the policy effects of the Supreme Court's decisions, it selected two policy areas particularly relevant: abortion and expropriation. Whereas in the case of the former the analysis is based on secondary sources, in the case of the latter the *State Expropriation Laws and Precedents Dataset 1917-2011* provides the



evidence needed to trace the effects that judicial decisions are producing in subnational regulations. In other words, the analysis of these two policy areas allows this dissertation to offer specific evidence of the policy consequences judicial rulings produce beyond the judicial realm.

Finally, interviews constitute an equally important source of evidence for this thesis. The information provided by key actors is particularly useful not only because it allows us to assess the plausibility of quantitative findings, but also because it contributes significant insights in to the mechanisms whereby the Supreme Court displays its power to make policy. The information from the interviews is employed throughout the text in order to support, with original evidence, the arguments this dissertation makes regarding the emergence of the Supreme Court as a substantial policy-maker in Mexico.

To summarise, this thesis develops a diachronic within-case analysis of Mexico as a deviant case in terms of democratisation and judicialisation in Latin America. The strategy defined to undertake this analysis comprises both quantitative and qualitative tools in order to enhance its explanatory power. The evidence employed by the thesis is based on interviews, as well as in three original datasets elaborated from primary and secondary sources. The objective in the design of this strategy is to provide this study with the methodological foundations needed to provide robust conclusions based on objective and solid evidence.

## **1.6 Organisation of the Thesis**

This thesis is structured in seven chapters including this one, which outlines its theoretical and methodological foundations. Chapter 2 analyses the institutional design of constitutional review in Mexico to explain how its evolution led to the adoption of a particularly powerful institutional design combining the most influential elements of both the United States model of judicial review and the European system of centralised control of

constitutionality. Building upon the elements explained in this introductory chapter, the second one argues that the Court tempered its lack of effective policy-making tools by enforcing the authority of judicial precedents, particularly through the creation of *jurisprudencia*, Mexico's own case law system. Additionally, it also claims that the Supreme Court did not actively engage in policy-making until the constitutional review system was reinforced with wide-ranging constitutional review procedures.

Chapter 3 provides an account of why since 1995 Mexico has undergone a judicialisation process whereby the Supreme Court has gained an unprecedented influence over policy issues. The argument advanced in this chapter is that a more democratic context has fostered political fragmentation and so increasing the incentives political actors have to actively use standing in the Supreme Court to litigate provided by the 1994 judicial reform. The explanation offered in this chapter constitutes the basis for explaining why judicialisation triggered the development of more proactive policy-making by the Supreme Court.

Chapter 4 is intended to explain how the institutional change from the reform, political factors from democratisation, and the experience gained by justices under a more stable composition, have fostered the development and consolidation of the Supreme Court as a national policy-maker in Mexico, an actor with the capacity to perform as Mexico's political system's ultimate arbitrator, as well as a more effective source of rules of general application. In order to do so, this chapter presents, first, a schematic account of the Supreme Court's decision-making process to explain that there are different phases along which the Court displays its arbitration function. Second, it examines the different patterns followed by the decisions rendered by the Supreme Court to constitutional controversies and actions of unconstitutionality cases. Finally, by resorting to inferential statistics it provides an explanation of what have been the determinants of the Supreme Court's policy-making,

particularly testing to what extent fragmentation and stability have indeed altered the performance of the Supreme Court.

Chapter 5 provides evidence to support the idea that the Supreme Court has become a more effective policy-maker by analysing the effects of its resolutions on a specific policy area. Using abortion, this chapter presents an evaluation of the Supreme Court's policy-making role at the micro level based on research strategy and combines the following elements: a review of abortion law transformation over the last forty years; interviews with key actors including law clerks and civil society organisation leaders; and an in-depth analysis of the Supreme Court's decisions in landmark abortion cases and their effects on state level regulations.

Chapter 6 addresses the question of to what extent the Supreme Court has left behind the legacy from authoritarian times. In particular, this chapter examines the determinants of the overriding of precedent by the Supreme Court, as well as the effects that legal changes like this have produced in the legal system. The objective, hence, is to provide an understanding of how the Supreme Court has explicitly sought to make policy and law by modifying specific rules established in precedents.

Chapter 7 presents a summary of the conclusions emerged from the empirical analysis of Mexico as case study. Additionally, it provides a discussion of the contributions of this thesis to the relevant literature. Lastly, it assesses both conclusions and implications in the light of future research.

To summarise: the purpose of Chapter 1 was to set the theoretical and methodological framework of this thesis. Chapter 2 presents a historical revision of constitutional review in Mexico to explain why the institutional design created by the 1994 judicial reform set a new scenario for the advent of a policy-making Supreme Court. The objective of Chapter 3 is to elucidate how political fragmentation from democratisation has fostered the use of litigation, promoted the emergence of a judicialisation process of legislation and government action, and therefore expanded the scope of action for the

policy-making of the Supreme Court. Chapter 4 seeks to provide a systematic large-n account of the way the Supreme Court performs as a policy-maker by arbitrating political conflict and creating rules of general application through precedent in a more fragmented political environment and under an unprecedented internal stability. The purpose of Chapter 5 is to illustrate by analysing the issue of induced abortion how the Supreme Court has strategically employed strike down decisions and precedent as policy tools to pursue long term policy goals. Chapter 6, through the analysis of expropriation law, explains why the Supreme Court has overridden precedents and how such legal transformations have produced substantial transformations beyond judicial boundaries in subnational regulations. Finally, Chapter 7 summarises the findings of this thesis and discusses their implications in the context of present and future research.

## 2. The Institutional Design of Constitutional Review in Mexico

The Supreme Court of Justice has played a restrained political role during most periods of Mexico's history. In the decades following independence, in a context of prolonged instability, the judiciary was the most stable branch of government, which, for instance made a decisive contribution to the restoration of federalism in the late 1840s (Arnold, 1996). However, political struggles, first, and later the establishment of a dictatorial regime led to the development of formal and informal mechanisms that helped the executive branch to subordinate the judiciary. The 1917 Constitution made no substantial change to the competences and jurisdiction of the Supreme Court so it continued to lack effective tools for checking executive and legislative authorities. Later, the consolidation of Mexico's one-party presidential regime reinforced the unbalanced executive-judicial relationship.

The research explaining the absence of judicial independence in Mexico indicates that the convergence of two elements made possible the subordination of the judiciary: a weak institutional setting and *presidencialismo* (Domingo, 2000; Magaloni, 2003; Rios Figueroa, 2007). As mentioned in the previous chapter, the first component of this formula drastically changed in 1994 as a result of a wide-ranging constitutional reform implemented to strengthen the Supreme Court through wider constitutional review powers and the reduction of its size from 26 to 11 justices. The 1994 judicial reform established a new framework for the intervention of the Supreme Court in the political arena, which, this thesis argues, along with an increasingly competitive political system and an unprecedented internal stability, encouraged justices to more proactively engage in policy-making.

This chapter analyses the institutional design of constitutional review in Mexico to explain how its evolution gradually led to the adoption of a

particularly powerful arrangement combining the most influential elements of both the United States model of judicial review (i.e. binding precedent) and the European system of centralised control of constitutionality (i.e. centralised jurisdiction and abstract review with *erga omnes* effects). Drawing on the discussion regarding policy-making by courts developed in the previous chapter, this one argues, first, that the Supreme Court tempered its lack of effective policy-making tools enforcing the authority of judicial precedents, particularly through the creation of *jurisprudencia*, Mexico's own case law system. Second, the Supreme Court did not actively engage in policy-making until the constitutional review system was reinforced with a wide-range of constitutional review procedures.

The chapter is structured as follows: the first section develops a framework for explaining why, in general, constitutional review allows courts to perform two complementary functions: arbitration (the settlement of a legal dispute between two parties) and rule-making (the establishment of rules supporting such settlements). The second section provides a review of the major changes to constitutional review design experienced in the eighteenth century to show that judicial subordination is a legacy from that century. The third section explains that the combination of a weak design with an authoritarian regime hindered the emergence of an effective and autonomous Supreme Court. The fourth section presents a detailed analysis of the 1994 judicial reform to clarify why it meant an institutional revolution that constituted the basis for a transformation in the role of the Supreme Court in the political system. Finally, the fifth section provides a review of the way the 1994 judicial reform affected the administrative operation of the Supreme Court.

## **2.1 Constitutional Review and Policy-Making**

The first chapter provided an analysis of the different notions of judicial policy-making existent in the judicial politics literature, concluding that the

judgements rendered by courts on constitutional review cases contain two different policy outcomes: a disposition settling a dispute and a reason supporting such a disposition. On the one hand, by establishing a concrete, particular and retrospective rule (a disposition), courts define between the parties involved in a dispute by the one that prevails. On the other, by justifying the reasons that support such dispositions courts create another rule, one of an abstract, general and prospective nature (Hansford and Spriggs, 2006; Stone Sweet, 2002).

According to this distinction, policy-making by courts is twofold and allows them to perform two different but complementary functions: arbitration (by resolving a concrete dispute) and rule-making (by setting a rule affecting the normative structure of a particular polity). Using the two paradigmatic models of constitutional review –judicial review in the United States and the European system of centralised control of constitutionality- as ideal types this section sets the framework that will be employed for explaining how changes in the design of constitutional review have affected the performance of the Supreme Court as a policy maker.

The United States Constitution does not grant judges constitutional review powers. Judicial review is a by-product of the decision rendered in *Marbury v. Madison* where the Supreme Court held that federal courts could review the constitutionality of laws passed by the legislature as a mechanism to guard the supremacy of the constitution. This judgement established a model of judicial review where any court could rule over the constitutionality of any law (decentralised jurisdiction), but only in those cases in which a material conflict regarding its constitutionality exists (concrete review). Under this model, the rulings rendered by courts only affect the parties involved in the case at hand (*inter partes* effects), but due to the authority of *stare decisis* principle, which establishes that “courts are bound to follow their own prior decisions and [...] the precedents of higher courts in the same jurisdiction” (Cappelletti, 1970: 1041), the judgements virtually produce *erga omnes* effects.

The European model, created under Hans Kelsen's influence and first established in Austria by the Enactment of its 1920 Constitution, was designed for parliamentary regimes with the objective of protecting the coherence of the legal system (Kelsen, 1942). Under this premise, the power of constitutional review was granted to a single-court not belonging to the judiciary and entitled to review the constitutionality of laws in the absence of concrete conflicts. Since abstract review, as this type of constitutional review is called, implies a potential invalidation of the laws under review, it is accompanied by judgements with *erga omnes* effects but which do not formally become case law.

Different institutional designs produce different policy outcomes. Among the different elements particular to each model there are four that have had a greater impact on the way courts engage in policy-making: standing, (which actors have the right to present cases before the Supreme Court?); jurisdiction (is the constitutional review centralised in a single-body or can it be carried out by different courts?); generalizability (do the dispositions of courts affect only the parties in conflict or are they intended to be of general application?); precedent (are courts or other actors bound to follow their previous decisions or those of higher courts?)<sup>1</sup>.

First, standing refers to the rules governing the access to the Supreme Court of different actors. Where certain actors have privileged access to courts (e.g. political parties or government authorities) they are also given an important veto power that most of the time is strategically employed seeking to block the application of certain policies. The rules of standing affect the way political actors behave in different arenas, legislative bargaining for example (Vanberg, 1998); and they are also determinant in the salience of the

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<sup>1</sup> The decision to highlight the relevance that in policy-making terms have all these four elements was inspired by the analysis regarding the structure of judicial review in Brazil and Mexico, conducted by Rios Figueroa and Taylor (2006) in their text about the judicialisation of policy in both countries.



cases being brought into courts. The extent to which a court gets involved in policy-making largely depends on the rules governing standing.

Second, jurisdiction refers to those rules that are centralised in a single-body or decentralised in multiple constitutional review powers. Centralisation implies the existence of a monopoly that increases the incentives for employing it in a dynamic way. Decentralisation diffuses this power but does not necessarily decrease the incentives for an active use of constitutional review. In fact, the factors that allow higher courts to have a certain degree of control over lower courts' performance are the hierarchy of courts and the existence of binding precedent.

Third, the rules governing effects determine the extent to which judgements could be generalizable, in so doing they affect also the capacity of courts to check executive and legislative authorities. Under *erga omnes* effects every authority is bound to follow the dispositions rendered by the Supreme Court, a feature that expands the influence of courts' judgements beyond judicial boundaries. Conversely, *inter partes* effects limit the capacity of courts to produce far-reaching resolutions, which means a substantial reduction of their formal powers to make policy. Nonetheless, the possibility of making rules applicable only in single cases expands the scope of a discretionary use of constitutional review. *Erga omnes* effects compel judges to be aware of all the potential consequences that their judgements may generate. Therefore, in practice having stronger effects does not necessarily stimulate a more dynamic use of constitutional review powers.

Fourth, precedents, in formal and informal terms, are one of the most outstanding instruments that judges have to make policy and law. When courts are bound to follow dispositions from previous or higher courts, such dispositions gain an authority akin to *erga omnes* effects. The authority of precedent relies on legal provisions like those that determine which rulings are subject to become case law, but it is also determined by informal rules which in many instances make them as influential as proper binding judicial

precedents. Although the authority of precedent is circumscribed to the judicial sphere, tradition and forward thinking by government authorities contribute to expanding its degree of influence.

The rules governing each of these elements greatly determine the way courts perform the two aforementioned policy-making functions. For example, a highly accessible court without *inter partes* rulings would probably be a less effective policy-maker than a tribunal inaccessible to the ordinary citizen with *erga omnes* rulings. As standing determines whether certain actors have greater access to courts than others, and as jurisdiction determines how fragmented the constitutional review powers are, both of them are more related to the arbitration than to the rule-making function. In contrast, generalizability and the role of precedent are particularly relevant to rule-making because both define the scope of influence of resolution rendered by courts. To map how the merging of these elements creates different designs and thus different policy-making tools, the next table shows, on one side, the different possible combinations of standing and jurisdiction, and on the other those of generalizability and precedent.

Table 2.1 Policy-making and the design of constitutional review

		Arbitration		Rule-making			
		Jurisdiction		Generalizability			
		Decentralised	Centralised	<i>inter partes</i>		<i>erga omnes</i>	
Standing	Individuals	US model Mexico ( <i>amparo</i> )	Mexico from 1994 (CC & AU)	Precedent	Not binding	Mexico before 1882 ( <i>Amparo</i> )	European model
	Influential political actors	-	European model		Binding	US model Mexico from 1882 ( <i>Amparo</i> )	Mexico from 1994 (CC & AU)

CC= constitutional controversy, AU=action of unconstitutionality

Table 2.1 shows how Mexico's constitutional review procedures compare to the US and European models. The European model has, in formal terms, tools more suitable for conducting the arbitration function because it implies a centralised setting with access to courts by influential political actors. The difference is less evident in rule-making terms, essentially because the

principle of *stare decisis* provides courts the power to issue judgements with an authority similar to those rendered under the European model. Notwithstanding such particularities, from a legal perspective it is clear that the combination of *erga omnes* effects with binding precedent sets a powerful framework for judicial rule-making.

As with the United States Constitution, the first Mexican charter enacted in 1824 made no reference to any form of judicial review of laws. The lack of mechanisms for protecting individual rights and guarding constitutional supremacy inspired the creation of the *amparo* procedure in 1847 (next sections explain in more detail the evolution of constitutional review and the relevance of *amparo*). The original institutional design of *amparo* restricted the effects of the judgements only to the parties directly involved in a concrete case (this clause is known in Mexico as *Formula Otero*).

Under *Formula Otero*, and in the absence of provisions defining the authority of judicial precedents, the Supreme Court lacked the tools to become an effective policy player. The enactment of the 1881 *Amparo Law* set up a set of rules to define under which conditions it would be able to create precedents with a binding force. *Jurisprudencia*, as this case law system is known, gave formal authority to judicial resolutions without abolishing *Formula Otero*. From that year, *jurisprudencia* has allowed the Supreme Court –and from 1967 the Circuit Courts too- to have an increasing involvement in the creation and renovation of the norms of general application in Mexico.

In 1994, as a result of a presidential initiative, a group of constitutional reforms granted the Supreme Court stronger constitutional review powers through the creation of the constitutional controversy (concrete centralised review) and the action of unconstitutionality (abstract centralised review), both procedures of its exclusive jurisdiction. The reform gave the Supreme Court, for the first time in Mexico's history, the capacity to render *erga omnes*

effects rulings. Furthermore, a proper system of binding precedents<sup>2</sup> was created for all constitutional controversies and actions of unconstitutionality adjudicated by the Supreme Court. From the 1994 reform emerged a design where the Supreme Court preserved the role of last resort court, but also with powers similar to those that characterise European constitutional courts. Certainly, as it will be explained in more detail in the following sections, with 1994 judicial reform the Supreme Court gained unprecedented tools for developing a more active arbitration function, as well as for becoming a more effective rule-maker.

Once established, this basic framework for understanding the link between the design of constitutional review and the policy-making by courts, the following sections are devoted to clarify in more detail the evolution of the constitutional review in Mexico, from its birth as independent nation in the eighteenth century and until the enactment of the 1994 judicial reform. The purpose of this is to provide a thorough explanation of why this reform meant a revolution for Mexico's constitutional review framework, therefore, why it set the basis for the development of a policy-making Supreme Court.

## **2.2 The Emergence of Constitutional Review**

A hundred years passed between the outbreak of The War of Independence in 1810 and the start of the Mexican Revolution in 1910. During this period, Mexico underwent different domestic and international armed conflicts that, among other consequences, resulted in the loss of more than half of its original territory to the United States<sup>3</sup>. The country had a high rotation in the presidency -48 different presidents took office between the enactments of the

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<sup>2</sup> Section 2.4 provides a more detailed explanation of this system of binding precedents.

<sup>3</sup> The most relevant of these domestic conflicts was the Reform War that took place between 1857 and 1861 and emerged from the opposition of conservative groups to the enactment of the liberal 1857 Constitution.

1824 and 1857 constitutions<sup>4</sup>- that prevented the construction of a stable government. The legacy of decades of violence and turmoil created the appropriate environment for the emergence of the dictatorial regime that ruled the country for over 35 years (Guerra 1988). In the end, political instability and authoritarianism prevented the emergence of a genuine democratic representative system.

Mexico's judicial system was built upon the unstable environment that distinguished the nineteenth century. In the years that followed the establishment of the first federal republic in 1824, despite lacking constitutional review powers, the Supreme Court was an influential actor, which, for instance, disputed with Congress the power to review the constitutionality of state constitutions (Cossio Diaz, 2008). Years later, with the substitution of federalism by a centralist republic, the Supreme Court acquired the right to initiate legislation, a faculty that it successfully employed to adapt the judiciary's structure to the features of the centralist system that ruled the country from 1835 to 1847 (Arnold, 1996).

In the late 1850s began a process of gradual subordination of the Supreme Court to the federal executive. This was most notable when a group of justices were dismissed after opposing the abolition of military and clerical privileges that a piece of legislation known as *Ley Juarez* had established. The centralisation of power Porfirio Diaz's authoritarian regime contributed to subordinate the judicial power and to reinforce the Supreme Court's restraint from political arenas. From that moment, instead of contributing to balance the distribution of power, the Supreme Court became a source of regime legitimacy (Guerra, 1988).

Despite the unstable political environment, the origins of both constitutional review and binding precedent date back to the eighteenth

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<sup>4</sup> This calculation is based on the information included in Fowler's book (2008) on Mexican rulers.

century. Through a chronological analysis of the major constitutional and legal reforms, this section explains, first, that the emergence of both elements occurred due to the need to construct mechanisms to protect constitutional rights and, second, that they were not powerful enough to allow the Supreme Court to effectively check the executive and legislative branches.

The United States Constitution inspired the drafters of the 1824 Constitution to establish in Mexico a popular, federal, representative and republican system of government, with formal separation of power and a Supreme Court as the head of the federal judiciary (Rabasa, 2000). The design of Court consisted of 11 justices<sup>5</sup>, life tenure, exclusive jurisdiction over conflicts involving federal authorities, and last resort court within the federal judiciary. As mentioned above, the 1824 Constitution made no reference to any formal method of constitutional review by courts. Indeed, it was vague in determining whether the Supreme Court or the Federal Congress would be in charge of settling the cases involving two or more states. As a result of this, the Supreme Court never adjudicated a case of this nature, being the Congress instead the institution that struck down state laws (Cossio Diaz, 2008)<sup>6</sup>.

Despite the fact that a transition from federalism to centralism (1835-1846) meant a radical drift in the system of government, for the Supreme Court it only implied a narrow transformation<sup>7</sup>. The centralist constitution, known as *Siete Leyes Constitucionales* and established in December 1836, preserved both the composition and recruitment method, but removed lifetime tenure, gave the Supreme Court the right to initiate legislation and the ability to review any law related to the administration of justice and, it also expanded the Supreme Court's jurisdiction over military and ecclesiastic matters. In regard

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<sup>5</sup> The Federal Prosecutor was an original part of the Supreme Court as established by the 1824 Constitution.

<sup>6</sup> According to Cossio Diaz (2008) the Congress struck down at least eight state laws in the period comprising the enactment of 1824 Constitution and the establishment of Mexico's centralist republic.

<sup>7</sup> Between 1935 and 1946 the Mexican federalism established in 1824 was formally abolished, so Mexico was governed under a central republican regime (Zamora et al, 2004).

to the administration of justice, the most important innovation to develop during the centralist period was the establishment of the *Supremo Poder Conservador* (literally Supreme Conservative Power), a judicial body with competences that virtually made it a *fourth* branch of government (Fix-Zamudio, 1991; Pantoja, 2005). The *Siete Leyes Constitucionales* specifically granted this body with constitutional review jurisdiction over laws, decrees and judicial resolutions, but only in cases endorsed by the heads of the executive, legislative or judicial branches.

The *Supremo Poder Conservador* adjudicated a small group of salient cases related, for example, to debt contracting or the imposition of controls on free press (Cossio Diaz, 2008). This quasi-constitutional review mechanism existed only during the centralist period. Its creation, however, revealed the need for establishing proper constitutional review procedures that allowed citizens to protect their rights and courts to guard constitutional supremacy. In this light, the first example of a procedure for enforcing constitutional rights was created under centralism with the enactment of the *Political Constitution of the State of Yucatan* in 1841. Inspired by Tocqueville's "Democracy in America", Mexican jurist Manuel Crescencio Rejon designed *amparo* as a procedure intended to provide citizens with the power to contest in Yucatan state courts legislation and government action (Fix-Zamudio, 1999).

The victory of liberals over conservatives in 1847 led to the restoration of federalism originally established in the 1824 Constitution, and to the adoption of the *Act of Reform of the Federal Constitution of 1824*. This legislation restored the Supreme Court's power to settle concrete legal conflicts between two or more states and granted the Senate constitutional review powers over state laws. Additionally, the Act established the Chief Justice as the first replacement in line in case of presidential absence.

The 1847 Act did not consider any proper individual guarantee of rights but it did "introduce the term 'rights of man', and created, at the federal level, the *amparo* proceeding, as a federal judicial procedure through which an

individual could defend his or her constitutionally guaranteed liberties and protections in court” (Zamora et al., 2004: 233). As drafted by Mariano Otero, article 25 of the 1847 Act included a clause (known as Formula Otero) establishing that the effects of *amparo* would only be applicable to the parties directly involved in a legal dispute<sup>8</sup>. This law inaugurated a decentralised system of constitutional review with *inter partes* effects and no provision related to the authority of precedent. Ever since, *amparo* has been the main judicial remedy for the protection of constitutional rights in Mexico but under Formula Otero it has not been a particularly effective tool in policy-making terms.

The enactment of the 1857 Constitution again changed the structure of the Supreme Court, specifically by setting first-degree indirect election as justices’ appointment method, as well as by increasing the size of the Supreme Court with the introduction of four supernumerary positions. Regarding constitutional review, the 1857 Constitution gave the *Amparo* procedure constitutional status but keeping the restrictions imposed by *Formula Otero*. The 1861 *Amparo Law* was the first instrument specifically created to regulate *amparo* proceedings. Under this law, district courts were in charge of adjudicating *amparo* petitions at the trial level, and the Supreme Court of ruling upon appeals (Magallon Ibarra, 2004).

Given the difficult conditions that judges were facing to follow the provisions established by the 1861 Law, a second *Amparo Law* was published in 1869. This piece of legislation, albeit more detailed, included no disposition related to the effects of judgements or precedents. In 1870 a decree issued by President Benito Juarez –a former Chief Justice to the Supreme Court- created

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<sup>8</sup> Article 25 of the Act of Reform stated that “The courts of the Federation shall afford protection to [ampararan] any inhabitant of the Republic in the exercise and preservation of the rights granted to him or her by this Constitution and constitutional laws, against any attack by the legislative and the executive branches, whether of the Federation or of the States; said courts being limited to provide protection in the specific case that is the subject of the process, without making any general statement regarding the law or act that gave rise to this protection”. Translation borrowed from Zamora et al. (2004).



the *Semanario Judicial de la Federacion*, the official weekly bulletin publishing the judgements rendered by federal courts. The creation of this publication implied no formal change neither to the structure of the Supreme Court nor to the design of constitutional review design. However, by establishing an instrument to publicise the work of federal courts it also contributed to enhance the authority of judicial rulings (Gonzalez Oropeza, 2011).

The 1882 *Amparo* Law established the first provisions to formally regulate the role of judicial precedents in Mexico's legal system (Meza-Chavez 2012). The introduction of these rules was driven by a reaction to the application of a compulsory recruitment policy by the army force. The conflict between the judicial branch and the army arose in 1876 when army forces started to apply this aggressive measure to cover the vacancies left by casualties and dropouts. A group of people affected by this policy resorted to the federal courts requesting by means of *amparo* the invalidation of the measure. Judges from the states of Puebla, Tlaxcala and Veracruz granted *amparo* proceedings preventing some of the affected people to be recruited by army forces. High-ranked officials within army forces responded by submitting a formal complaint to the Supreme Court, arguing that the decisions rendered by federal courts were virtually legalising desertion. The Supreme Court reviewed these allegations confirming the unconstitutionality of compulsory recruitment as determined by lower federal courts (Gonzalez Oropeza, 2011).

The decision of the Supreme Court, however, underlined that federal courts lacked the formal powers to rule unconstitutional army's compulsory recruitment policy. The Supreme Court urged to the Federal Congress to legislate on this matter in order to prevent a conflict between the federal judiciary and the army forces. As the Federal Congress failed to intervene in this issue, federal courts continued ruling case-by-case the unconstitutionality of the compulsory recruitment policy implemented by the army. The Supreme Court resolved to publish in the *Seminario Judicial de la Federacion* all the

judgements related to this issue in order to draw attention to the crisis that in fact emerged.

Eventually, as a result of the conflict between the judiciary and the army forces, representatives from the executive and legislative branches agreed to carry out a reform to reinforce the strength of judicial rulings. Mexican jurist Ignacio L. Vallarta, who served as Chief Justice to the Supreme Court in the period 1877-1882, was entrusted with drafting the corresponding project of reforms to the *Amparo Law* (Cabrera, 1990). Vallarta, drawing on the innovations produced in the United States by *Marbury v. Madison*, drafted a bill that enhanced the authority of judicial rulings but preserving the *inter partes* clause established by Formula Otero.

The articles 37, 44 and 73 of Vallarta's Amparo Law established the following:

Article 37. Decisions pronounced by judges shall always be based on the applicable constitutional text. For its proper interpretation, attention shall be paid to the meaning given in the opinions of the Supreme Court and the [doctrina] writings of authors.

Article 44. Decisions of the Supreme Court ought to state the reasons the tribunal considers sufficient for its interpretation of the constitutional texts and to resolve, by the application [of these reasons], the constitutional questions addressed. When the votes on decisions are not unanimous, the minority shall also set out in writing the reasons for its dissent.

Article 73. The granting or denial of *amparo* against the text of the Constitution or against its fixed interpretation by the Supreme Court, by at least five uniform opinions, shall be punished with the loss of employment and imprisonment from six months to three years if the judge has acted fraudulently [dolosamente], and if by lack of instructions or care, with suspension of its functions for one year<sup>9</sup>.

The main innovation of the 1882 *Amparo Law* was the creation of a method whereby the Supreme Court could set binding precedent without formally disregarding *Formula Otero* (Mirow, 2006). In particular, this law a) established the Supreme Court as the ultimate interpreter of the Constitution;

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<sup>9</sup> This translation of 1882 Amparo Law is borrowed from Mirow (2006).

b) requested the Supreme Court to explicitly provide in every judgement the reasons that support that specific resolution; c) established that five consecutive, uniform opinions of the Supreme Court could constitute a fixed interpretation (i.e. binding precedent) of the constitution; d) determined that state and lower federal courts must follow the constitutional interpretations included in Court's judgements; e) specified that judges who do not follow *jurisprudencia* could be subject to punishment.

Although the Federal Procedures Code of 1897 abolished all the provisions referent to the authority of precedent to prevent federal judiciary to encroach on legislative powers (Carbonell, 1995), *jurisprudencia* was reinstated in 1908 through the enactment of the Civil Procedures Code, becoming therefore the most relevant tool that federal courts had to issue generalizable decisions.

The basic rules that govern the creation and application of *jurisprudencia* are those established by Ignacio L. Vallarta in the eighteenth century. Certainly, Vallarta's system of case law, *multiple-ruling jurisprudencia* (because of the clause requesting five consecutive, uniform opinions of the Supreme Court to constitute a fixed interpretation), was designed to enhance the authority of judicial precedents without disregarding *Formula Otero*. Vallarta did so by establishing that the 'reasons' supporting a judgement are what could be subject to become binding precedent and not the disposition settling a specific dispute. As the next paragraph written in 1881 makes clear, Vallarta was well aware of the consequences that this case law system might produce:

And do not think that judgments of *amparo*, by being trapped in the narrow limit of protecting an individual only in the particular, are of little importance: they are, on the contrary, of the highest value, so high, that according to law, they ought to be published in the newspapers to determine the public law of the nation; they serve to nullify unconstitutional laws, to conserve the balance between the federal and local authority, avoiding their mutual collisions; they form the supreme, definitive and final interpretation of the Constitution, even above the interpretation that the legislator wanted to establish; through a peaceful process they resolve the most serious, the most difficult questions upon which the peace of the nation rests at times, the sovereignty of the states, the imperium of law over authority, the precepts of justice over the

exigencies of political passion. Judgments of this transcendence cannot be but of the highest importance, much greater than the importance of judgments in ordinary trials [Vallarta (1881) cited in Mirow (2006)].

The purpose of this brief account of the evolution of the design of constitutional review was to illustrate that since the birth of Mexico as an independent nation, the Supreme Court faced both a chronic instability and the lack of tools to perform a more proactive policy-making role. Neither the rules of standing nor those regulating the jurisdiction of federal courts set incentives enough for the development of an active arbitration function. As it happened in the United States during the first decade of the eighteenth century, Mexican federal courts faced the difficulty of lacking of formal instruments to produced generalizable judgements. The creation of a system to regulate the force of precedent provided the way to solve this issue. In formal terms, *jurisprudencia* improved the capacity of the Supreme Court to perform its rule-making function. Nonetheless, the political environment was decisive in preventing the emergence of an effective judicial power.

### **2.3 The Development of Constitutional Review**

The main feature of the Mexican political system during the twentieth century was the consolidation of an authoritarian regime based on two components: *presidencialismo* and a hegemonic party (Cosío Villegas, 1964). An informal rule known as *dedazo* gave Mexican presidents the power to virtually designate their successors (Langston, 2006)<sup>10</sup>, whereas the control of the party allowed them to control most salient issues at national and sub-national levels. Political competition occurred mainly within the party, but outside opposition forces played a marginal role in institutional politics (Magaloni, 2006). In this context, the Supreme Court was a passive actor, which preformed according to the conditions of the political regime (Zamora and Cossío Díaz, 2006). This

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<sup>10</sup> As Langston (2006) explains, *dedazo* or “big finger” was an unwritten rule that allowed the sitting president to select his successor and force potential contenders to publicly seeking the nomination.

section argues that the reforms undertaken during the authoritarian period were determinant to prevent the advent of a genuine policy-making Supreme Court.

The 1917 Constitution preserved the structure of the federal judiciary constituted of the Supreme Court and the circuit and district courts. The Supreme Court returned to its original size of 11 justices, all of them being appointed by the Federal Congress for 2-year terms subject to 4-year re-appointment. Two constitutional procedures were included in this charter: *amparo* and constitutional controversy, the latter as the legal procedure permitting state and federal organs of government to challenge in the Supreme Court the constitutionality of acts and laws by other state or federal organs. Regarding precedent, the original version of the constitution made no reference to *jurisprudencia* or to any other form of judicial precedent. The 1919 *Amparo Law* filled this gap, establishing the Supreme Court as the only tribunal entitled to issue *jurisprudencia*, but required the vote of at least 7 justices. Accordingly, the legal system that emerged from the Mexican Revolution established a mixed constitutional review system: concrete decentralised and with *inter partes* effects in the case of *amparo* procedure; and concrete and centralised for the constitutional controversies.

A group of constitutional amendments enacted in 1928<sup>11</sup> increased the number of justices from 11 to 16; gave justices lifetime tenure; established a nomination/designation appointment system, where the president must send a three-candidate nomination short-list upon which the Senate must designate one; created *salas* (chambers) as matter-oriented jurisdictional bodies within the Supreme Court with analogous powers to issue *jurisprudencia*. Paradoxically, the 1928 judicial reform expanded presidential powers over

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<sup>11</sup> Regarding this reform it is important to stress that the formal rules for the initiation of legislation were not followed. Despite lacking formal faculties, president-elect Alvaro Obregon submitted to the Congress a bill to reform the judiciary and another to abolish municipalities from the Federal District. Disregarding constitutional precepts, the Congress accepted and approved them.

judicial appointments and at the same time reinforced judicial autonomy with life tenure. All these changes together constituted the first step towards the construction of informal mechanisms that gradually allowed incumbent presidents to discretionarily appoint and remove justices.

In 1934 a new reform reinforced presidential influence over the Supreme Court, specifically by increasing its size from 16 to 21 justices and reducing tenure from lifetime to a fixed six-year period. In 1936 Congress passed a new *Amparo* Law to improve the regulating framework of precedent, distinguishing conventional *multiple-ruling jurisprudencia* (also known in Mexico as *jurisprudencia by reiteration* because of the 5 consecutive rulings clause) from *single-ruling jurisprudencia* (or *jurisprudencia by contradiction*); the latter as those precedents resulting from the Supreme Court decision over two contradictory rulings by different chambers. These more vigorous attempts to alter the structure of the Supreme Court coincided with a period in which the two pillars of Mexico's authoritarian regime were consolidated: a hegemonic party combined with *presidencialismo*.

The process of transformation of the judicial system continued in 1944 with the re-establishment of lifetime tenure which paradoxically coincided with the creation of a new provision that authorised presidents to request justices' dismissal from the Chamber of Deputies. Another two constitutional reforms were enacted in 1951 and 1967, both of them focused in creating mechanisms to help the Supreme Court in dealing with a growing caseload. The 1951 reform produced four main outcomes: an increase in the size of the Supreme Court (from 21 to 26); the introduction of a fifth chamber; the incorporation of *jurisprudencia* to the constitutional text; and the creation of Courts of Appeals specialised in the adjudication of *amparo* procedures (Fix-Zamudio and Cossio Diaz, 1996)<sup>12</sup>. For its part, the 1967 reform made another

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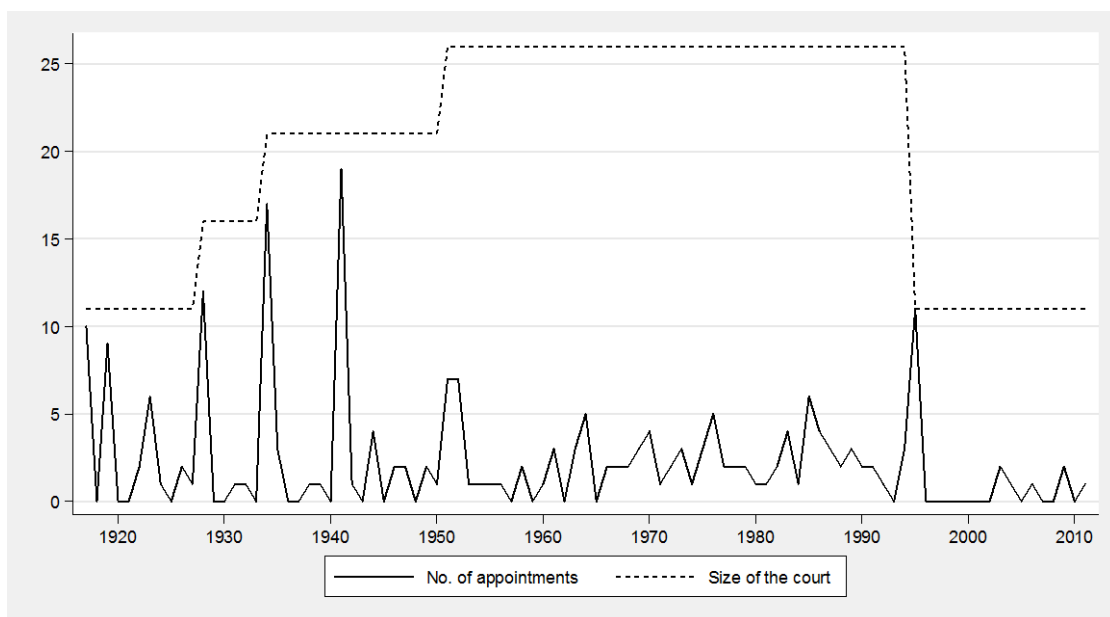
<sup>12</sup> On this issue it is important to bear in mind that Collegiate Tribunals were authorised to adjudicate 'legality' but not 'constitutionality' cases; this attribution remained centralised in the Supreme Court.

step towards a more decentralised setting by granting Courts of Appeals with the capacity for creating *multiple-ruling jurisprudencia*.

Up until 1967, both the structure of the Supreme Court and the institutional design of constitutional review had already been altered in such way that affected the prospects for the emergence of more political decision body. Presidents desisted from promoting further changes, so no substantial reform was made until 1987. Political pluralism and a growing caseload within the judiciary led to a re-centralisation of all *amparo* proceedings demanding the constitutionality of laws in the Supreme Court. This drift towards a more centralised setting announced the advent of deeper changes to the judiciary's design, which were eventually adopted by the 1994 judicial reform.

Before turning to the analysis of the 1994 judicial reform, it is convenient to provide evidence of how presidents took advantage of the institutional design to promote the subordination of the Supreme Court. Since the capacity to affect the composition and size of a decision-making body is a powerful mechanism for influencing its policy outcomes (Moraski and Shipan, 1999), the analysis of appointment strategies is a suitable way to clarify the degree of presidential control over the Supreme Court.

Figure 2.1 Appointments and size of the Supreme Court, 1917-2011



Source: Mexico Supreme Court Justices Dataset 1917-2011 (see Appendix I).

From the moment the Supreme Court was re-established in 1917 Mexican presidents have had broad control over the appointments of justices as well as over the regulations regarding the size of the Supreme Court (Domingo, 2000; Fix-Fierro, 2000). In the period 1917-1994, 192 different people served as justices to the Supreme Court, seven of them in more than one period. In total, 199 appointments were made, an average of 2.5 per year and which, weighing up changes in the Supreme Court's size, is equivalent to a mean annual rotation 12.9%<sup>13</sup>.

Figure 2.1 illustrates how presidential influence on the Supreme Court composition followed two different paths: court-packing<sup>14</sup> and forced-dismissals. Court-packing strategies are particularly visible in the years preceding 1951. In six years of the period 1917-1951 the number of appointments exceeded 50% of the court's size (1917, 1919, 1923, 1928, 1934 and 1941). Forced-dismissals, on the other hand, are noticeable along the whole period but especially evident after 1941. In only 29 years of the period 1917-1994 no appointment to the Supreme Court was made and there were only two periods of two consecutive years without changes in the Supreme Court's composition: 1920-1921 y 1929-1930. During most of the twentieth century, a major feature that distinguished the Supreme Court was its 'stable instability'. This instability prevented the consolidation of genuine experienced careers within this judicial body, consequently affecting its performance as source of policy and law.

High rotation in the bench is telling but not enough evidence on its own to support the subordination hypothesis. The appointments with political background and the number of justices who completed their fixed-terms or

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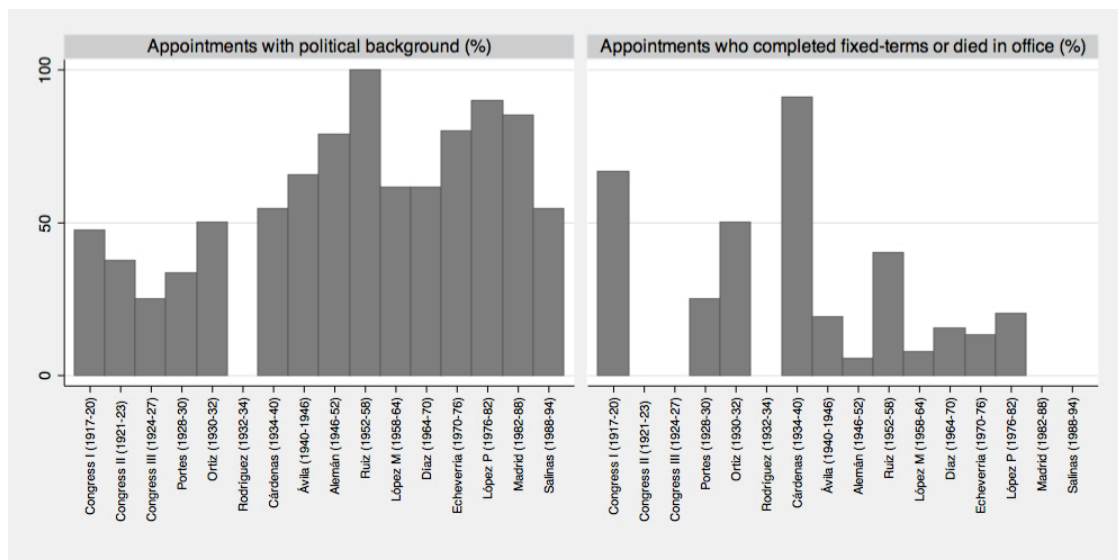
<sup>13</sup> According "The U.S. Supreme Court of Justices Database" (Epstein et al. 2010) the average number of appointments in the United States was 0.5 and a mean renovation of 6.2

<sup>14</sup> The concept of "court-packing" originated in 1937 in the United States, when President Franklin Roosevelt submitted an legislative initiative known as Judicial Procedures Reforms Bill, in which he proposed that a president would be granted with the capacity to appoint up to six justices, for every sitting justice older than 70 (Leuchtenburg 1966).



died in office are both appropriate complementary indicators. Figure 2.2 shows that from Lazaro Cardenas presidency (1934-1940) to the Salinas administration (1988-1994), justices with political background represent (i.e. those who had occupied positions either in the federal or state executive branches) at least half of the total appointments of the term. As this period coincides with most of the years during the PRI's hegemony, it is possible to conclude that presidents employed the formal and informal rules of the authoritarian regime to promote or block the careers of politicians, including the justices of the Supreme Court.

Figure 2.2 Types of appointees by presidential term, 1917-1994



Source: *Mexico Supreme Court Justices Dataset 1917-2011* (see Appendix I).

Note: there is no complete reliable information for all cases, so calculations are for 184 out of the total 199 appointments.

Figure 2.2 also illustrates how the number of justices who died in-office or completed their terms in only two periods was higher than the total number of appointments<sup>15</sup>. The number of justices leaving the Supreme Court either by finishing their terms or passing away ranges from 13 to 40% between the 1940s and late 1970s. All the justices appointed from 1982 to 1994 left the Supreme Court before completing their terms. As all of them had lifetime

<sup>15</sup> The number of justices that finished their legal terms or died in-office is employed as a proxy for understanding to what extent presidents were able to remove justices before the completion of their appointments.

tenure it is possible to infer that political factors had an influence on their exit from the bench<sup>16</sup>.

To sum up, since the enactment of the 1917 Constitution and up until 1994, the Supreme Court went through a period that can be defined as ‘stable instability’. During authoritarian rule, presidents exercised an extreme and discretionary power, based in informal rules, to control nominations and dismissals of the Supreme Court’s justices. This single body, hence, instead of being the ultimate step in the judicial careers, became at the same time a ‘trampoline’ and ‘freezer’ for the careers of those who served on it (Domingo, 2000; Magaloni, 2003)<sup>17</sup>. Nonetheless, the 1994 judicial reform radically transformed these features, bringing about a new set of incentives for the Supreme Court to turn into a more independent and proactive decision-making body.

## 2.4 The Consolidation of Constitutional Review

Only four days after his inauguration on the 1<sup>st</sup> of December of 1994, President Ernesto Zedillo submitted the Bill of Reforms to Federal Courts, a wide-ranging package of constitutional amendments to the design of the judiciary and, therefore, of constitutional review. As the president himself declared in the statement accompanying the bill, the intention was to contribute to the consolidation of the rule of law in Mexico by enhancing the

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<sup>16</sup> In the period 1982-1994, presidents de la Madrid (1982-1988) and Salinas de Gortari (1988-1994) nominated 31 different people to the Supreme Court, nominations that were all confirmed by the Senate. Leaving aside the 26 justices that were removed from their posts as a result of the 1994 judicial reform, a group of five justices left the Supreme Court in spite of having life tenure. Among them, stands out Jorge Carpizo McGregor who, before his designation, served as rector to the National Autonomous University of Mexico, and who left the bench to become the first President of Mexico’s Federal Human Rights Commission. After holding this position for three years, he was appointed by president Salinas de Gortari Attorney General in 1993 and Secretary of the Interior in 1994.

<sup>17</sup> An example of a justice leaving the Supreme Court to run for public office is Manuel Bartlett Bautista. With experience as legislator in Congress of Tabasco state, Bartlett was appointed Justice to the Supreme Court in 1941. In 1952, he left the bench to become Governor of Tabasco state.

independence and competences of the federal judiciary. Given that a constitutional reform requires the approval of a two-thirds majority in both chambers of the federal congress as well as the ratification of at least 16 out of the 31 state legislatures; getting approval at state level was relatively easy for a President whose party was at that time in control of over 90% of the legislatures. Passing the bill in the Federal Congress where the PRI had a simple majority the approval required a coalition with the National Action Party. Legislative bargaining was promptly concluded, so the whole legislative process took only 23 days, concluding in the enactment of the reform on the 31<sup>st</sup> of December of the same year, which came into force a day later.

The 1994 judicial reform was focused on restructuring two elements of the federal judicial system: the administration of federal lower courts and the institutional design of the Supreme Court. Regarding the first element, the reform created the Federal Judicial Council as the organ responsible for the administration and supervision of circuit and district courts. With concern to that latter point, the reform specifically reduced the composition of the Supreme Court from 26 to 11 justices; substituted justices' lifetime tenure with a 15-year fixed term; and expanded constitutional review powers by establishing two procedures that transformed the Supreme Court in to the main arbitrator in Mexico's federal, and supreme negative legislator of the country: the constitutional controversy and the action of unconstitutionality.

Under the 1824 and 1857 Constitutions, the Supreme Court had exclusive jurisdiction over a legal procedure similar to the constitutional controversy, one of the two procedures mentioned above. The 1917 Constitution preserved this procedure and granted the federation and the three branches of government at state level legal standing to submit this type of cases involving conflicts between federal and state authorities to the Supreme Court of Justice (Berruecos, 2004). Between 1917 and 1994, the Supreme Court adjudicated only 63 constitutional controversies, almost all of them submitted prior to 1947 (Cossio Diaz, 2008). It is possible to infer that this limit number of cases –

less than one per year- is linked to the features that distinguished authoritarian Mexico, particularly to presidential control over the ruling party and the existence of non-institutional means for processing conflict, particularly the capacity presidents had to rule political disputes and the sanction and reward mechanisms proper of a hegemonic party-system.

The transition to a more democratic system started in the late 1980s encouraged opposition actors to find new arenas wherein political conflict could be institutionally processed. From the late 1980s the constitutional controversy became a suitable instrument for opposition parties to dispute the PRI-controlled federal executive branch the constitutionality of its policies. Moreover, as municipalities lacked of legal standing for resorting to the Supreme Court thorough constitutional controversies, the number of and complexity of the *amparos* endorsed by authorities of this level also increased (Berruecos, 2004).

The 1994 judicial reform re-shaped the constitutional controversy procedure, particularly through the establishment of more precise rules regarding standing and the effects of judgements. As Zamora et al (2004) explain, constitutional controversies “[were] intended to settle any dispute that may arise between government authorities: conflicts between federal and state authorities, between authorities from different states, and between authorities from different branches of government” (Zamora et al., 2004: 275). The reshaping of this concrete constitutional review procedure meant, at least in institutional terms, to constitute the Supreme Court of Justice as the ‘referee’ of federalism since all authorities from all levels of government were allowed to bring political conflicts into the courtroom. Certainly, as the fourth chapter explains in detail, became more relevant as the political system became more competitive.

The action of unconstitutionality<sup>18</sup>, the second procedure included in the 1994 judicial reform, gave standing to the Attorney General as well as federal and state legislative minorities (the endorsement of at least 33% of the legislative body is required), political parties (from 1996 and only against electoral laws) and human rights commissions (from 2006), to challenge in the Supreme Court a law within the first 30 days of its adoption. With the incorporation of the action of unconstitutionality to the constitutional review design, the Supreme Court gained unprecedented policy-making tools, first by the inclusion of *erga omnes* judgements and second through the creation of a third method for setting *jurisprudencia* which established that *considerandos* (the reasons provided by justices supporting a ruling) automatically gained the status of binding precedent if approved by a qualified majority of 8 or more justices.

Furthermore, the establishment of this abstract judicial review procedure also provided a new veto power to those actors with standing. Holding this power has for specific actors –minority parties, for example- such importance that it can in fact be their only means for opposing the validity of the laws approved by majority parties. Political parties have two routes for reaching the Supreme Court through actions of unconstitutionality: they can either use their standing as ‘parties’ for challenging electoral laws at federal and state levels, or, as legislative minorities, by building a coalition with other forces to meet the 33% requirement (in case no single minority party can the control one-third of the respective legislature alone).

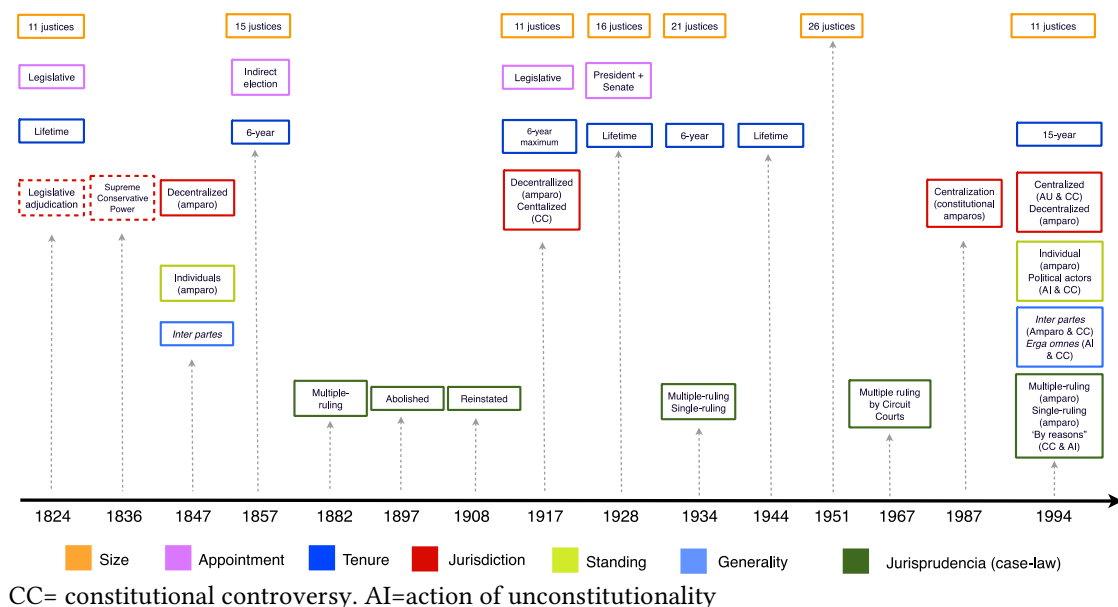
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<sup>18</sup> In Spanish this figure is called “accion de inconstitucionalidad”, a term which we literally translate to English seeking to use it in the more neutral way without removing the real sense of the concept. Due to the impossibility of a precise translation, legal specialists have employed the term in Spanish while explaining that it may be translated as “challenge to the constitutionality of laws” (Zamora, *et al* 2004). There are also authors that prefer the concept of “constitutional actions” (Magaloni and Sanchez 2006); others use “unconstitutional laws” (Finkel 2008), and some translate it as “unconstitutional actions” (Berruecos 2003). There are also scholars using the employed in dissertation such as Rios Figueroa and Taylor (2006) and Staton (2006).

In Mexico the prosecutorial organ at federal level (the Procuraduria General de la Republica) forms part of the executive, so the standing granted to the Attorney General provided this branch with a new mechanism for preventing the application of certain pieces of legislation. Issues like abortion or same-sex marriage have shown that the federal executive has resorted to this procedure as a way to intervene in local political processes that would otherwise be beyond its influence.

The substantial transformation produced by the 1994 judicial reform is summarized in figure 2.3. Particularly, this figure shows how, since the establishment of Mexico as independent nation, have evolved the features that this thesis has considered decisive for judicial policy-making. In first place, the size of the Supreme Court increased considerably along the twentieth century up until reaching it historical peak in 1950s with a structure of 26 justices. The 1994 reform transformed this design and established a more compact decision body composed of 11 justices. The constitutional amendment passed that year made, however, no change to the appointment method, so it preserved the presidential nomination and legislative designation model created in late 1920s.

Figure 2.3 The evolution of the Supreme Court's institutional design and constitutional review



Turning to the justices' periods of appointment, as the previous figure shows, the 1994 judicial reform meant a substitution of life tenure with a fixed-period, this time of 15 years. In fourth place, the reform reinforced the centralisation of the most important cases in the Supreme Court, particularly through both the creation of actions of unconstitutionality and the invigoration of the constitutional controversies.

A major innovation introduced in 1994 was the expansion of standing by providing political actors with special powers to recourse to the Supreme Court in cases originated in the aforementioned actions of unconstitutionality and constitutional controversies. In connection to this radical change, the reform gave the Supreme Court for the first time in its history the power to rule with general effects the unconstitutionality of legislation and government actions. Finally, the reform reinforced the role of judicial precedents by establishing a new route for creating case law through the introduction of the "by reasons" model of *jurisprudencia*.

Now that the features of the 1994 judicial reform have been covered it is possible to look at the determinants behind the decision of former rulers to limit their own power by establishing an institutionally stronger Supreme Court. Three different but interrelated responses have been provided to this apparent paradox. The first one claims that the reform resulted from former rulers' need to legitimize themselves in a more competitive context (Inclan, 2004). Second, it has also been argued that the force behind the reform was the necessity of creating laws in an increasingly market-oriented economy (Magaloni, 2003). The third response has proposed that anticipating their removal from power, former rulers (i.e. the PRI and President Zedillo) reformed the judicial system as a sort of insurance policy.

Ginsburg (2003) and Hirschl (2004) argue that the introduction of stronger forms of constitutional review through judicial reforms is possible in a non-zero sum game where both rulers and opposition forces obtain benefits; the former guaranteeing the creation of a 'friendly' court that would be strategic

in the case of an eventual demise; the latter securing the creation of a new arena for advancing their political agendas. Drawing on these ideas, Finkel (2004) argues that in the case of Mexico President Zedillo, foreseeing the potential demise of his party pushed forward the reform seeking to constitute a loyal and powerful judiciary that might protect PRI's interests in an increasingly democratic context<sup>19</sup>.

The interviews conducted in the context of this dissertation confirm that both economic and political factors fostered this reform. According to interviewees 24 and 30, both privileged witnesses of the process, there was also an interest within the Supreme Court to acquire an improved tool to deal with an increasing number of more complex cases. High-ranking judicial officials sought to increase their influence over the scope of the reform by approaching influential members of the PRI and proposing what they thought would be the less harmful changes for the Supreme Court. One of the interviewees even mentions that it was within the Supreme Court where the proposal for renovating the constitutional controversy procedures was drafted.

In all, by reshaping its institutional design and competences, the 1994 judicial reform set the basis for the Supreme Court to become a more proactive policy-maker in at least two ways: allocating political resources among political actors by deciding case-by-case which one prevails in constitutional cases; producing more legal dispositions through *erga omnes* judgements and case law. The following section will explain how the arbitration and rule-making functions implied by the new powers of the Supreme Court developed to make it a more active and effective policy-maker.

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<sup>19</sup> Inclan (2004) contends this view, arguing that the 1994 judicial reform was a concurrent rather than an insurance policy. According to this scholar, instead of seeking to establish a friendly judiciary, the need to legitimize by rulers was the driving force behind the reform.



## 2.5 A Constitutional Court upon a Supreme Court

The 1994 judicial reform gave the Supreme Court powers comparable to those of constitutional courts, but without removing its role as a last instance within the federal judiciary. The Supreme Court therefore gained unprecedented powers to intervene in conflicts of a political nature but preserved a considerable degree of control over lower courts. For instance, the Chief Justice, elected every four years from among all justices presides over the Supreme Court and the Federal Judicial Council (CJF, for its Spanish abbreviation), the administrative organ within the federal judiciary. The previous sections explained how constitutional review evolved to create a Supreme Court with constitutional court functions. The purpose of this section is to show how legal transformations materialize in a completely different institutional setting.

Table 2.2 Career paths of Supreme Court's justices, 1995-2011

Original justice	Term	Judicial career*	Previous position	Replacing justice	Term	Judicial career*	Previous position
Aguinaco Aleman	1995-03	Appellate Judge	Private solicitor	Cossio Diaz	2003-18	-	Professor
Castro y Castro	1995-03	-	Public servant	Luna R,	2004-19	Appellate Judge	CJF
Diaz Romero	1995-06	Justice	Justice	Franco G.S.	2006-11	-	Professor
H. Roman Palacios†	1995-06	Appellate Judge	Appellate Judge	Valls H.	2004-19	-	CJF
Azuela Güitron	1995-09	Justice	Justice	Aguilar M.	2009-24	Appellate Judge	CJF
Gongora Pimentel	1995-09	Appellate Court Judge	Appellate Judge	Zaldivar L.L.	2009-24	-	Private solicitor
Aguirre Anguiano	1995-12	-	Notary public				
Ortiz Mayagoitia	1995-12	Appellate Judge	Electoral Court Judge°				
J.J. Gudiño Pelayo †	1995-15	Appellate Judge	Appellate Judge	Pardo Rebolledo	2011-26	Appellate Judge	Appellate Judge
Sanchez Cordero	1995-15	-	Local appellate judge				
Silva Meza	1995-15	Appellate Judge	Electoral Court Judge°				

Source: *Mexico Supreme Court Justices Dataset 1917-2011* (see Appendix I).

\* Highest rank held within the federal judiciary before the appointment

† Died in office, Roman Palacios in 2004 and Gudiño in 2010.

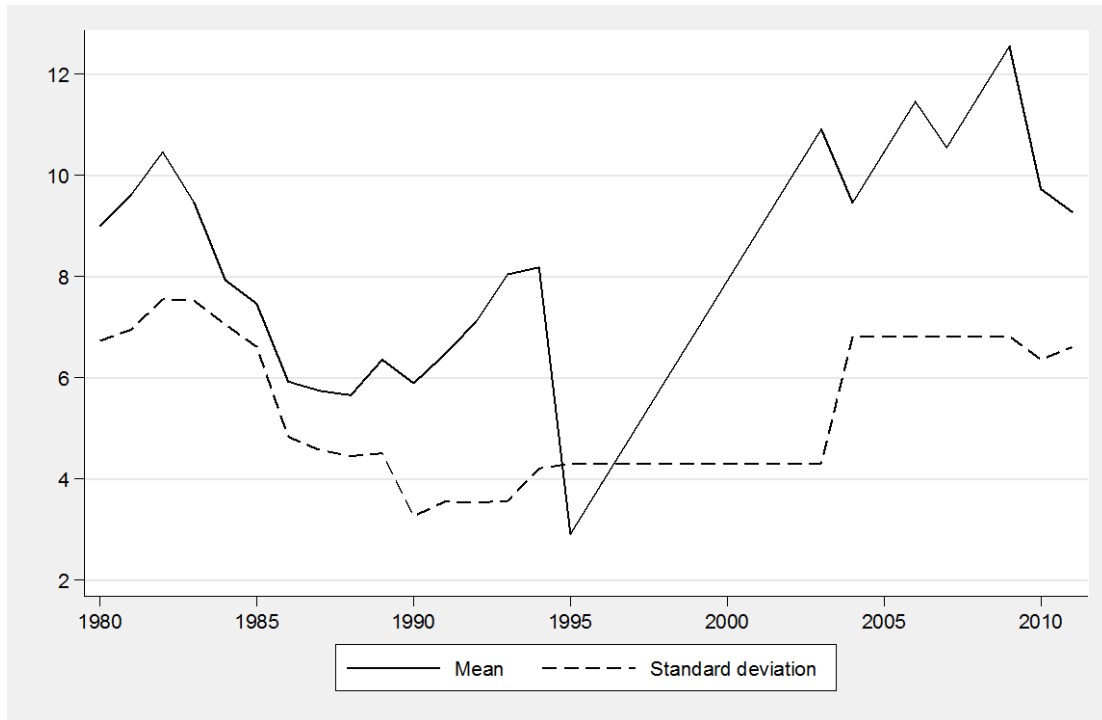
° Before 1996 the Electoral Court was not part of the federal judiciary

The first important aspect to consider is the one related to the selection of the people in charge of the new Supreme Court. The decree that published the 1994 judicial reform also established that the eleven seats of the Supreme Court must be filled from an 18-candidate list proposed by the President to the Senate. On the 26th of January 1995 the PRI held a two-thirds qualified majority in the legislature where they appointed eleven new justices, only three of which without career paths in the federal judiciary and with two of the new appointees having been a part of the previous integration of the Supreme Court. This composition remained the same for almost nine years, an unprecedented event in Mexico's history, until the first two justices went into retirement in November 2003.

Since 2003, seven justices have been appointed to the Supreme Court, four of them with no previous background in the federal judiciary. This has been an important change because, to a certain degree, it has made the Supreme Court less reluctant to make administrative and interpretative changes. In terms of its membership, one the most important transformation to have occurred since 1995 is that the Supreme Court is now one of Mexican lawyers' highest professional aspirations. Being justice to the Supreme Court is not only the highest position that judges can occupy within the federal judiciary, but also interesting an attractive career path for law professors, private solicitors and public officers.

Figure 2.4 illustrates how the Supreme Court has become more stable and experienced by analysing the years seating justices have passed in the bench in the period 1980-2011. Before the 1994 judicial reform both the mean and standard deviation followed similar patterns. However, once the Supreme Court was re-designed and the new 11 justices were appointed, the mean substantially increases while the standard deviation remains steady for 8 years to change and the become again stable.

Figure 2.4 Experience of Seating Justices (years)



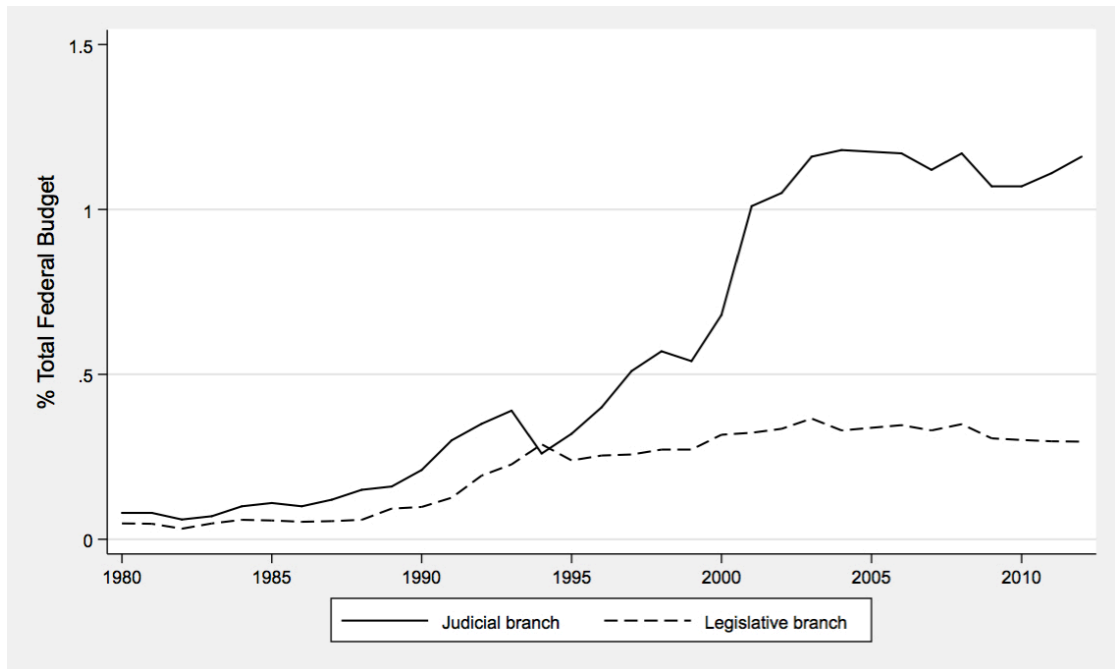
Source: *Mexico Supreme Court Justices Dataset 1917-2011* (see Appendix I).

In terms of its membership, the Supreme Court has gained the stability that it lacked for much of Mexico's history. Certainly, the period 1995-2003 has been the only one since 1917 –and probably also since the birth of Mexico as an independent nation- in which the composition of the Supreme Court suffered no change. Justices as individuals learnt, during these years, learned to perform their role as ultimate interpreters of the constitution and, so, they became more aware about the implications and possibilities of this responsibility. As this thesis seeks to demonstrate, stability in the bench permitted justices to enhance their experience and, as result, more experienced judges working on a more stable environment within the Supreme Court became more prone to engage in policy-making.

A second relevant element to underline is related to the financial conditions surrounding the operation of the Supreme Court and, in general, of the whole federal judiciary. Both the legislative and judicial branches have traditionally received a marginal proportion of the federal budget, the difference between them being small. Since the enactment of the 1994 judicial

reform however, the financial resources given to the judiciary have increased considerably. In 1994 its budget represented less than 0.3% of all federal expenses, whereas by 2012 this had risen to 1.16%, a fourfold increase. The most important change occurred after 2000, once the PRI had lost the presidency.

Figure 2.5 Budget of federal legislative and judicial branches, 1980-2012



Source: author's calculation with data from SHCP (2000; 2012).

In a more pluralistic system the allocation of financial resources became subject to the bargain among the political forces represented in legislative bodies. In this new context, the judiciary has received an unprecedented amount of financial resources. In 2010, for instance, the outlay by the United States Federal Judiciary represented 0.19% of the federal budget<sup>20</sup>, while in Mexico it was 1.07%. There are substantial differences in the institutional design of the judicial branches in the United States and Mexico. However, the comparison remains helpful for the purpose of illustrating to what extent the Mexican judiciary has increased its significance in financial terms, and how it has received over the last years unprecedented resources to conduct their

<sup>20</sup> The information for the United States is based in the data published in the Historical Tables of the Budget of the Federal Government for the fiscal year 2011.

ordinary judicial function as well as being the one of guardian of constitutional supremacy<sup>21</sup>.

The judicial branch has increased its relevance in financial terms. This change, among other features, has led to a radical variation in judicial salaries, therefore, increasing the incentives to work in for the judiciary, which offers better conditions than other areas of the public service. The Supreme Court and in general the judiciary have become increasingly dependent on economic resources and, as a result, more eager to engage in the bargaining process to secure its increasing financial need. This condition has implied risks for the Supreme Court but, as the evidence provided shows, it has managed to succeed in the gathering financial resources in the last two decades.

## 2.6 Conclusion

The objective of this chapter was twofold: on the one hand it aimed to explain why, before 1994, the design of constitutional review was a determinant factor that prevented the development of policy-making in the Supreme Court. On the other, it sought to account for the changes made to this institutional setting by the 1994 judicial reform. To accomplish this objective the chapter proposed that, according to the nature of constitutional review rulings, policy-making by courts develops around two complementary functions: arbitration and rule-making. The rules of standing are particularly important for the way courts perform their arbitration function, while those governing the generalizability of judgements' effects and the binding force of precedent are determinant for judicial rule-making.

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<sup>21</sup> In a piece of research published in 2010, Elizondo Mayer-Serra and Magaloni (2010) analysed the cost of selected constitutional and supreme courts. They found that in 2009, the budget of the United States Supreme Court represented in real terms 37% of its Mexican counterpart. The German *Bundesverfassungsgericht*, had a budget equivalent to only the 13% and the Colombian and Peruvian constitutional courts of 3.3% and 2.9% respectively.

Based upon this framework, it was argued that during the nineteenth century the Supreme Court underwent a process of consolidation but the establishment of solid policy-making tools did not accompany it. Certainly, the Supreme Court acquired limited constitutional review powers by the establishment of *amparo* that later gained force as result of the creation of *jurisprudencia*. The emergence of an authoritarian regime, however, prevented the development of an active Court able to maximize the use of such limited tools.

In the aftermath of the Mexican Revolution emerged a setting that granted the Supreme Court certain institutional guarantees to perform an independent role, but the advent of a new authoritarian regime fostered judicial subordination by both altering the structure and controlling the composition of the Supreme Court. All changes made to constitutional review between 1917 and 1994 refined the features of an already limited design. This context explains why the 1994 judicial reform meant a revolution for the Supreme Court and, in general, for the whole judiciary. The establishment of centralised jurisdiction, standing to privileged actors, *erga omnes* effects and the reinforcement of case law together set a completely new institutional framework to be employed by the Supreme Court in an increasingly competitive political context.

The Supreme Court has become more autonomous but increasingly dependent on financial resources. It gained more robust competences for displaying a policy-making function, which, as this thesis argues, has been put into practice in a more democratic political context. At the same time, the Supreme Court has managed to subordinate the Federal Judicial Council and, thus, to continue controlling the administration of the federal judiciary (Carpizo, 2009).

The Supreme Court has increased its independence from external factors, but also has expanded its control on the federal judiciary as a whole, becoming a very powerful decision body that has a broad jurisdiction not only

in judicial specific terms, but also in administrative ones. Altogether, the Supreme Court now operates in a institutional framework that allows their justices to play a more decisive role as policy makers.

### **3. Democracy, Constitutional Review and Judicialisation**

Arbitration gives a substantial amount of power to the individual in charge of settling a dispute. At the same time the rules governing the access to arbitration determine the way the power of resort to the arbitrator is distributed amongst different actors and this then affects the way individuals and organisations use their veto to challenge certain decisions. The distribution of this veto power also influences the nature and scope of the conflicts brought into courts and consequently shapes the type of policy outcomes judges produce. In short, if a court becomes a more effective arbitrator and rule-maker it is largely due to the legal rules shaping the way political actors employ litigation.

As was discussed in the first chapter, this thesis is particularly interested in examining the effects of the convergence of democratisation and judicialisation. In order to study in-depth how judicialisation has occurred in Mexico and why democratisation has influenced policy-making by the Supreme Court, this chapter analyses one particular side of the convergence of these two processes by empirically exploring the way the political fragmentation from democratisation has fostered a process of judicialisation of politics whereby an increasing number of more complex cases have been brought into the courtroom.

In particular, this chapter provides evidence to demonstrate that since 1995 Mexico has gone through a judicialisation process whereby the Supreme Court has gained unprecedented influence over policy issues. As was examined in the first chapter, the comparative judicial politics literature proposed the notions of ‘insurance policy’/’hegemonic preservation’ to explain the reasons behind the determination by authoritarian rulers to limit themselves by empowering courts with broad constitutional review powers



(Finkel, 2008; Ginsburg, 2003; Hirschl, 2004). In the same way, this body of research has also provided persuasive explanations about the effects of political fragmentation on the emergence of more independent courts (Ferejohn et al., 2004; Rios Figueroa, 2007).

This literature, however, has not addressed in-depth the question of under what specific conditions political actors and public authorities more proactively employ courts to advance their agendas<sup>1</sup>. The relevance of this question not only relies on the gap that exists in the literature, but also in the relevance of improving the understanding of the inputs upon which it displays its policy-making role. The argument proposed in this chapter is as follows: a more democratic context has fostered political fragmentation<sup>2</sup>; this has increased the incentives political actors have to actively use standing to litigate in the Supreme Court provided by the 1994 judicial reform. The importance of this chapter for this thesis is, consequently, that it provides an explanation of why judicialisation has been fostered by a more proactive use of litigation by actors interacting in more competitive political environment. This account will be used in the next chapter to explain why judicialisation has triggered the emergence of a more proactively policy-making Supreme Court.

The chapter is organised as follows: the first section presents an examination of how democracy has led to different levels of political fragmentation at national and subnational levels. The second analyses the way political actors have employed the constitutional controversy procedure. The

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<sup>1</sup> The literature of Latin American judicial politics has certainly paid attention to litigation but to the one employed by social actors. A good example of this is Courtis (2006), a text in which the author reflects on the causes provoking courts in the regions being limited to social policy makers. This chapter, on the other hand, is focused on researching the way political parties and public authorities from different levels of government use constitutional litigation.

<sup>2</sup> Here, according to the conceptualization proposed by Ferejohn (2002) and mentioned in chapter one, the term political fragmentation is employed to describe the fragmentation produced by non-institutional means, particularly divided governments and the increase of political forces represented within the federal and state legislatures.

third one replicates this analysis but for the action of unconstitutionality, the abstract review procedure created by the 1994 judicial reform. This chapter concludes that the judicialisation of Mexican politics has in fact occurred and that it has been triggered by political fragmentation. Constitutional controversy has been the main channel whereby low-ranked authorities (i.e. municipalities) have turned political conflict into constitutional cases ('judicialisation from below'). In contrast, actions of unconstitutionality have been employed by high-ranked actors to overcome the decline in their dominance over national and subnational politics ('judicialisation from above'). Above all, this chapter shows that the effects of political fragmentation on judicialisation-through-litigation reverse when it reaches medium-to-high-levels. The implication of this conclusion is that political fragmentation from democratisation does foster judicialisation but, paradoxically, a high degree of fragmentation instead of stimulating litigation actually reduces its use by political actors.

### **3.1 Democracy and Political Fragmentation**

Mexico's political system has radically changed in the last thirty years. It has passed from an authoritarian one-party system to a competitive three-party system with alternation in the presidency as well as in more than half of the 32 states<sup>3</sup>. Political fragmentation has been one of the main features of this process of change to more democratic political conditions. Here, this thesis does not refer to any form of fragmentation such as a federalism of presidential regimes but, as explained by Ferejohn (2002), to the fragmentation implied in the existence of divided governments and legislatures controlled by no-single party majority.

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<sup>3</sup> For instance, all the 32 Mexican states were ruled by the PRI until 1989, year when the candidate of the National Action Party won the governor race in the Baja California state (Lujambio ,2000)

In Mexico, non-institutional has led in some states to the consolidation of divided legislatures, but in some others it has had virtually no effect in attenuating the dominance of a single party. The variation in political fragmentation over time and across the states has therefore conditioned law and policy-making processes. The purpose of this section is to explain how Mexico has largely become a more fragmented country and why this transformation has caused the Supreme Court to emerge as the more plausible arbitrator in a system that no longer has either an overwhelmingly powerful president or a hegemonic political party.

### 3.1.1 The national level

In the 1960s Mexico began a process of successive electoral reforms intended to increase access to legislative positions for opposition political parties, developed mainly through the adoption of clearer proportional representation formulas. The *diputados de partido* reform passed in 1963 allowed opposition parties to go from having 6 seats in the Lower Chamber in 1961 to 32 in 1964<sup>4</sup>. Later on, thanks to a new design that included 300 single-member constituencies plus 100 positions elected through proportional representation, the 1977 electoral reform gave such parties the opportunity to increase their representation by controlling more than a quarter of the Chamber of Deputies (Lujambio, 2000). In 1988 the PRI lost the two-thirds qualified majority required to pass constitutional amendments, this was the first time in contemporary history that the PRI would be required to bargain with opposition parties to advance its agenda. The system changed even more when in 1997 the PRI lost the majority in the Chamber of Deputies. Since then no single-party has managed to gain the majority in Congress and, as a result,

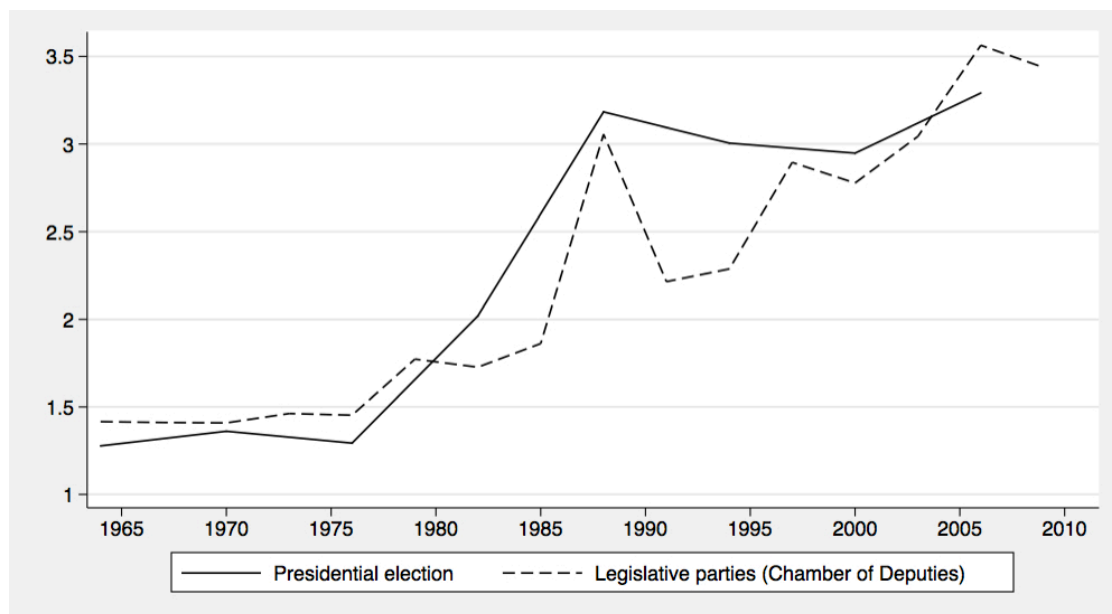
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<sup>4</sup> The figure *diputados de partido* was introduced in 1963 to the Mexican electoral system. The reform established a system that permitted the allocation of five seats in the Chamber of Deputies to the parties that had obtained 2.5% of the vote in the federal election, plus one more for every additional 0.5%. The introduction of this incipient mechanism of proportional representation allowed opposition to gradually increase their representation in the chamber from 1961 to 1976 (Lujambio, 2000).

presidents and their parties have had no other option than to negotiate legislation with opposition parties.

Figure 3.1 provides an account of how this transformation of the political system occurred. Using Laakso and Taagepera's (1979) effective number of parties index (ENP), it illustrates how Mexico passed from having 1.5 effective parties in 1965, to more than 3.5 in 2009. This figure makes clear that the 1988 election was the turning point in the establishment of the three-party system. Since 1988, ENP in the presidential election has been around 3 points, reflecting how electoral preferences are divided among the formerly hegemonic PRI, the right-wing National Action Party (PAN, for its Spanish abbreviation) and leftist Party of the Democratic Revolution (PRD, for its Spanish abbreviation). In legislative matters, however, the conditions have been less uniform. In 1988 legislative ENP reached more than 3 points, but decreased to 2.2 in 1991 and remained at a similar level in 1994.

Figure 3.1 The evolution of the effective number of parties at federal level



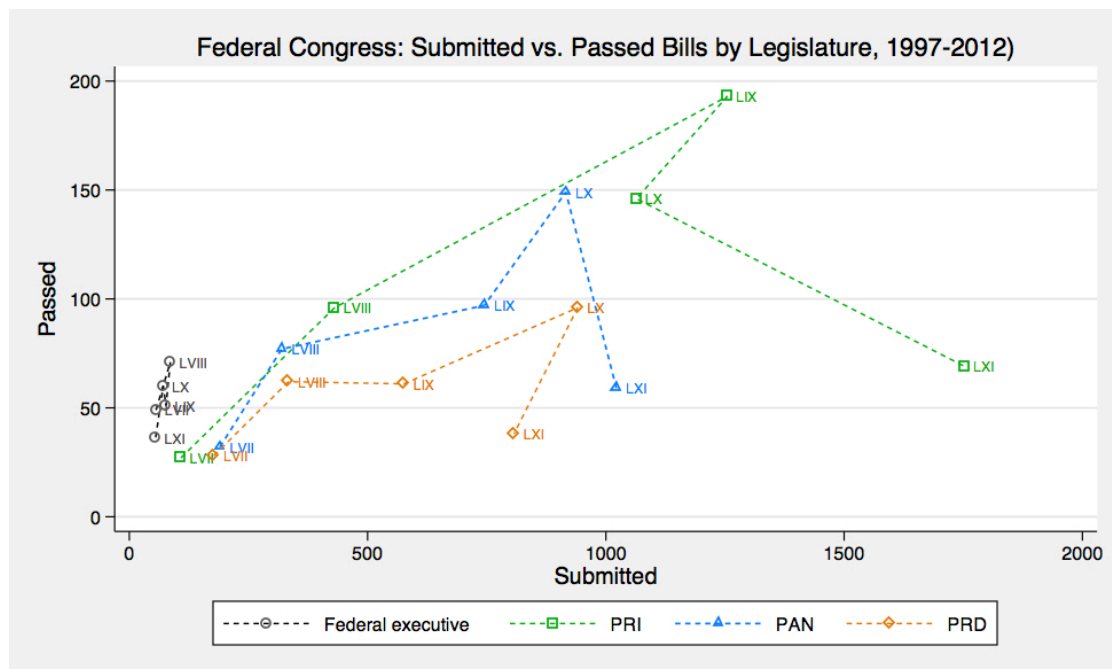
Source: author's calculations with data from (CIDAC, 2011).

What have these changes implied for legislative politics? From 1997 no single-party has had complete control of both chambers composing the Federal Congress. According to Nacif (2005) executive-legislative relations with the advent of divided government have made the Congress a more

effective player able to check the power of presidents. In spite of the fact that the Mexican Constitution does not grant the presidency with particularly broad formal powers (Weldon, 1997), during the authoritarian period presidents were dominant enough as to have become the principal source of legislative proposals (Casar, 2002).

Figure 3.2 illustrates the relationship between bills submission and approval during the five most recent legislatures (1997-2012). The number of submitted bills has increased from 674 in 1997-2000 to 5,067 in 2009-2012, but the number of bills approved has been 371 on average. In the LVII legislature – the first one without a single-party majority- the president remained the most active and effective legislative player. The federal executive submitted a relatively stable number of bills, being successful in an also relatively stable number of cases (the number of bills passed vary between 40 and 75).

Figure 3.2 Submitted vs. passed bills in the Federal Congress, 1917-2012



Source: author's calculations with data from the Government Secretary's Legislative Information System (SEGOB, 2012).

Certainly, as three-major parties became more dynamic, the legislative success of the federal executive decreased but not their approval ratings, which have always been higher than those of the legislators. It is clear that

legislative politics has changed. Legislators from all parties have engaged in a more active role in terms of bill submission, provoking a considerable increase in the number of bills to be reviewed.

Political fragmentation has transformed the way political parties interact both in and outside of legislative arenas. Executive-legislative relations have changed as the political system has become more plural. Even if the president remains a highly influential player, in democratic times the presidency no longer plays the role of ultimate referee of the disputes arising amongst actors from the different branches and levels of government. Democracy has resulted in more fragmentation and this in turn has led to a greater need for an effective arbitrator able to institutionally process and settle political disputes. The next sections explain how the Supreme Court has gained this arbitration role, inviting judges to more proactively engage in the making of policy and law.

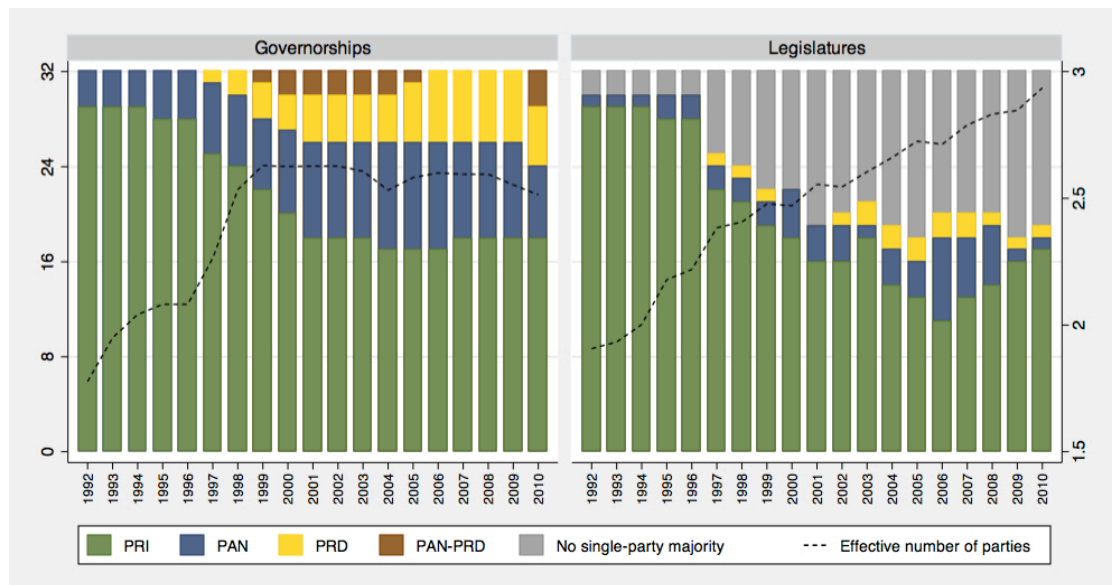
### 3.1.2 The subnational level

The emergence of political pluralism at state level has been the counterpart of the changes occurring at the national level. Before 1989 all sub-national executives and their respective legislatures were under the control of the by-then hegemonic PRI. That year The National Action Party won the Baja California state governorship but was unsuccessful in accompanying this triumph with control of the local congress. At subnational level alternation and divided governments concurrently emerged in Baja California. Since then, 22 states have had alternation in the governorship and the other 26 have had at least one divided government experience.

Alternation and political fragmentation have followed different patterns in governorship races from legislative elections. Figure 3.3 shows how the distribution of governorships and legislatures evolved from 1992 to 2010. In the first instance, it makes clear that it was during the 1990s when the PRI gradually lost its dominance in local politics. Between 1992 and 2001 this

party fell from governing 30 states to only 17, most of them being captured by the PAN. Secondly, it also illustrates that the PRI has remained a dominant party in more than a half of the states. Up until 2010 this party never lost more than 11 state governorships and even then has recovered them in 7 other states. Third, the average effective number of parties confirms that the most substantial change in the fragmentation of the vote occurred before 2000. From that year fragmentation has been steadied at slightly above 2.5.

Figure 3.3 Governorships and legislatures by political party, 1992-2010



Source: *State/year constitutional litigation dataset* (see Appendix I).

As in the case of national level institutions, in most of the states – DF being the most important exception- alternation has not meant the substitution of the dominance of one party over another. The number of states where no single party has outright control of the legislature steadily increased up to 2001. Since that year, about one half of the states have been ruled under divided government. In fact, there are only six states (Durango, Hidalgo, Oaxaca, Puebla, Sinaloa y Tamaulipas) that, up to 2010, have not had any divided government experience. Unlike in the case of governorships, the average number of legislative parties has steadily increased before and after 2000, passing from 1.9 in 1992 to 2.9 in 2010.

What does this increase in subnational political fragmentation mean? In the first place it is important to point out that even though political fragmentation has, in general terms, increased there are important differences among states. In Chiapas, for example, the ENP underwent a significant increase from 2.2 to 5. But in other states like Tamaulipas it only grew from 2.2 to 2.5. Second, political fragmentation has affected the complexity of legislative decision-making processes. In those states with higher degrees, political parties have needed to construct coalitions stable enough to guarantee internal governability. Nonetheless, in the states where fragmentation has been less visible, such as those that had not experienced divided governments, governors have been able to run the states without effective internal checks and, moreover, without being subject to the control presidents used to exert in the authoritarian period<sup>5</sup>.

Political fragmentation is visible not only in the polarisation of governorship elections or in the correlation of forces within a legislative body. A federal system implies a design where authorities of three different levels of government have jurisdiction over the same territory. The number of subunits composing a polity is another form of fragmentation that has an effect in governability<sup>6</sup>. A more divided polity implies a more complex scenario for a decision-making process particularly where the different authorities governing those subunits have different political affiliations. In a context where the authorities from the three levels can all belong to different parties,

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<sup>5</sup> A piece of research published by Rosas and Langston (2011) illustrates the influence of subnational factors on national political dynamics. They found that governors have been able to affect voting behaviour of federal legislators thus influencing that decision made within the national congress

<sup>6</sup> As Ferejohn (2002) points out, fragmentation is also related to the territorial configuration of a given state. "Federalism, for example, fragments certain kinds of political powers—vertically, between central and local governments—and can create the space for judicial action. Federal systems not only provide opportunities and duties for states to make policy unchecked by the national government, they also generally provide the states with the capacity to block or slow actions by the national government. Finally, jurisdictional disputes in federal systems, whether between states or between a state and the national government, need to be resolved, and courts are typically employed for this purpose" (57-58).9696



having an institutional mechanism to process potential conflicts is fundamental to guarantee governability. It is in this context that, due to its constitutional review powers, the Supreme Court appears to be the most qualified actor to undertake the arbitration of the conflicts of federal and republican systems.

Mexico has become a more plural and democratic country in electoral terms. Political parties contend for executive and legislative positions at national, sub-national and municipal levels. Pluralism has led to different forms and degrees of fragmentation and this has also translated into more complex conditions for the making of policy and law. This has been the context where an institutionally empowered Supreme Court has emerged as a feasible arbitrator of political conflict and as a potentially more effective policy-maker. The next two sections examine the way political actors have used litigation and why this has been determinant for the development of more proactive forms of judicial policy-making.

### **3.2 Constitutional Controversies: Judicialisation from below**

Since the establishment of the new institutional design an average of 2,894.2 cases have been filed annually in the Supreme Court to be adjudicated by the justices working *en banc* (*Pleno*). Constitutional controversies and actions of unconstitutionality represent 3.4% and 1.6% of this caseload respectively. Due to the infeasibility of dealing with such a large volume itself, every year the *Pleno* remits to the Chambers (*Salas*) a significant proportion of them (86% on average). Sending cases to the *Salas* has allowed the *Pleno* to settle a more manageable volume, which on average have been 419 per year. It is in this reduced caseload that the relevance of both constitutional controversies and

actions of unconstitutionality seems clearer as they represent 1 out of every 5 cases justices settle working *en banc*<sup>7</sup>.

The procedures established by the 1994 judicial reform have been determinant for the emergence of the Supreme Court as an effective policy-maker. However, the Supreme Court is not the actor that has given these procedures a privileged position in its everyday activity. The political actors with access to the Supreme Court in these procedures have also regarded them as a strategic tool for advancing their agendas and protecting their interests. Before analysing the way the Supreme Court has dealt with these new types of cases, this section analyses the use these actors have made of the right to litigate in the Supreme Court.

Constitutional controversy has formally existed since the enactment of the 1917 Constitution. As mentioned in the previous chapter, according to the original text of the charter, this procedure was restricted to settle disputes between states, between authorities within the states, between a state and federal branches, or between federal branches. The lack of secondary legislation along with the authoritarian conditions that characterised Mexico during most of the twentieth century prevented the consolidation of constitutional controversies as an effective constitutional review procedure (Zamora et al., 2004). The constitutional controversy had limited success between 1917 and 1937, a period during which the Supreme Court received 50 cases. The number of cases decreased as *presidencialismo* and the hegemony of the PRI became more prevalent. In the period 1938-1947 four controversies were submitted to the Supreme Court. However, as not even a single case was initiated between 1948 and 1988, this procedure disappeared in practice from Mexico's legal system (Cossio Diaz, 2008).

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<sup>7</sup> These calculations are based on two sources: caseload data were taken from the information registered by the Supreme Court's annual reports (available at [http://www.scjn.gob.mx/Transparencia/Paginas/trans\\_int\\_lab0.aspx](http://www.scjn.gob.mx/Transparencia/Paginas/trans_int_lab0.aspx)). The information about actions of unconstitutionality came from the Constitutional judgements dataset integrated *ex professo* for this thesis' purposes.

Between 1989 and 1994, a period when opposition parties started to gain control of governorships, state congresses and municipalities, the constitutional controversy recovered its relevance. Six new cases were filed in this period, all of them by municipal authorities, which lacked standing for doing so. Berruecos (2004), while analysing the Supreme Court's performance along those years, points out that a highly relevant outcome was the overriding of a judicial precedent disallowing municipalities to submit constitutional controversies. Certainly, the emergence of the cases before the 1994 judicial reform made evident the need for developing stronger mechanisms for processing political conflict in institutional arenas.

The 1994 judicial reform re-defined the nature and scope of the constitutional controversy procedure by broadening standing and authorising the Supreme Court to render general effects rulings. The reform intended this procedure to be used for disputes between: a) executive and legislative federal branches; b) federal and state authorities (the Federal District included); b) federal and municipal authorities; c) authorities from different states (the Federal District included); d) branches of government within a state; e) state authorities and municipalities of the same or a different state; and f) different municipalities of the same or a different state.

The institutional design established in 1994 set the basis for the Supreme Court to become the ultimate arbitrator of Mexico's federal and republican system. In particular, the design created two categories of conflicts susceptible to be reviewed by the Supreme Court: a) horizontal, or those between actors of the same level and jurisdiction (e.g. conflicts between two municipalities or two branches of government of the same state), and b) vertical, or those confronting authorities from different levels of government (e.g. between the federal congress and a municipality or between a state and the president). The veto power implied in having access to the highest court became distributed among authorities of the three levels of government.

The Supreme Court adjudicated 1,160 constitutional controversies in the period 1995-2009<sup>8</sup>. Table 4.1 shows the distribution of cases according to the parties in conflict. In the first place, it is clear from the table that constitutional controversy has essentially been a procedure whereby authorities have contested actions or decisions by higher authorities. Indeed, municipalities have submitted 82.9%, subnational authorities 14.1% and national ones 2.9%. Conversely, national and subnational parties have been defendants in 28.4% and 70.2%, respectively. Accordingly, horizontal controversies account for only 11% of the cases, most of the conflicts being between sub national authorities. The remaining 89% are vertical controversies, the overwhelming majority (97.4%) by authorities from lower levels against the highly ranked ones.

Table 3.1 Constitutional controversies: claimant party vs. defendant party, 1995-2009

		Defending party						Municipal	Total	
		National			Subnational					
		Exec..	Legisl.	Jud.	Exec.	Legisl.	Jud.			
Claiming party	National	Executive	0	13	0	5	4	0	1	23
			(0.0)	(1.1)	(0.0)	(0.4)	(0.3)	(0.0)	(0.1)	(2.0)
	National	Legislative	8	0	0	1	2	0	0	11
			(0.7)	(0.0)	(0.0)	(0.1)	(0.2)	(0.1)	(0.0)	(1.0)
	Subnational	Executive	22	9	1	2	32	6	6	78
			(1.9)	(0.8)	(0.1)	(0.2)	(2.8)	(0.5)	(0.5)	(6.7)
		Legislative	6	4	0	13	0	2	4	29
			(0.5)	(0.3)	(0.0)	(1.1)	(0.0)	(0.2)	(0.3)	(2.5)
	Subnational	Judicial	2	0	0	23	31	0	1	57
			(0.2)	(0.0)	(0.0)	(2.0)	(2.7)	(0.0)	(0.1)	(4.9)
Municipal		188	75	2	227	451	15	4	962	
		(16.2)	(6.5)	(0.2)	(19.6)	(38.9)	(1.3)	(0.3)	(82.9)	
Total		226	101	3	271	520	23	16	1,160	
		(19.5)	(8.7)	(0.3)	(23.4)	(44.8)	(2.0)	(1.4)	(100.0)	

Percentages in parentheses

Source: *State/year constitutional litigation dataset* (see Appendix I).

<sup>8</sup> The calculation is based on the data available in “@lex”, the Supreme Court’s judicial statistics website. @lex registers information for all “original, complete and closed files”, excluding those incomplete and/or unclosed ones. This study employs this website as its source of judicial information for being the most reliable and methodologically robust compendium regarding constitutional controversies and actions of unconstitutionality. As updated in June 2012, @alex registers 1283 different constitutional controversy files. The calculations used in this dissertation excluded all the 123 cases that are registered as submitted by or against “non-legitimate actors” as well as those described as dismissed by the Supreme Court without rendering a formal judgment.

Constitutional controversy has certainly been effective in processing conflicts emerging a more fragmented political scenario. In a context characterised by declining *presidencialismo* and the debilitation of the formerly hegemonic party system, political actors become more prone to employ all the tools they have for advancing their agendas. Having access to the Supreme Court was one of these tools that proved to be effective in transforming political conflict into a legal dispute subject to the arbitration of a court. In order to explain in more detail how political disputes have translated into constitutional controversies the next sections analyse in detail the particularities in the use of constitutional litigation by the authorities of the three levels of government.

### 3.2.1 National-level authorities

On the 21<sup>st</sup> of December 2004 President Vicente Fox sued (filed as 109/2004) the Chamber of Deputies for having refused to consider the observations he submitted to the Federal Budget that that organ approved for the 2005 fiscal year. The Supreme Court admitted the case first, then suspended the application of the budget as a precautionary measure and, eventually in 2005, once the budget was in operation, rendered a decision against the legislative branch. The federal budget is one of the 34 cases federal authorities have filed in the Supreme Court.

At the national level the constitutional controversy has fundamentally worked as a mechanism for settling disputes between the president and the federal congress. The federal executive has been the claimant party in 13 out of the 21 cases opposing federal authorities, all of them filed after alternation in the presidency and under divided government. Likewise, all but one of the 8 federal congress cases against the executive appeared under similar conditions. Both the executive and legislative branch have particularly targeted fiscal dispositions such as the 2005 Federal Budget or, in the case of the Congress, the constitutional controversy 32/2002 whereby the Supreme

Court struck down a decree issued by the president exempting from paying the *Services and Production Special Tax* those industries employing non-sugar sweeteners in the manufacture of their products.

Alternation has had an evident effect in the way federal authorities employ the Supreme Court. The first time a president submitted constitutional controversy was in 1996 when Ernesto Zedillo, the last president of PRI's dynasty, sued the PAN-governed municipality of Guadalajara for having issued new regulations regarding the provision of private security services to banking institutions. The relevance of this demand does not only rely on the fact that this municipality is part of Mexico's second largest metropolitan area, nor on the legal outcome of the case –new regulations were struck down- but in being a sign of the advantages of having established formal methods for processing conflicts between authorities.

The case of Guadalajara's municipality exemplifies how political affiliation has been determinant for federal authorities to engage in constitutional litigation. The federal executive has never employed the constitutional controversy to sue an authority affiliated to its own party. On the contrary, in 3 out of the 9 cases submitted by the federal executive the targets of the demand have been decisions made by Mexico City's left wing authorities. These three controversies filed between 2000 and 2006 were circumscribed to the Fox- Lopez Obrador quarrel, a conflict that lasted for the entire period of the former's presidency, and the latter's Head of Mexico City's Government.<sup>9</sup> The first case regarded the local Education Law (CC-29/2000), the second was a decree declaring the inapplicability of the daylight saving time in the Federal District (CC-8/2001), and the third one was a technical standard regulating the re-charge by injection of groundwater reserves.

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<sup>9</sup> About the political conflict that lead to Lopez Obrador's impeachment see for example Roldan Xopa (2004), Oliver (2010), Flores- Macias & Lawson (2006).

The Federal Congress has sued only three subnational authorities and no municipal ones. The first of them (CC-42/2004) contested the refusal of Oaxaca state government to permit the evaluation for the 2002 fiscal year by the Federal Audit Office (*Auditoria Superior de la Federacion*), which is the country's highest audit public body, and an institution attached to the Chamber of Deputies. The second case (CC-24/2005), which was linked to the Fox-Lopez Obrador quarrel, challenged a legislative agreement whereby the Mexico City' Legislative Assembly set out the rules to conduct the impeachment processes of local public officers. In the third and most recent one the federal legislative disputed a reform to the Chiapas state constitution extending the fixed and predefined terms of publicly elected officers.

National-level authorities, both executive and legislative, have used litigation in a selective and strategic fashion. They have privileged fiscal-related matters over other legal matters, and have concentrated litigation against authorities under the control of opposition parties. Indeed, the evidence shows that although strategic, litigation has not been a tool regularly employed by federal authorities. Being at the top of the federal system allows executive and legislative institutions to have a more diverse set of tools with which to engage in political bargaining with authorities from other levels of government. One of these tools is the control federal authorities have over fiscal policy. Every year, federal and state authorities negotiate the volume of financial resources to be transferred from national to subnational governments. As it is explained in the following pages, the control of public money is the main factor stimulating litigation.

### 3.2.2 Subnational authorities

In the period 1995-2009 subnational authorities submitted 14% of all constitutional controversies, an average of 0.34 per state per year. Not all the states, however, have resorted to the Supreme Court. There is no single constitutional controversy filed by any subnational authority from Hidalgo,

Sinaloa, Sonora, Tamaulipas or Veracruz, all of which are states where the PRI has not lost its historic dominance. Neither have there been any from Michoacan nor Queretaro, states governed during most of the period by the PRD and PAN, respectively. The use of constitutional controversy has been, as in the case of federal authorities, selective and limited, as well as being especially affected by political variables like affiliation and fragmentation.

Controversies against national-level authorities represent a quarter of all subnational cases. State-executive branches have been the most active actors, initiating 1 out of every 3 cases focusing litigation against the federal executive. In the period 1995-2000, still under PRI's rule, governors of six different states sued the president for acts related to the transfer of financial resources, territorial disputes and criminal proceedings against state public officers. Among these cases, the CC-11/1995 is especially relevant because it was part of the 1994-1995 Tabasco state post-electoral conflict, where president Zedillo, governor Roberto Madrazo and the defeated PRD candidate Andres Manuel Lopez Obrador, all played relevant roles. Madrazo won the 1994 governor election amid allegations of fraud and campaign overspending (Berruecos, 2003). Lopez Obrador reacted by setting up a mobilisation strategy that included the closure of oil fields and a march from Tabasco to Mexico City.

As the PRI administrations had done in previous post-electoral conflicts, Zedillo negotiated an informal agreement with the PRD that included the organisation of new elections. To execute his part of the agreement, Zedillo offered governor-elect Madrazo a cabinet position in exchange for his resignation. Madrazo did not accept and with the support of local legislators took office on the 1<sup>st</sup> of January 1995 (Eisenstadt 1999). In June of that year Lopez Obrador sued Madrazo claiming he had committed different electoral offenses during the governorship race. On August 20<sup>th</sup> the Attorney General issued a press release informing that Lopez Obrador's demand had been admitted and, as a result, his office would start the corresponding



investigations. A day after, governor Madrazo submitted a constitutional controversy demanding the invalidation of investigations under the argument that the Attorney General was invading Tabasco's exclusive jurisdiction on criminal proceedings. The Supreme Court dismissed the case and no formal charges were filed against Madrazo. The relevance of this case relies on the fact that it was an evident sign of *presidencialismo*'s decline, anticipating the extensive use of litigation that soon would take place.

Unlike the experience of litigation between authorities from the same political affiliation, since the PAN came to power in 2000, no governor of this party has submitted any case against the federal executive. Actually, the noticeable feature during PAN's rule is the significant increase (from 1 to 10) of local congresses demands against the president. A good example of this group of cases is the file CC 109/2009 whereby Mexico City's Legislative Assembly challenged a presidential decree declaring the closing-down of the main public energy company in central Mexico (*Compañía de Luz y Fuerza del Centro*). Despite this case's relevance for its links to the highly controversial conflict between the federal government and Mexican Union of Electric Workers, one of the most combative labour organisations in the country, most of the cases by state congresses are related to financial transfers from federal to subnational governments.

Overall, in the case of subnational authorities, the constitutional controversy has mainly been a means for settling internal conflicts - 2 of every 3 subnational cases are internal - rather than a method for contending higher or lower authorities. Three features distinguish internal controversies: first, one half of them have state judiciaries as claimant. Second, there is an evident difference between the number of cases emerging under divided (69) and unified governments (30). Third, in addition to fiscal-related controversies, a considerable proportion of cases linked to the designation and dismissal of public officers also exists.

The activity by state-judiciaries has coincidentally been focused on fiscal and public officer matters but with no clear skew towards divided governments. The judiciaries of Jalisco (12), Baja California (7), Tlaxcala (7) and Yucatan have been remarkably proactive in using litigation, mainly as means for protecting their financial conditions. The Baja California state High Court of Justice for example demanded the local congress for the approbation of the 2005, 2006 and 2007 local budgets, whereas its counterpart in Jalisco did so in 2003 and 2006 and, in addition to this, it also sued the local congresses for not having ratified two of the High Court's members.

The controversies by local judiciaries indicate a further change in the political system, this one at the subnational level. As in the case of the president, diffusion of power has, in general terms, made governors less dominant, and, at the same time, it has encouraged the other branches of government to effectively check executives.

The divided governments' effect on constitutional litigation is noticeable in the number of cases brought by local executives. Whereas under a unified government there are only 3 cases of governors challenging the congress, in divided government this figure reaches 22. Nayarit is a state where conflict has been more intense. Between 2002 and 2005 the governor, who was elected as the candidate of PAN-PRD coalition, sued the local congress 14 times, half of them contesting fiscal dispositions. The case of Nayarit clearly illustrates how governors have resorted to the constitutional controversy as practically their only way to oppose *unfriendly* legislatures. If controversies by state-judiciaries show the autonomy gained by courts, controversies by executives are evidence of the decline of governors' dominance.

Up to this point the main patterns followed by subnational authorities' use of litigation have been explained. Constitutional controversy has amounted to an important tool for both contesting federal authorities and processing internal conflicts. Nonetheless, it has been narrowly employed to deal with inter-state conflicts. There are only two cases confronting authorities from

different states, both them filed in 1996 by the governor of Jalisco against its counterpart in Colima, and circumscribed to the historic territorial conflict between these states (Barragan 2002). In a similar way, subnational authorities have barely employed the constitutional controversy against municipalities. Save for the CC-83/2008 whereby the Morelos' High Court of Justice sued 33 municipalities in Morelos, subnational authorities have demanded 9 out the 2456 municipalities that exist in Mexico.

To sum up, constitutional controversy has performed two main roles at the subnational level: it has been a mechanism whereby authorities from opposition-governed states have contested federal authorities, particularly in connection to fiscal issues; and also as a channel for processing states' internal disputes, mainly in divided government contexts. Nonetheless, the procedure has not been significant in settling inter-state conflicts or for contesting municipalities.

### 3.2.3 Municipalities

Mexico's federal system is composed of: 32 subnational entities (31 states and the Federal District) and 2,456 municipal-level authorities (2,440 proper municipalities plus Mexico City's 16 boroughs). Subnational entities have 76.8 municipalities on average but with an extreme variance among them, ranging from 5 in Baja California and Southern Baja California, to 570 in Oaxaca, the state with the largest proportion of indigenous population (INEGI, 2011). Under the 1917 Constitution (Article 115), municipalities have exclusive jurisdiction over land use regulations (zoning) as well as for the provision of drinking water, sewerage, lighting, graveyards, markets, streets, parks gardens and public security. Municipalities, despite being in more regular contact with the population, have limited fiscal faculties, a condition that, as in the case of states, implies that they have the right incentives to constantly resort to the Supreme Court.

As was mentioned earlier, before 1995 municipalities' lacked the standing to resort to the Supreme Court through constitutional controversies. One of the 1994 judicial reform's main innovations was to have provided municipal authorities with access to the Supreme Court. In the first fifteen years of the new provisions, municipalities have submitted 962 cases or, in other words, 4 out of every 5 constitutional controversies filed in Court. If the reform is assessed by only considering the extent to which municipal authorities have in fact employed their standing, the conclusion would be clear: it has been a success. Indeed, it has been effective in taking to the Supreme Court a considerable volume of a completely new type of cases that has gradually but radically transformed the way constitutional judges understand their role in the political system.

Authorities of 632 different municipalities have filed all the 962 controversies. Put differently, a quarter of all the 2,457 municipalities that exist in Mexico have sued other authorities in the Supreme Court. These 632 municipalities are almost equally distributed between rural (55%) and urban (45%). However, in terms of the number of cases, the urban municipalities have been more active, submitting 59% compared to 41% from the rural areas. This distinction is relevant in understanding what was mentioned earlier about the considerable number of indigenous rights controversies in 2001.

That year the Supreme Court received 315 cases by municipal authorities (92% of them from Oaxaca state) contesting the constitutional reform that incorporated into the charter a group of dispositions intended to be more protective of indigenous communities. At the core of these demands was the claim that the reform failed to comply with the organisation of a popular consultation of the proposed changes, an obligation the Mexican state had as a result of the ratification of the International *Labour Organisation Convention* 169 on indigenous and tribal peoples. As these cases targeted a constitutional reform process rather than conflict between the charter and a low-ranked disposition, the Supreme Court opted to dismiss them, justifying its decision

on a precedent specifying the constitutional controversy as an unsuitable procedure to challenge constitutional amendment processes.

Indigenous rights controversies represent 27% of all cases the Supreme Court received from 1995 to 2009. Leaving these cases aside, municipal controversies are distributed in the following way: 18% against national authorities, 81.4% against subnational ones and 0.6% against other municipalities. Contrary to the predominant use national and subnational authorities have made of constitutional controversy to settle horizontal disputes, municipalities have largely employed it to contest high-ranked authorities.

Three aspects feature municipal controversies against federal authorities. Firstly, they have fundamentally emerged after alternation took place in 2000. There were only 7 cases registered before 2001, but 109 afterwards. Secondly, they have mainly been submitted to contest the Federal Congress. Thirdly, they have targeted two main categories of provisions: fiscal and those related to the appointments of public officers. Indeed, municipal authorities initiated 44 different cases contesting the appointments of the commissioners to the Federal Commission of Telecommunications.

Turning to controversies against subnational authorities, it is important to first bear in mind that they represent the largest proportion of all cases by municipalities (4 out of every 5). Second, in a similar way to the cases against national authorities, subnational ones are characterised by an increase considerably after 2001 (from 28.5 on average, to 42.9). Third, this group of cases is predominantly concentrated on fiscal matters, followed by functionaries' appointments and then infrastructure and planning.

Finally, all four cases between municipal authorities are linked to conflicts related to the services exclusively provided by municipalities. Two of them were originated in disputes over drinking water provision in the municipalities of Puebla (CC-23/1998) and Martinez de la Torre (124/2006). The other two, filed by the municipalities of Tultepec (CC-14/1999) and

Tlanepantla (CC-17/1999), both of them within the state of Mexico and within Mexico City's metropolitan area, were intended to annul a single construction permit authorising the development of a sizable housing project which was issued by the municipality of Cuautitlan. The relevance of municipal horizontal municipalities does not rely on the conflict that they have brought to the Supreme Court, but on the one that they have not. The absence of horizontal conflicts between municipalities undoubtedly deserves further research to elucidate its causes. This objective, however, is beyond the scope of this dissertation.

### **3.3 Actions of Unconstitutionality: Judicialisation from above**

The introduction of the action of unconstitutionality to Mexico's legal system was the major innovation of the 1994 judicial reform. Before then Mexico lacked an abstractive review procedure whereby the Supreme Court could adjudicate on the constitutionality of legislation passed by the national and subnational legislative bodies. Inasmuch as the reform expanded the jurisdiction of the Supreme Court, political actors were also granted with an unprecedented veto power over legislation that has influenced legislative behaviour and thence the way laws are made.

As reformed in 1994, article 105 provides standing to initiate abstract review cases to: a) the Attorney General; and b) legislative minorities (with the support of least the 33% of the legislature) but only against laws approved by the legislative body they belong to. Later on, the 1996 electoral reform expanded standing to federal and state-level registered political parties (the latter only against local laws). In 2006 a new amendment further increased the scope of litigating by giving standing to the National Commission for Human Rights (CNDH) as well as to human rights commissions in the states.

The incorporation of the action of unconstitutionality to Mexico's political system created a scenario more appropriate for the emergence of a judicialisation process of legislation. This procedure's institutional design, however, included a pair of rules that, while guaranteeing a certain margin of deference to legislative bodies, limited the prospects of an extreme use of litigation. These rules introduced: 1) a 30-day span after the enactment of a piece of legislation as the only period in which actors with standing have to present a demand in the Supreme Court, 2) a supermajority of 8 out of the 11 justices as the minimum vote the Supreme Court must reach to override any law under its jurisdiction.

Unlike in other countries such as Colombia, where access to abstract review is open to the ordinary citizen, the institutional design selected for the action of unconstitutionality restricted standing only to political actors and, consequently, set the basis for the development of the Supreme Court as an eminently politicized body<sup>10</sup>. In order to analyse to what extent these political actors have in fact used this procedure this section categorizes them according to two main criteria: hierarchy and the fragmentation of veto power. Hierarchy refers to the jurisdiction to what different the actors with legal standing belong, that in Mexico's federal system could be national or subnational.

On the other hand, drawing on Tsebelis' (2002) study of veto players, the analysis developed in the following pages consider that the veto power implied in having standing to resort to the Supreme Court could be fragmented when this power is given to different actors which in order to

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<sup>10</sup> Schor (2009) provides an interesting comparison of the Mexican Supreme Court and the Colombian Constitutional Court. He argues that each court is playing a different role in their respective democratic order due to the institutional design that was established, but also as a result of short-term political bargains and long-term societal transformations. In his view, these differences explain why the Colombian Constitutional court has undertaken a more ambitious agenda than this Mexican counterpart.

employ it need to act collectively (i.e. the 33% of the members of a legislature); or can be unified when this power is given to individual actors.

Individual and collective players have different incentives to litigate. Individual actors virtually have full autonomy to determine the use of veto power implied in having standing to initiate abstract review cases. Conversely, the behaviour of collective actors largely depends on the correlation of forces within a legislative body. For example, when the fragmentation within a legislative body is as low as to make it impossible for opposition parties to meet the 33% requirement, the use of litigation by collective actors is null. The incentives for litigating grow as fragmentation grows but, at the same time, the possibilities for conducting non-consensual decision-making decrease. Therefore, when fragmentation is so as high as to always require a coalition composed by more than three parties to pass a law, the possibility of taking this law to the Supreme Court is very low.

Table 3.2 Actions of unconstitutionality: claimant party vs. defendant party, 1995-2010

		Jurisdiction of the challenged legislation				
		National	Subnational legislatures		Total	
			Subnational	Municipal		
Claiming party	National	Attorney General	12 (1.71)	80 (11.40)	215 (30.63)	307 (43.73)
		Political party	14 (1.99)	241 (34.33)	1 (0.14)	256 (36.47)
		Human Rights Commission	3 (0.43)	8 (1.14)	0 (0)	11 (1.57)
		Legislative minority	6 (0.85)	- -	- -	6 (0.85)
	Subnational	Political Party	-	12 (1.71)	0	12 (1.71)
		Human Rights Commission	-	3 (0.43)	0	3 (0.43)
		Legislative minority	-	105 (14.96)	2	108 (15.24)
			-		0.28	
		Total	35 (4.99)	449 (63.96)	218 (31.05)	702 (100)

Percentages in parentheses

Source: *State/year constitutional litigation dataset* (see Appendix I).

As individual actors, the scope for employing litigation increases for political parties. They have two possible paths to resort to the Supreme Court: either as part of a legislative body or as individual actors, but only in electoral



matters. So when parties have marginal legislative force -which has been the case for several small parties- standing turns into a powerful tool to advance their agendas<sup>11</sup>. The incentives the Attorney General has to litigate are even higher because he can bring to the Supreme Court cases of any nature. Therefore, as the president appoints the Attorney General, and its office (the *Procuraduria General de la Republica*) is considered one of the administrative organs composing the federal executive, when this functionary litigates it is virtually acting as a delegate of the president. On the whole, having privileged access to the Supreme Court is strategic for being a veto power with the capacity to annul political decisions by other actors. In a fragmented environment where no actor has extreme dominance over the rest, having a veto power that is not accessible to all policy players becomes even more relevant.

The Supreme Court adjudicated 702<sup>12</sup> actions of unconstitutionality in the period 1995-2010<sup>13</sup>. The largest proportion of these cases (77.6%) originated from petitions by national actors against subnational ones. Example of this type of cases are the actions of unconstitutionality submitted by the Attorney General challenging abortion law reforms passed by Mexico City's local congress (chapter 5 analyses in depth these two cases). As in the case of constitutional controversies, vertical conflicts account for the larger proportion of cases but unlike them, the design of the action of unconstitutionality does not allow lower-ranked actors (i.e. subnational actors) to challenge decisions by those of higher levels of the federal system.

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<sup>11</sup> By small-parties this thesis refers to the political parties that have a marginal representation in legislative bodies (federal and local). Among these parties are the Labour Party, the Green Party of Mexico, the Social-Democratic Party, Convergence Party.

<sup>12</sup> This figure excludes 16 cases registered in @lex, the source of judicial information, because they were submitted by or against actors with no standing. For further information of this source please refer to Appendix I.

<sup>13</sup> The period of analysis for the actions of unconstitutionality comprises one more year (2010) than the one for constitutional controversies. @lex, the main source of judicial information, does register information for this procedure up to that year. The aim then was to use the largest sample possible in order to maximize the explanatory power of this research.

On the other hand, horizontal cases mostly concentrate at the subnational level. What does this preliminary examination mean? In general terms, it makes clear that federal actors like the president during democracy have had to resort to the Supreme Court as a method of overcoming the decline of their influence over subnational politics. In the following pages it is explained in detail how the use of litigation by the different categories of actors was greatly affected by the changes in the political environment at both national and subnational levels.

### 3.3.1 National actors

National actors, that is those to belong to the federal jurisdiction like the Attorney General or the Human Rights Commission, submitted 4 out of every 5 actions of unconstitutionality and within this group only 1% were by collective actors. The fragmentation of standing has made the use of litigation more difficult. However, individual actors have been encouraged to engage in a more proactive use of the Supreme Court insofar as they have not needed to agree the use of litigation with others. But even when the different individual actors have similar incentives to litigate, the factors fostering the use of it have been operated in different ways. For instance, it is possible that presidents have had to resort to litigation as they capacity to subordinate other actors declined. Small parties have never enjoyed real influence on decision-making processes, so having access to the highest court has always been strategic for them. For legislative minorities the decision-making processes have, on many occasions, been difficult enough that it has made no sense for them to litigate against decisions they were already involved in.

There are three particular features featuring the cases brought by national actors: a) they have overwhelmingly been submitted by individual actors, b) they have considerably increased after alternation in the presidency, and c) they have particularly targeted subnational level legislation. More plural and competitive conditions have increased the incentives political actors have to

litigate. Litigation then increased the incentives to engage in policy-making in a more proactive way. To explain how litigation evolved, this section analyses separately the different uses individual and collective actors have made of it.

### *3.3.1.1 The Attorney General*

The Attorney General has been the most active litigant in the Supreme Court. The 307 cases submitted by this actor represent 43% of all actions of unconstitutionality, an average of 1.6 per month in the period 1995-2010. However, the Attorney General only made use of standing after Vicente Fox came to office. Although the federal executive already had legal standing, under PRI's rule this actor made no use of the capacity to bring cases into the Supreme Court. The relevance of this actor's use of litigation relies on the fact he has been the main litigant, but also on the fact that when litigating in the Supreme Court the Attorney General virtually acts as agent of the president.

Despite different efforts having been made to adopt a less centralised formula, Mexico's fiscal federalism remains considerably centralised (Weingast, 2009). Federal government concentrates most on tax-collection functions, so state and municipal revenues largely depend on transfers from the federation (Courchene and Diaz-Cayeros, 2000; Diaz Cayeros, 2006). Bearing in mind this condition of Mexico's fiscal system, it is not strange that the Attorney General has mostly litigated against subnational fiscal laws. Seven out of every 10 constitutional actions by the Attorney General challenged fiscal regulation approved by state congresses, but to be exclusively applied at municipal level.

The Attorney General has mainly targeted laws related to the administration of public financial resources, however, as most of them have only municipal jurisdiction the salience of these cases has in general terms been limited. In the case of Attorney General Actions against municipal laws, there seems to be no effect of political affiliation in the use of litigation. The most challenged states by the Attorney General are Yucatan (74), Morelos (41)

and Coahuila (36), the first two under PAN control. This evidence shows that the Attorney General has litigated even against legislatures under its own party's control. An example of this type of case is the AI-55/2008, whereby the Attorney General sued Revenues Law of the Municipality of Tixmehuac, passed by the Yucatan state Congress, claiming that taxing energy consumption violated Federal Congress' taxing jurisdiction.

If political affiliation had no effect on litigation against municipal-level laws, the opposite would occur in regards to laws of state jurisdiction. The Attorney General has proportionately demanded more laws approved by divided and opposition-controlled legislatures than by those of its own party. Certainly, the case of the Federal District is especially interesting because among all subnational entities it has been the most demanded by federal actors. Laws as different as the Reading Promotion Law, the Law of the Protection of Non-smokers, or the Financial Code, just to name a few, have all been subject to demands by the Attorney General. However, the most salient ones have been related to questions about the role of the state in reproductive and family matters.

The Attorney General challenged in 2000 a law decriminalising abortion for genetic causes (AI-10/2000), then in 2007 a new reform legalising first-trimester abortion (AI-146/2007) –these two cases are the subject of analysis in chapter six- and later on the legalisation of same-sex marriage approved in 2009 (AI-62/2009). These cases are emblematic because they opposed actors from different ideological orientations: the right-wing federal government and leftist Mexico City local legislature. Overall, the patterns followed by the Attorney General's use of litigation exhibits how in a more competitive and ideologically diverse system, the presidency has had to resort to legal instruments in seeking to defend in judicial arenas what has been impossible to prevent in legislative ones.

### 3.3.1.2 *Political parties*

Under article 105, political parties are restricted to present actions of unconstitutionality only against electoral laws. The 45% of national cases - slightly more than a third of the total - were by national political parties. The first and foremost relevant feature in the litigation by these actors is being essentially employed to contest subnational laws: 95% of the cases brought by national parties challenge subnational legislation. Political parties share with the Attorney General an inclination against laws of subnational jurisdiction.

The second important feature is that the parties that have made more regular and extensive use of the action of unconstitutionality are the smaller ones that lacked real capacity to influence the legislative decision-making process. In the period 1995-2011, 13 different political parties filed a total of 256 cases, 45% by the largest ones (i.e. PRI, PAN and PRD), and the remaining 55% by ten smaller organisations (6 of which are already defunct<sup>14</sup> due to poor electoral performance). For large parties the action of unconstitutionality has turned into a useful tool in those states where they have a limited electoral competitiveness. This explains, for example, why the PRI has submitted only 12 cases, the PAN 38 and the PRD 65.

Resorting to the Supreme Court is, for small parties, a strategic instrument they have employed in cases seeking to counterbalance the power of the three principal parties. Interviewee 4 confirmed this by describing this procedure as a powerful political 'weapon' they use to respond to the making of law by the three major parties. Small parties' marginal legislative representation makes it even more important for them to have access to the Supreme Court. "On some occasions [he concludes] what is at stake is our own subsistence, so having this tool is very important even to negotiate with stronger parties".

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<sup>14</sup> These parties are: Nationalist Society Party (PSN for its Spanish abbreviation), Party for Social Alliance (PAS for its Spanish abbreviation), Mexican Revolution Authentic Party (PARM for its Spanish abbreviation), Party of Democratic Centre (PCD for its Spanish abbreviation), Social-Democratic Alternative Party and Social-Democratic Party.

The third most relevant characteristic of political parties' actions is the high proportion of cases challenging laws passed by PRI-controlled legislatures. Political parties have challenged 14 federal laws, four of them before 1997 when the PRI held both chambers, and the remaining 10 afterwards, under divided governments. Still under unified government the PRD (2), PAN (1) and PVEM (1) challenged the Federal Code of Electoral Institutions and Proceedings' (COFIPE) new provisions in electoral justice, public funding and proportional representation matters. This modification to the COFIPE was the application to this secondary law the new electoral principles and competences incorporated in to the constitution by the 1996 electoral reform.

The 1996 reform gave full autonomy to the Federal Electoral Institute, the body in charge of organising elections at federal level, and the Federal Electoral Tribunal, the group of courts responsible of the arbitration of electoral conflicts (Becerra, Salazar, and Woldenberg 2000). The constitutional component of the reform was passed with the support of all parties. However, the conflict emerged when the PRI approved the changes to the secondary law –the COFIPE- without having reached an agreement with opposition parties. The four actions of unconstitutionality resulted from this conflict and, paradoxically, opposition parties employed their standing which the 1996 constitutional reform gave them to challenge the legal changes derived from that amendment.

After the arrival of divided governments small parties submitted all but one of the cases involving federal parties. The relatively equal correlation of forces among the three main parties in the federal congress has forced the construction of coalitions to legislate and this has reduced the incentives they have to litigate. The exception to this trend is AI-25/2003 whereby in 2003 the PRD challenged the designation of the Federal Electoral Institute's General Council new councillors. The Supreme Court soon dismissed the case under the argument that designations of public officers are acts not laws and

therefore cannot be challenged through actions of unconstitutionality. This case, however, is important because the performance of the IFE run by those councillors was the PRD's main complaint in the 2006 post-electoral conflict (Eisenstadt, 2007).

The dominance the PRI has in a fair number of states has provoked political parties to concentrate their demands precisely in the states where this party has complete control of the congress. Mexico and Veracruz, the most and third-most populous states in the country, have concentrated the largest amounts of cases. It is remarkable the fact that this type of litigation is focusing in states that have not experienced divided government because it reinforces the conclusion that it is a parties' low fragmentation degree which fosters litigation.

### *3.3.1.3 The National Commission on Human Rights*

In September 2006 the National Commission on Human Rights (CNDH) and human rights commissions in the states were granted with standing to actions of unconstitutionality. This was the first time since the creation of the procedure that a constitutional amendment was passed to expand the access to the Supreme Court to non-partisan actors. The amendment opened the door for the development of wider use of litigation, made it susceptible to becoming more human rights centred, and less focused on fiscal and electoral matters. From 2006 to 2010 the CNDH has been claimant in 11 cases, 3 against federal laws and 8 more against subnational applications. Although the reform has substantially transformed the nature of cases under the Supreme Court's jurisdiction, it has certainly provided judges with cases that involve more relevant questions about human rights and the role the state must play in their protection.

The CNDH sued the federal congress three times, all in 2009. One major aspect of this is that the two cases are linked to national security laws and were filed in the context of the 'war on drugs' declared by Felipe Calderon's

administration in 2007. The first one (AI-22/2009) challenged a reform to the Federal Commerce Code claiming that the new provision restricting appeals only to the cases involving at least 200,000 Mexican pesos (around £10,000 pounds sterling) establishes a discriminatory rule in contradiction to constitutional guarantees. In the second case (AI-48/2009) the CNDH challenged a new provision incorporated in to the Federal Police Law prohibiting non-Mexican born citizens to hold high-rank positions. The last, and second national security-related one, is a case whereby the CNDH challenged a reform to the Attorney General's Office Organic Law granting this prosecutorial organ with discretionary powers to deny public information to the CNDH.

The subnational actions by the CNDH challenged legislatures with no single-party majority and under the control of both the PRI and the PRD, but none against the PAN. Four out of these 8 cases sued the leftist Mexico City legislature, one against Public Health Law, another related to the Civil Proceeding Code and one more against the Disability Rights Law, but the most salient and coincidentally the first action of constitutionality submitted by the CNDH contested liberalisation of first-trimester abortion in Mexico City. This case was joined by a demand the Attorney General submitted against the same law. In these cases the Supreme Court rendered a landmark decision that held the reform as constitutional. For the CNDH this was an important reversal because it prompted hard criticisms from feminist groups and academia not only because it was conceived as a conservative measure by the highest institution devoted to human rights protection, but also because it was regarded as a sign of subjection to presidential power (Fuentes, 2008)<sup>15</sup>.

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<sup>15</sup> A note published by Fuentes (2008) in Mexico City's newspaper *Reforma*, mentions that five full-time professors at the National Autonomous University of Mexico, who by the time were also members of the Human Rights Commission's Council, publicly expressed their concern about the decision of José Luis Soberanes, Head of the Commission, to challenge the liberalisation reform passed in Mexico City. Pedro Morales Ache, in representation of the Information Group on Reproductive Choice (GIRE for its Spanish abbreviation), a non-profit, non-governmental organization devoted to promote women's reproductive rights, also



### 3.3.1.4 *Federal legislative minorities*

Mexico has been under divided government since 1997. The PRI lost their majority that year in the Chamber of Deputies and three years later in the Senate. A divided government gradually transformed politics in both chambers, forcing parliamentarian groups to become more proactive in legislative processes. The construction of coalitions is what has distinguished legislative decision-making since 1997. This is the context in which federal legislative minorities have employed litigation.

In the period 1995-2010 federal legislators filed in the Supreme Court five cases, one of them before the advent of divided government, and the rest afterwards. In 1996 deputies from the PAN, PRD and Labour Party (PT, for its Spanish abbreviation) together sued PRI's majority in the Federal Congress for passing the Law for the Coordination of the National Public Security System, claiming that the incorporation to the National Public Security System of the Defence and Navy Secretaries was in contradiction to the constitutional principle establishing public security as a matter of the civil police corps exclusive jurisdiction. In this case (AI-1/1996) -the second action of unconstitutionality filed in the Supreme Court ever- justices delivered a decision against the legislative minority which is, in fact, the only case where federal legislators have not been successful.

It took seven years for the Supreme Court to receive a new case by federal legislative minorities. In 2003 and 2004 deputies from PAN, PRD, Green Ecologist Party of Mexico (PVEM, for its Spanish abbreviation), PT and Convergencia (a small left-to-centre party created in 1999) submitted three different actions against the Federal Revenues Laws for those fiscal years. Later in 2008 legislators from the Chamber of Deputies also sued the Fiscal Coordination Law. Legislative minorities achieved relative success in all these

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criticised the arguments provided by the Commission as they imply that abortion must be absolutely prohibited and criminalised.

cases, getting from the Supreme Court the invalidation of at least one of the contested norms.

Now, in relation to litigation by members of the Senate, it is important to underline, first that although they have exclusive standing to contest international treaties ratification, no case of this type has ever been filed in the Supreme Court. Second, there is only one case that has prompted a group of senators to employ litigation against a norm approved in their own chamber: the reform to the Federal Law of Radio and Television passed in 2006 known as *Ley Televisa* (named after the largest media company in Mexico and allegedly the main beneficiary of this piece of legislation).

In March 2006, in the middle of that year's electoral process, the Senate approved a reform that eased telecommunications regulations in favour of 'concessionaires' (in Mexico the electromagnetic spectrum is considered a public property that the state allocates to a public contractor in the form of a 'concession'). Under the new provisions *concessionaires* have less restrictions to consolidate their dominance over the electromagnetic spectrum, essentially through the expansion of their control over frequencies, the tacit authorisation, under the same concession, for providing services additional to radio and television broadcasting, and the contraction of regulatory powers by the sector regulator (Madrazo and Zambrano, 2007).

Immediately after the approval, the *Ley Televisa* provoked an intense debate about the new regulations themselves and, most importantly, regarding the subordination of state institutions to the power of private corporations (Esteinou and Alva de la Selva, 2009). Certainly, Santiago Creel, former Secretary of Government, declared in 2007 that the reform had in fact been an imposition by television companies which, taking advantage of the on-going electoral process, put enough pressure on the legislature to get the new law approved by 79/38 (Becerril, 2007). In reaction to *Ley Televisa*, 47 senators – more than those who voted against the law- endorsed an action of unconstitutionality (AI-26/2006) claiming that the new provisions violated the

state constitutional obligation of administrating national property. The Supreme Court struck down 6 articles and 16 paragraphs of the *Ley Televisa*, invalidating the dispositions permitting concessions to be ratified without auction, setting irreversible fixed-term concessions, and authorising the provision of services unspecified in the concession titles.

### 3.3.2 Subnational actors

Under article 105, subnational actors have standing to litigate only against legislatures from their own jurisdiction. Therefore, all the 122 subnational actions imply internal horizontal disputes. This certainly is one of two main features identifying this procedure at the subnational level; the other being the legal mechanism whereby the highest judicial organ in the country arbitrates internal legislative conflicts. The second feature is that, unlike national cases, 9 out of every 10 subnational actions have had collective actors as the claiming party.

Subnational individual actors consist of state-registered political parties and state commissions on human rights. These actors together have submitted only 15 cases to the Supreme Court, two-thirds of which are against legislatures where a single-party holds the majority. Two facts explain the limited number of cases by this group of actors: first, national-registered parties are the dominant electoral organisations at subnational level, curbing the development of local forces and therefore limiting the demand of litigation to just a few parties. Second, the human rights commissions gained standing only in 2006, so in comparison with the rest of the actors they have had a narrower time-span to more actively engage in litigation.

In regards to actions of unconstitutionality by local parties it is important to underline, first, that they have been submitted by a reduced group of ten parties from in an equal number of states. These parties together filed 12 cases in the Supreme Court, nine of them contesting single-party controlled legislatures and the rest from divided congresses. In a similar way to national

small parties, local organisations have targeted laws modifying the allocation of public funding and imposing stricter rules for electoral coalition formation. The AI-11/1999 constitutes a good example of the cases of this type. In this action, the People's Conscience Party from San Luis Potosi state sued the congress claiming that the then recently approved public funding regime created an unequal resources-distribution system. This example makes clear incentives for national small parties and state-registered parties alike: lack of legislative presence to effectively take part in rule-making processes compels them to use litigation. The difference and reason why just a few small parties' cases exist is due to the limited number of small parties.

State human rights commissions have made use of standing in just three cases. In the first one (AI-37/2006) the San Luis Potosi state commission contested the state's Minor Offenders Law, in the second the Zacatecas state commission sued the Law of the Institute for Women in Zacatecas, in the most recent one Mexico City's commission challenged the local Patrimonial Liability Law. Only in this last case did the claimant prevail largely because the submitted demand was more precise and comprehensive in invoking international instruments and precedents by supranational courts. Still, what is most outstanding in the case of the human rights commission is the deficit in their use of litigation<sup>16</sup>.

Legislative minorities have filed a total of 107 actions of unconstitutionality. The peculiarity of these cases is that most of them emerged from single-party majority legislatures, rather than from the divided ones. Three-quarters of these demands targeted single-party majority legislatures, two-thirds of them controlled by the PRI. The states of Veracruz, Sinaloa or Durango are examples of how litigation has been triggered by less fragmentation. In all, the local congresses have been under PRI's control

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<sup>16</sup> In this respect, it is convenient to underline that the lack of cases from human rights commissions encouraged Justice Jose Ramon Cossio Diaz to dedicate one his newspaper collaborations to invite these types of institutions to make more active use of the action of unconstitutionality (Cossio Diaz, 2012).

throughout the period of this study. Opposition parties have therefore lacked the capacity for vetoing majority decisions in the legislative arenas. It is this context in which standing has become a strategic mechanism for contesting the majorities' dominance. Something similar has occurred in the Federal District and Nuevo Leon, the states with more cases by legislative minorities, but where the dominant parties have been the PRD and PAN, respectively.

### **3.4 The Determinants of Constitutional Litigation**

This section presents the results of a more comprehensive statistical analysis about the specific political factors determining judicialisation. The literature on Mexican judicial politics has addressed the question of whether political factors influence the Supreme Court's decision-making (Magaloni and Sanchez, 2008; Magaloni and Sanchez, 2006; Rios Figueroa, 2007) –the next chapter pays particularly attention to this question- but has not responded in depth to extent to what political factors have been the determinants of judicialisation. Having preceding sections provide an account of the evolution of political fragmentation and the use of litigation at national and subnational levels, the current one aims to find out the specific causes in Mexican states fostering political actors to resort to the Supreme Court.

The specific study conducted for this section consisted of a panel data negative-binominal regression analysis using a generalized estimating equations model (GEE). The selection of this method was based on three considerations: first, since the purpose of this analysis was to examine the effects of political variables through time but also across the different states, the appropriate method to conduct is longitudinal or panel data analysis because it permits to account for these changes by using state-year as the unit of analysis (Agresti, 2007; Wooldridge, 2001). Second, as the response variable is a count (i.e. the number of cases filed in the Supreme Court by state per year) and therefore the data are zero-inflated and not following neither a normal nor a Poisson distribution, a negative-binominal methods was selected

because it is specifically intended to account for data distributed in this particularly way (Greene 1994; Hilbe 2011; King 1988)<sup>17</sup>. Third, as the data included in the model present a certain degree of correlation, the analysis opted to employ GEE because it permits to address such difficulties at the same time as using an event count response variable (Ballinger, 2004; Zorn, 2001).

The dataset employed in the analysis was constructed from the sources cited in the Appendix. The following table reports descriptive statistics for all data.

Table 3.3 Descriptive statistics. Time span 1995-2010

Variable	Obs.	Mean	Std. Dev.	Min	Max
Actions of unconstitutionality <i>Number of cases</i>	512	1.31	4.19	0	62
Constitutional controversies <i>Number of cases</i>	512	1.88	3.61	0	42
PRI <i>Governor</i>	512	0.63	0.48	0	1
PAN <i>Governor</i>	512	0.22	0.42	0	1
PRD <i>Governor</i>	512	0.12	0.32	0	1
<i>Divided government</i>	512	0.37	0.48	0	1
Local congress <i>FENP</i>	512	3.02	0.40	2.29	3.56
<i>Effect. no. of parties in fed. congress</i>	512	2.59	0.57	1.40	5
LENP <i>Effect. no. of parties in local congress</i>	512	7.02	3.48	1.95	25
<i>LENP squared</i>					
Population (logged) <i>State population</i>	512	14.66	0.78	12.83	16.53
<i>Participaciones</i> (logged) <sup>18</sup>	512	22.42	0.75	20.59	24.36
Financial resources from fed. govt. Municipalities (logged) <i>State's no. of municipalities</i>	512	3.74	1.12	1.61	6.35

Following the theoretical arguments outlined in the first chapter, the analysis expects that the use of litigation will vary positively with political

<sup>17</sup> An example of the use of this model in political science might be found in Cox (2008).

<sup>18</sup> *Aportaciones* are the targeted financial resources that federal government transfers to the states to be applied in specific programs. *Aportaciones* distinguish from *participaciones* in the fact that the latter are those non-targeted resources (Courchene and A. Diaz-Cayeros 2000). The model employs *participaciones* at constant values of 2003.

affiliation, as well as with higher degrees of national and subnational political fragmentation. In the first place, the expectation of litigation to be positively associated with PRI affiliated governorships relies on the premise that there are more incentives to judicialise political conflict in states governed by the former hegemonic party. Second, litigation is expected to vary positively with national political fragmentation because the latter constitutes a sign of *presidencialismo*'s decline and therefore of the increasing need for a new, ultimate political arbitrator. Third, litigation is expected to vary positively with fragmentation because of the difficulties that it engenders in the decision-making process.

Accordingly, the analysis aims to test the following hypotheses:

H1a: Litigation will vary positively in PRI-governed states

H1b: Litigation will vary positively with FENP

H1c: Litigation will vary positively with LENP.

Table 3.4 GEE analysis of effects of political variables on constitutional litigation

	Constitutional controversies				Actions of unconstitutionality			
	1	2	3	4	5	6	7	8
PRI	-0.603 (0.34)	-0.613 (0.34)	-0.577 (0.35)	-0.597 (0.35)	0.226 (0.41)	-0.279 (0.39)	0.22 (0.42)	-0.415 (0.40)
PAN	-0.235 (0.36)	-0.295 (0.36)	-0.259 (0.36)	-0.31 (0.36)	0.609 (0.43)	0.079 (0.41)	0.578 (0.43)	0.018 (0.41)
PRD	-0.097 (0.39)	-0.206 (0.39)	-0.237 (0.39)	-0.284 (0.39)	0.918* (0.45)	0.12 (0.43)	0.874 (0.45)	0.226 (0.44)
FENP		0.535** (0.17)		0.508** (0.18)		1.904** (0.20)		2.022*** (0.21)
LENP			2.212** (0.84)	2.256** (0.84)			2.688** (0.91)	2.311* (0.94)
LENP2			-0.331* (0.14)	-0.351* (0.14)			-0.435** (0.15)	-0.433** (0.16)
Population (logged)	-0.643** (0.20)	-0.501* (0.20)	-0.585** (0.20)	-0.449* (0.20)	- (0.18)	-0.361 (0.19)	- (0.19)	-0.329 (0.19)
Particip. (logged)	0.968*** (0.18)	0.816*** (0.18)	0.918*** (0.18)	0.766*** (0.18)	0.870*** (0.16)	0.341* (0.17)	0.801*** (0.17)	0.27 (0.17)
Municip. (logged)	0.482*** (0.09)	0.464*** (0.09)	0.477*** (0.09)	0.462*** (0.09)	0.274** (0.09)	0.121 (0.09)	0.290*** (0.09)	0.158 (0.09)
Constant	- (2.28)	- (2.24)	- (2.50)	- (2.48)	-7.43*** (2.22)	-8.48*** (2.35)	- (2.53)	- (2.61)
Observation	512	512	512	512	512	512	512	512
Wald test	85.801	102.12	96.187	110.002	46.505	121.524	53.679	131.509
P value	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000

Coefficients with standard errors in parentheses \* p<0.05, \*\* p<0.01, \*\*\* p<0.001

Table 3.3 presents the results of the population-averaged generalized estimating equation model (GEE)<sup>19</sup>. This table divides the analysis of constitutional controversies from the one for actions of unconstitutionality, in order to assess the variation in the use of these two different procedures. Moreover, for each of them four different models were conducted with the purpose of examining separately the effects of affiliation and fragmentation variables. Models 1 and 5 consider only political affiliation variables; models 2 and 6 incorporate national fragmentation to the analysis; model 3 and 7 exclude national fragmentation but include the subnational; finally in models 4 and 8 all variables under analysis are included.<sup>20</sup>

The results of this analysis stand out, first, for disconfirming the hypothesis of the association between *political affiliation* and *litigation*. In none of the models is the statistical effect of *political affiliation* to any of the parties significant. This result means that the governorship of a state by any particular party makes no substantial difference in the use of *litigation*. In other words, the fact that a state is governed by the PRI –or any other party– does not increase the probability of the Supreme Court receiving a constitutional claim. This finding therefore shows that factors other than the *political affiliation* of governors have been determinant for activating the use of *litigation*. This finding does not necessarily mean that *political affiliation* of the parties involved has no impact at all, but that a state being governed by a certain party does not significantly impact the use of *litigation*.

Second, *political fragmentation* at federal level is statistically significant for both types of procedures. FENP variable performs as expected producing a positive effect on *litigation* showing that as the political system becomes less

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<sup>19</sup> The GEE model was selected because it allows for the accounting of the average effect of the explanatory variables across all the state-year observations. This is a relevant aspect because the purpose of this analysis is, instead of finding out specific state level effects, to identify effects in the sample as a whole. Ingram (2009) is an example of another study employing a GEE model (it does not use a negative-binomial distribution though).

<sup>20</sup> All the eight models were estimated with Stata v. 12.0 using the command xtgee. The data and the corresponding do-file are available from the author upon request.



presidentially-centred, the incentives for resorting to the Supreme Court increase. This is also an interesting result that supports the diffusion of power argument: the absence of a dominant actor increases the prospects of more equal political actors requiring the intervention of a third-party for solving the disputes emerging among them. This third-party is no longer the president, as it used to be under authoritarian rule, but the Supreme Court of Justice.

The third relevant finding is that *subnational political fragmentation* (*LENP*) is also linked to the use of litigation. Models 3 and 7, as well as 4 and 8, test all for a quadratic effect of the effective number of legislative parties on litigation. In all cases the effect is statistically significant which means that the relationship between state-level fragmentation and judicialisation takes an inverse “U shaped” form. This finding may constitute a contribution to the judicial politics literature because it provides evidence to show that the effects of fragmentation on judicialisation are limited by the dynamics of democracy. In other words, democracy produces fragmentation, fragmentation produces judicialisation but more higher levels of fragmentation produce less judicialisation. The results indicate that political actors have more incentives to litigate when they are excluded from decision-making processes. When *political fragmentation* is high enough that a wide coalition is required to pass any piece of legislation political actors found fewer incentives to judicialise a decision in which they were probably involved. This finding, however, deserves further attention in order to explore in more detail and with more precision the quadratic association between state-level fragmentation and the use of *litigation*.

Fourth, the effects of control variables on litigation are also a major finding of this analysis. In the case of constitutional controversies *population*, *participaciones* and *municipalities* are statistically significant in all models, the former producing a negative effective, while the latter two a positive one. For actions of unconstitutionality all variables are significant and produce similar

effects but not in all models. *Population* is significant in model 3 only, while *participaciones* and *municipalities* in models 1, 2 and 3.

The findings related to control variables are interesting because of three main aspects. In the case of constitutional controversies, the four models confirm that more *population* is negatively associated to litigation. In other words, the models provide evidence that shows that the prospects of using litigation are higher in less populated states. The implications of this particular finding, however, need further research in order to be properly interpreted.

The second relevant aspect related to control variables is that they show, also in the case of constitutional controversies, that that *political fragmentation* in terms of the territorial structure also affects *litigation*. In all the four models for constitutional controversies, *municipalities* are positively associated to more litigation. This finding indicates that the odds of using litigation increase in states composed by a larger number of subunits. More municipalities therefore expand the possibilities of conflict arising between authorities from different levels and, thus, of requiring the involvement of an arbitrator (i.e. the Supreme Court of Justice).

The third aspect that should be noted in relation to control variables is that the financial resources transferred from the federal government to the states and the territorial fragmentation of the state are both linked to the more active use of litigation. In short, the arbitration role the Supreme Court performs while adjudicating constitutional controversies becomes more relevant for wealthier and more fragmented states.

The relationship between federal transfers (*participaciones*) and litigation is particularly relevant because it indicates there exists an association between litigation and Mexico's centralised fiscal policy. 90% of states' total revenues come from federal transfers, and for municipalities this figure is 65% (Courchene and Diaz-Cayeros, 2000). This condition creates an excessive dependence of states on the federal government, and therefore incentives for

the federal executive to employ fiscal policy to control local governments, and for local governments to overcome federal dominance by resorting to constitutional controversies.

This structural feature of the Mexican federal system explains why the constitutional controversy, as the procedure intended to process conflicts of federalism, has been particularly employed to challenge fiscal-related government acts and legislation. The emergence of the Supreme Court as an arbitrator of the federal system has modified the dynamics of Mexico's federalism but not the structural conditions unbalancing the correlation of forces among the authorities of the three levels of government.

To sum up, judicialisation is linked to the changes the political system has lived through in the last fifteen years. Actions of constitutionality are more related to the dynamics of political fragmentation within legislative bodies, while constitutional controversies are particularly linked to fragmentation in territorial terms. More municipalities and financial resources are more problematic and produce a positive effect on litigation. More fragmentation engenders more judicialisation but only up to a certain limit. In democracy, and more specifically in the different degrees of fragmentation, lies the origin and limits of judicialisation.

### **3.5 Conclusion**

Mexico's political system has become more competitive, plural and democratic in the last two decades. In 2000 Mexico faced alternation in the presidency for the first time after more than seventy years of PRI's administrations. Democratisation has allowed the opposition to gain the control of an increasing number of legislative and executive positions. As the political system has become more fragmented decision-making processes at national and subnational levels have also become more complex. The result of this increasing complexity in a less presidentially centralised political system has

been the need for a new and more effective institutional means for processing political conflict.

The 1994 judicial reform set the institutional foundations for the process of judicialisation to occur. Although a necessary condition, institutional change itself does not provide a sufficient explanation of the process that emerged in the country with the inauguration of the Supreme Court's new institutional design. In the case of constitutional controversies, judicialisation has essentially come from 'below', that is, from low-level authorities resorting to the Supreme Court as a means for effectively opposing those with more influence. Actions of unconstitutionality on the other hand have fundamentally been employed by national level actors to challenge laws passed at state level. Both processes show a substantial transformation in the political system since both are connected to the consequences of the diffusion of power on the behaviour of political actors. In short, while some actors are no longer reluctant to legally challenge others with a more privileged position in the system, the most influential ones are no longer so dominant as to be able to constantly constrain the less privileged.

The increasing degree of political fragmentation has been the decisive factor behind the judicialisation of Mexican politics. Judicialisation has forced the Supreme Court to deal in a more complex way with an increasing amount of more difficult cases. The next chapter explains how this process has gradually encouraged the Supreme Court's Justices to employ in a more proactive and strategic way the tools they have to shape the making of law and policy.

## 4. Constitutional Review and Policy-making

The Supreme Court acquired the right to overrule legislation and government action with the enactment of the 1994 judicial reform on the 31<sup>st</sup> of December of 1994. The Supreme Court did not employ this power until June 1997 when it struck down the dispositions that the Municipality of Guadalajara had established for the provision of private security services to banking institutions -a case previously mentioned in chapter three. Interestingly, it was the first case filed by Ernesto Zedillo, the president who promoted the reform that established this new constitutional review power. Before deciding this case, the Supreme Court had received 77 other constitutional controversies and adjudicated nine of them, so justices only rendered a strike down judgement until the one responsible for their nominations submitted his first case.

The two previous chapters were devoted to analysing the factors related to the development of a more proactive policy-making by courts, paying particular attention to the way such elements have been displayed along Mexico's history. In particular, the previous one demonstrated that political factors such as the increase in fragmentation have had a major role in the development of the judicialisation process. Now, this chapter is intended to explain how the institutional change from the reform, political factors from democratisation, and the unprecedented stability gained by the Supreme Court from 1995, all fostered the development and consolidation of this body as a national policy-maker in Mexico, an actor with the capacity of performing as Mexico's political system's ultimate arbitrator, as well as an effective source of generally applicable norms.

The literature on Mexican judicial politics has explored the effects of political pluralism in the development of a more active court. Rios Figueroa (2007) found out that the probability for the Supreme Court to rule against the

PRI has increased as political fragmentation at the federal level has also increased. Magaloni and Sanchez (2008; 2006), on the other hand, asserted, that before but also after alternation in the presidency the Supreme Court has been inclined to rule in favour of the PRI, particularly in highly salient cases, and, meanwhile it has been inclined to strike down laws by opposition-controlled institutions.

Certainly, there seems to be a tacit agreement about the effects of political fragmentation in the Supreme Court's performance, but not regarding partisan bias and autonomy. Furthermore, the analysis of the effects of the Supreme Court's own transformation on its decision-making processes still is gap in Mexican judicial politics scholarship. The purpose of this chapter is, considering judicial rulings as non-zero game that produce different outcomes, to explore how the convergence of fragmentation with a more stable and experienced Supreme Court might have shaped its performance as policy-maker.

The chapter is structured as follows: the first section provides a schematic account of the Supreme Court's decision-making process to explain that there are different phases along which the Supreme Court displays its arbitration function. Having set this framework, the second and third sections respectively examine the different patterns this role followed on constitutional controversies and actions of unconstitutionality matters. Finally, the third one presents a statistical explanation of what have been the determinants of the Supreme Court's decision-making, testing to what extent fragmentation and stability indeed altered its performance.

#### **4.1 Policy-making in the Structure of Decision-making**

The design of legal proceedings shapes decision-making processes by courts and, hence, their capacity to make policy and law. The objective of this section is to explain how the structure of the decision-making greatly affects the way

the Supreme Court arbitrates the conflict and employs case law to introduce laws that in practice can become rules of general application. But before presenting a detailed explanation of the structure of the decision-making process in actions of unconstitutionality and constitutional controversies, this section briefly revises the broad general features that distinguish the judicial operation of the Supreme Court. This first part of the section compares the Mexican case with the United States to better illustrate how policy-making by courts is shaped by certain rules regarding case selection and assignment, and the publicity of debates.

First, unlike its counterpart in the United States, the Mexican Supreme Court has a limited control over its docket that limits its agenda-setting capacity (Magar et al., 2010). Albeit the Supreme Court has the *facultad de atraccion*, a proceeding whereby cases from lower courts can be brought to Supreme Court jurisdiction -either by petitions originated in lower courts' judges or in the own Supreme Court's justices- in general terms the Supreme Court lacks of tools for implementing a regular and permanent case selection policy. In the United States, most of the caseload originates by *certiorari* petitions, a procedure whereby the parties of a trial request the Supreme Court to 'attract' the case from lower courts. Each year the United States Supreme Court receives numerous petitions from which justices select those more interesting for them and that could be adjudicated along a single-term (which usually goes from October to June). In the 2005-06 term, for example, the Supreme Court granted *certiorari* to 78 out of the 8,517 petitions received (Thompson and Wachtell, 2009).

To select what cases will be ruled *on the merits*<sup>1</sup>, the Supreme Court employs the *cert pool*, a method whereby petitions are randomly allocated to justices' law clerks for them to prepare and circulate a summary of each of

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<sup>1</sup> The concept 'on the merits' refers to a judgement where the judge or court bases the decision on fundamental issues rather than on technical or procedural aspects.

them (Owens, 2010)<sup>2</sup>. Justices then proceed to hold ‘conferences’, the meetings where they *collegially* decide what cases they will adjudicate. In order for a *certiorari* to be granted the vote of only four out of the nine justices in the bench is required. The ‘rule of four’ therefore prevents a majority of justices to gain the complete control over the docket (Epstein and Knight, 1998).

The second feature that greatly differentiates the courts of Mexico and the United States is related to the assignment of cases. Unlike in Mexico, where the Supreme Court appoints a reporting justice even before admitting a case, the United States Supreme Court first holds hearings and only after they have finished proceeds to assign cases. Justices then hold the so-called conferences to discuss cases and take a preliminary vote. According to this vote, the most senior member in the majority (the president if he is in the majority) has the right to freely assign the case to the justice that will be responsible of drafting the opinion of the Supreme Court (Segal et al., 2005).

Once the draft opinion is complete it is circulated among the rest of the justices who can either ratify or change their votes. If the opinion is approved, the Supreme Court proceeds to its announcement, which regularly occurs during the lasts months of the term. In the United States justices reach a preliminary agreement before assigning a case, a policy that allows them to, in most of the occasions, construct a judgement upon a decision already made. In the Mexican system, case assignment precedes hearings, hearings precede opinion drafting, and opinion drafting precedes the discussion and vote, so this method leaves the core of the decision-making process until the final stage.

Third, there are certain rules regarding the publicity of the decision-making process that give the United States Supreme Court greater discretion than its Mexican counterpart. In that country, most parts of the process are

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<sup>2</sup> Former Chief Justice Warren E. Burger created the cert pool in 1973. During his tenure Justice John Paul Stevens did not take part in the *cert pool*. Justice Samuel Alito Jr. decided in 2008 to no longer participate in the pool (Liptak 2008).



not open to the public. The hearings for the presentation of oral arguments are public, but justices discuss and make decisions in private. In Mexico, although private sessions are not an uncommon practice, the Supreme Court does hold public hearings, but also deliberates and votes on the cases in public. Interviewees 18, 19 and 32, all of whom were clerks to different Supreme Court justices, report that public sessions deeply affects justices' behaviour, in some cases preventing them from engaging in more open and sincere debates but in others encouraging them to more constantly disagree. These three interviewees agree in that the effects of the public transmission of become noticeable from the moment they began to be televised on 2005.

To summarise: the way Mexican process is structured makes it, first, more focused in the conduct of the proceedings than in reaching an effective decision; second, it opens a space for the development of a less consistent *jurisprudencia*; third, it creates conditions for evading a public confrontation of arguments and; finally, grants the reporting justice with considerable discretion for making relevant policy decisions such as case admissibility.

As mentioned in the second chapter, constitutional review allows courts to play a double policy-making function: arbitrating political conflict and making law. Arbitration is essentially displayed through the dispositions whereby courts settle disputes, between two opposing parties; rule-making through the reasons founding such resolutions. This chapter is devoted to the analysis of the patterns followed by the Supreme Court decisions since the renovation of its institutional design in 1994. This section examines the decision-making process the Supreme Court conducts to adjudicate constitutional cases in order to explain the way arbitration and law making are displayed in the different decisions that are made along the process different stages.

Turning to actions of unconstitutionality and constitutional controversies, it is convenient to recall that the fundamental task of last resort courts is to review judgements previously rendered by lower level courts. Last resort

judges analyse whether first and second level courts properly conducted legal proceedings, made a right interpretation of law and properly rendered judgements. They essentially work with the files of the cases at hand, and under some circumstances they also gather the arguments of the parties either orally or written. For last resort judges therefore it is not usual to be in charge of integrating judicial files for themselves, developing a first and completely new judgment. The incorporation of the action of unconstitutionality along with invigoration of the constitutional as procedures of the exclusive competence of the Supreme Court provoked a significant change to its proceedings and decision-making process. From 1995 the Supreme Court had not been only focused on deciding appeals but also in constructing judgements 'from scratch' in the constitutional cases under its exclusive jurisdiction.

This innovation to the proceedings is not the only noticeable feature. The proceedings of the Supreme Court for constitutional cases on their own have also considerable influence on decision-making and, hence, on the way political conflict is arbitrated. The Supreme Court conducts its proceedings along three different stages: 1) case assignment and admission, 2) presentation and analysis of arguments and proposed judgement drafting, and 3) discussion and final judgement integration. All the cases presented before the Supreme Court pass the first stage but not necessarily through the rest of them. Indeed, a constitutional case may conclude either in the first or in the third stage, but not in the second one. The following paragraphs describe each phase in detail and explain why the different decision the Supreme Court is confronted with allows it to strategically decide when to define the party prevailing in the dispute.

The main purpose of the first stage is to decide whether a demand is admissible or not. For doing so, the Supreme Court assigns the cases to justices through a turn-by-turn method following a sequential order not publicly available. Once the case is assigned to the reporting justice (*ministro*

*instructor*), he or she must decide its admission or rejection and issue the respective order (*acuerdo inicial*). In case the justice determines the rejection the process ends, unless the actor presents an appeal, which is also adjudicated by the Supreme Court. Although proceedings are alike for both constitutional controversies and actions of unconstitutionality, for being a *concrete* rather than *abstract* review procedure, in the controversies challenging acts the reporting justice could - either *ex officio* or by petition- as a precautionary measure suspend their application

The second phase is the longest part of the process. Once admitted the case, the reporting justice proceeds to request the parties to present either oral or written arguments, and does the same with the Attorney General who formally represents the interests of the nation. However, it is also possible that even after having admitted the case the reporting justice rules an order to reject the case without being required to gather the endorsement of the rest of the justices or taking the decision to the organ 'en banc'. When it does not occur in such a way, the reporting justice in collaboration with the law clerks (*Secretarios de Estudio y Cuenta*) drafts a complete judgement proposal (*Proyecto de Sentencia*) that should be integrated by three parts: a description of the different parts of the process and summary of the arguments of the parties involved (*vistos y resultando*), an exposition of the reasoning and interpretation of the law conducted by the Supreme Court (*considerandos*), and finally a proper resolution of the element or group of elements included in the demand.

The third phase begins when the judgement proposal is submitted for the discussion of the decision *on the merits* by the designated organ. In most cases this organ is the whole court working 'en banc'<sup>3</sup>; under certain circumstance the chambers -or panels- could also conduct the final adjudication though. The Supreme Court discusses the cases in public sessions, which are streamed

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<sup>3</sup> The concept 'en banc' refers to a session where a case is heard before all the judges of a court and not by a panel of judges.

on its website as well as broadcasted by the Canal Judicial, a channel run by the Supreme Court available on the internet as well as in paid television systems. There is no limited time for the Supreme Court to discuss a case, so justices freely discuss all the aspects they consider needed to settle the dispute. The regular practice is to take a vote to determine if the majority considers that, in general terms, the proposal should be the basis for the final judgment. In case the judgement proposal receives the endorsement of the majority, justices then proceed to vote on each of the decisive points (*resolutivos*) considered on it. When the project is dismissed, the Supreme Court can either vote on the decisive points proposed along the discussion and designate a different justice for drafting the definitive judgement (*engrose*), or defer the resolution and appoint a new reporting justice.

Since the Supreme Court makes a decision for every decision point of the proposed judgment, the definitive one may include one or more final dispositions. For example, in a single case the Supreme Court can strike down an article of the challenged legislation, but confirm the constitutionality of another one. This means that the different types of decision are mutually exclusive but only for a single decisive point; a ruling may include several decisions of different types. There are four different possible decisions the Supreme Court can make: strike down, validate (or not to strike down), dismiss, or *desestimar*, which occurs in those cases when the majority vote to strike down but the supermajority clause of eight justices is not met<sup>4</sup>.

After the Supreme Court reaches a final decision, the reporting justice (or the one appointed as replacement) prepares the definitive judgement (*engrose*) that has to incorporate the observations raised during the deliberation session. Once the final proposal is ready it is circulated again to gather the approval of

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<sup>4</sup> The secondary legislation establishing the regulations on actions of unconstitutionality and constitutional controversies is called Statutory Law on the Fractions I and II of the 105 Constitutional Article. This law establishes that for striking down general norms, either through constitutional controversies or actions of unconstitutionality, a supermajority of 8 votes is required.

every justice. When the plenary requests so, the reporting justice is also responsible of preparing the corresponding *jurisprudencias* (case law, see explanation in chapter two). Nonetheless, the justice in charge of the final draft also has certain discretion in promoting certain criteria to be raised as binding precedent: who controls the drafting of the definitive judgement controls law making. Along the whole process the Supreme Court faces arbitration-related decisions, in the final stage is when it confronts the opportunity of making law by setting rules of general application.

Figure 4.1 Decision-making process in the Supreme Court to constitutional controversies and actions of unconstitutionality

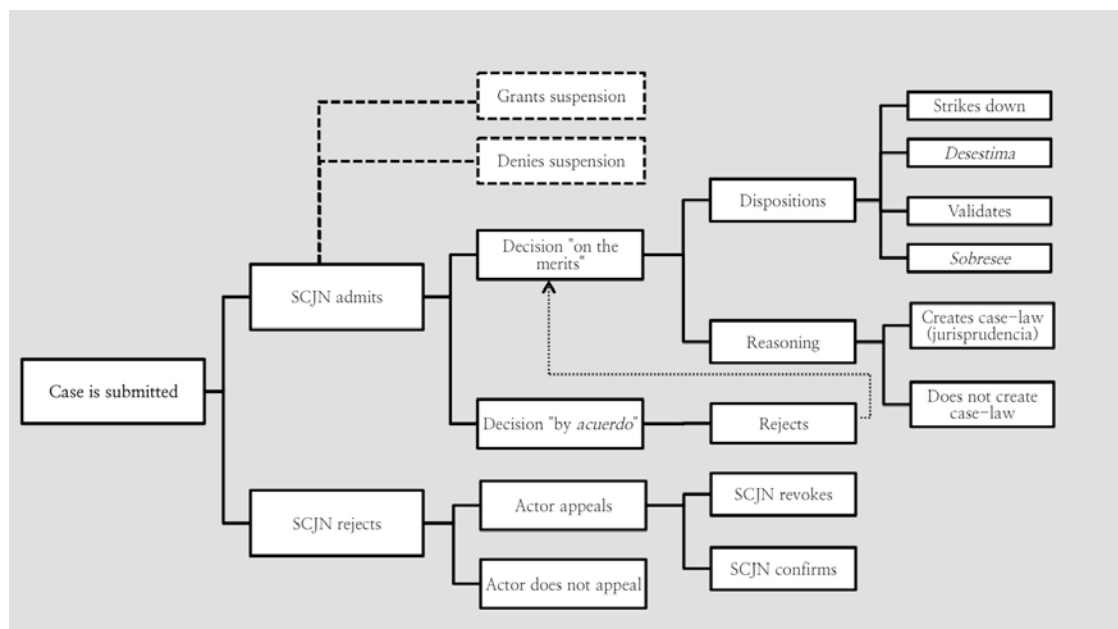


Figure 4.1 depicts how, along the three different stages composing its decision-making process, the Supreme Court arbitrates conflict by deciding which party prevails in the dispute, and may create a norm of general application through the reasoning founding such decisions. Accordingly, the decisions to strike down and to create case law are the two most relevant ones in policy-making terms because both imply that the case has undergone the whole decision-making process. However, another two decisions play a crucial role in the arbitration of political conflict: dismissals and suspension grants (which exist only for constitutional controversies). Dismissals allow the

Supreme Court to conclude a case before reaching a final decision. Suspensions grants on the other hand, permit justices to concede the claimant the suspension of the act that originated the demand also before a final judgement is made.

The first relevant policy-making decision the Supreme Court makes is defining whether to rule a case *on the merits* or not. Through the different stages the Supreme Court has different opportunities to dismiss a case, in the admissibility of the first stage, but also during the second phase exists the possibility for the reporting justice to reject a case or propose that the rest of the justices do so<sup>5</sup>. In some cases the grounds for rejection are blatant, for example when an actor without proper standing presents a case, but in many others the reporting justice has a certain degree of discretion in ruling the admission. A case whereby a political party challenges an amendment to a local constitution illustrates this discretionary capacity, because the reporting justice is able to decide if such an amendment satisfies the clause that limits parties to demand only electoral laws. As Magaloni and Sanchez (2008) point out, admissibility has in fact been helped to define the party that prevails in a case avoiding the risks implied in rendering a decision *on the merits*.

The second relevant policy decision is also made in the first stage when the Supreme Court defines whether granting a decree of suspension to the claimant party or not. In the next section is explained in detail why the suspension has been a determinant policy-making tool. For now, it is enough to underline that by granting the suspension the Supreme Court is in some way conceding a preliminary ‘victory’ to the claimant party. In cases where the challenged disposition has fixed duration such as budgets or other fiscal norms, suspensions might become even more important than decisions *on the merits*. Figure 4.1 shows in dashed-lines this ‘accessory’ decision is linked to

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<sup>5</sup> The Supreme Court has not followed a consistent strategy on this matter. There are cases in the second stage where the rejections have been ruled by the reporting justice, while in others they have been the product of a decision made by justices working *en banc*.

the rest of the process, accessory because it has not been made compulsory and is only applicable for the constitutional controversy cases challenging official acts rather than norms of general application.

The third meaningful policy decision is in the judgement the Supreme Court renders *on the merits (de fondo)*. Here is where resides most of its arbitrating capacity since the necessary outcome it involves is to define if a decision by a political actor - that can either be government action or general applicable norms - can be struck down. While not all validation decisions can be conceived of as necessarily political -for example because they are subject to rules of procedure- insofar as an overriding judgement implies a decision to change the *status quo* it also reveals the explicit intention to revert a previously political decision. In the case of the Mexican Supreme Court this is even more evident as a result of the aforementioned rule of 8 that requires the vote of an equal number of justices to strike down a general norm -for government actions only a simple majority of 6 justices is needed.

Finally, setting binding precedent is the fourth relevant policy-making decision the Supreme Court makes. In Mexico not all judicial rulings constitute binding precedent. For doing so, as chapter two explains, the Supreme Court has three different routes: *multiple-ruling jurisprudencia* (five consecutive cases decided in the same way), *single-ruling jurisprudencia* (when the Supreme Court decides upon two contradictory precedents set by different appellate courts), and *considerandos* (the proper system of precedents established by the 1994 judicial reform, determining that the reasons founding the judgements to those constitutional controversies and actions of unconstitutionality decided by the vote of at least eight of the 11 justices automatically gain the authority of case law).

In constitutional controversies and actions of unconstitutionality the Supreme Court has followed a *considerandos* system, but also it has remained creating *tesis de jurisprudencias* to explicitly establish which specific interpretations emerging from cases of both types should become case law. It

has happened this way as a result of path dependence, but also because, several interviewees note, legal operators including judges, lawyers and university professors are habituated to the use *jurisprudencias* and not *considerandos*. *Jurisprudencias*, hence, are for the Supreme Court the most appropriate method to communicate their legal and constitutional interpretations. In short, as *tesis de jurisprudencia* are more familiar to legal operators, they also are more effective than *considerandos* for spreading the rules established by the Supreme Court through the creation of binding precedent.

Before turning to the empirical analysis, one more element needs to be addressed in this revision of the structure of the Supreme Court's decision-making process. After being restructured and its composition completely renewed, the Supreme Court struggled with constructing an internal mechanism for solving constitutional cases. The first response to the problem was the creation of an organ within the Supreme Court (the Unit for Actions of Unconstitutionality and Constitutional Controversies) especially devoted to conduct the process of all constitutional controversies and actions of unconstitutionality submitted before the Supreme Court. The first two directors of this 'Unit' in charge of drafting the judgements to constitutional cases were interviewed on the context of this research (interviewees 10 and 25). They both comment that for almost ten years there were the clerks working for the 'unit' rather than the justices' clerks who were in charge of preparing all the decisions justices had to make along the different stages, from the declaration of admissibility to the judgement proposals.

Until 2004 most of the justices had scarce contact with the process through which the Supreme Court was ruling constitutional controversies and actions of unconstitutionality. Interviewee 29 asserts that during these years the unit was in charge of dealing with the most important parts of the process there existed within the Supreme Court a sort of micro constitutional court. In other words, during the years following the reform that gave the Supreme



Court unprecedented constitutional review powers, justices had little contact with the decision-making process for the adjudication of the cases emerging from procedures created by the reform. Nonetheless, the delegation of these tasks to an area composed of just a few lawyers rapidly changed with rotation in the bench began in 2003.

To sum up, the 1994 judicial reform produced a substantial change in the decision-making process of the Supreme Court, from management of cases resolution to a transformation of its capacity to make policy in terms of arbitration and law making. The process the Supreme Court conducts to rule a case is composed by three stages that allow justices to make four different decisions whereby they arbitrate conflict and set rules of general application. Dismissals and suspensions allow the Supreme Court to arbitrate conflict before reaching a decision *on the merits*, while through strike down decisions and validation the Supreme Court can either change or confirm the status quo previously set by a different or a group of different political actors. Rule-making on the other hand has essentially been displayed through the rules *jurisprudencia* establishes. The next sections provide an account of how political change and the own evolution of the Supreme Court influenced the way it employed its policy-making tools to become a more prominent political player.

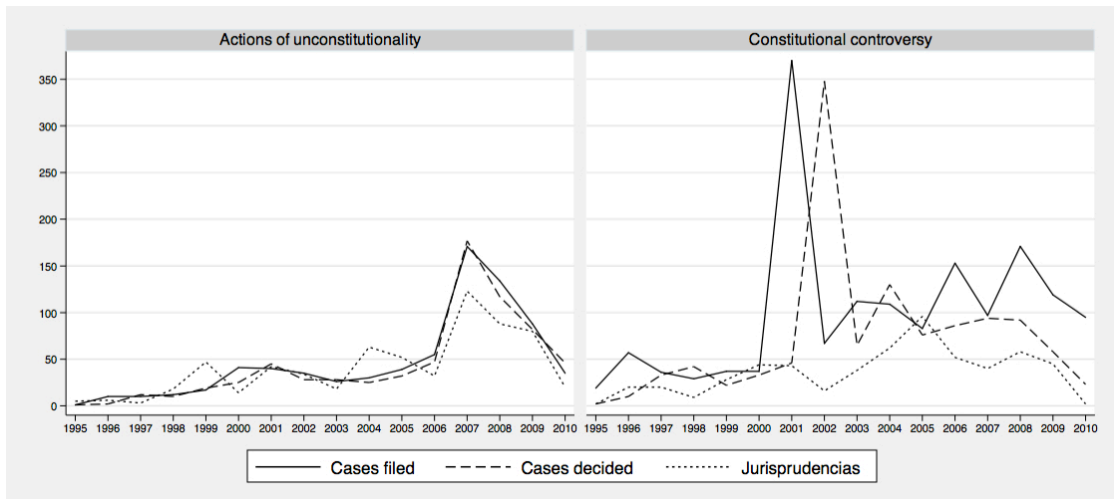
## **4.2 Decision-making in Practice**

The procedures established by the 1994 judicial reform have been determinant to the emergence of the Supreme Court as an effective policy-maker. In 1995 the Supreme Court received 19 constitutional controversies and only one action of unconstitutionality. It only adjudicated three out of those cases, two of them *on the merits* but without making any declaration of unconstitutionality. Fifteen years later in 2009, the Supreme Court received more than 200 cases, settled 140 of them *on the merits* and declared the unconstitutionality in one quarter of this 140. The Supreme Court has

undergone an important process, justices and their staff went from learning how to deal with these more complex and politically salient cases, to becoming more aware of their capacity to make policy and law and therefore be strategic in the use of the different tools they have for doing so.

Albeit the evolution of decision-making proceedings has been similar for both actions of unconstitutionality and constitutional controversies, the way the Supreme Court has in practice decided over these two types of cases has been different. A longitudinal revision of the actions of unconstitutionality makes it clear that the decision-making on this type of case has gone through three different periods: one before 2000, when the Supreme Court faced a small amount of cases, particularly submitted by the political parties; another between 2000 and 2005, distinguished by a subtle increase in the number of decisions rendered every year; and a third one from 2006 to 2010 characterised by an even more significant increase in the workload provoked by the outstanding use by the Attorney General of this legal figure focused on challenging subnational level laws.

Figure 4.2 Constitutional cases: files, decisions and case law, 1995-2010



Source: *Constitutional review judgements dataset* (see Appendix I).

As figure 4.2 shows, the relationship between the volume of cases filed in and the number of cases decided every year by the Supreme Court is similar. The Supreme Court has on average employed 178 days for deciding actions of unconstitutionality, the cases filed in 2004 have on average taken more time

(509 days) and the ones submitted in 2010 less (73 days). Overall, the fact that the number of cases filed and decided is greatly proportional shows that the Supreme Court has sought to avoid backlog by giving priority to the resolution of actions of unconstitutionality

In the case of constitutional controversies the Supreme Court has not only taken more time; the resolution of these cases has also been less proportional to the amount annually filed. As in the case of actions of unconstitutionality, 2001 was the turning point for constitutional controversies: in that single year the Supreme Court received 326 controversies requesting the invalidation of indigenous rights constitutional reform<sup>6</sup>. The Supreme Court dismissed almost all of them in 2002, and, even when the number of cases never again reached such a large number, the volume of cases filed in later years has abruptly increased. For instance, in five different years -2003, 2004, 2006, 2008 and 2009- the volume of cases has been above a hundred.

The Supreme Court has gradually taken less time to settle constitutional controversies. Before 2002 the average time for a constitutional controversy to be decided was over a year (decision-making process for cases filed in 1997 lasted in average 761 days), afterwards it gradually decreased until reaching an average of 118 days in 2009. However, it has occurred this way largely because of the reduction of the amount of cases annually decided. According to the law clerks interviewed for this thesis—particularly interviewees 29, 32 and 34- constitutional controversies stand out because their resolution process requires hearings and other types of proceedings that delay the making of a final judgment. Nonetheless, they also mention that the Supreme Court has employed the discretion it has to delay the resolutions of some cases, and to speed up some others.

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<sup>6</sup> In most of these cases, the Supreme Court held that the constitutionality of constitutional amendment could not be challenged through the use of the constitutional controversy.

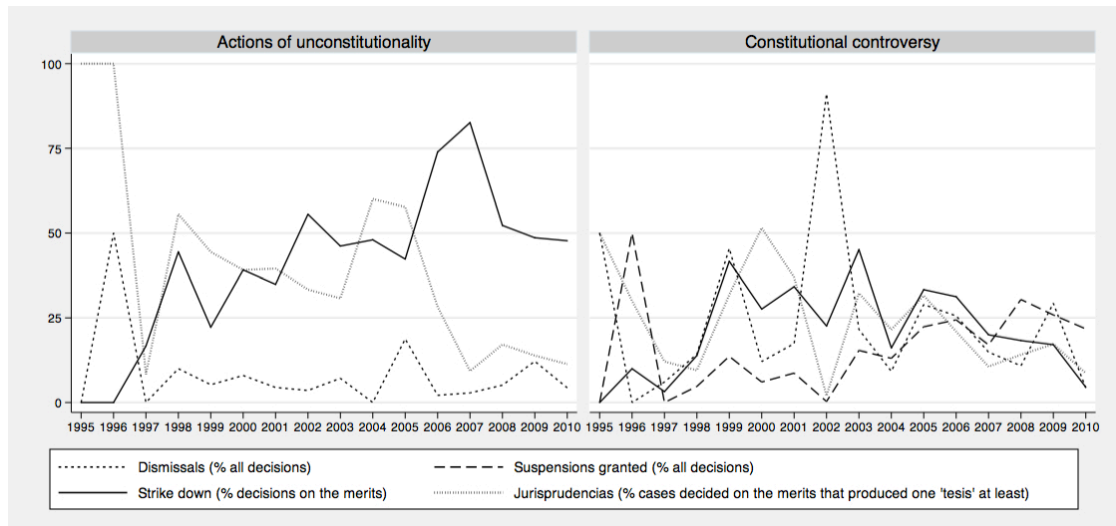
The previous section explained how the structure of decision-making processes allows the Supreme Court to arbitrate political conflict in different stages. The Supreme Court can opt to reject to review a case, giving no chance to claimants to advance their interests in the judicial arena. In the case of constitutional controversies the Supreme Court can also grant the suspension, thus preventing the application of the act or disposition the claimant party alleges unconstitutional before reaching a decision *on the merits*; and finally it can strike down or validate what the claimant demanded. The Supreme Court has employed these different types of decisions to strategically arbitrate the conflict being brought before its jurisdiction, as well as to advance rules of general application through the creation of case law.

The discretion the Supreme Court has in the case of actions of unconstitutionality is more limited than for constitutional controversies. Justices may use timing and dismissals to arbitrate conflict without rendering a final judgment. Despite this discretion, the fact that 94% of the actions of unconstitutionality have been decided *on the merits* show these types of decisions have been particularly relevant for the Supreme Court to display its arbitration role. Although the Supreme Court made no overriding of any law in the first two years of its new integration, since 1997 strike down decisions increased constantly until 2007, when they become 4 of every 5 cases. On the other hand, the Supreme Court passed from creating case law in at least a quarter of the cases, to making a much more limited use of this power since 2007.

If, in the case of actions of unconstitutionality, the court has essentially performed its arbitration functions by deciding *on the merits* in almost all cases, the story has been different for constitutional controversies. The Supreme Court has dismissed 40% of all cases and has struck down only 22% of those decided *on the merits*. In figure 4.3 it is evident that the Supreme Court has employed frequently but irregularly all types of decisions through which it can display its arbitration function. In other words, the Supreme

Court has not had a preferred method to arbitrate conflict; it has in the case of constitutional controversies resorted to all the instruments available for defining which party prevails in a constitutional dispute. *Jurisprudencia* has followed a similarly irregular pattern, a preliminary evidence of the strategic use that the Supreme Court may have made of this rule-making tool.

Figure 4.3 Policy-making decisions to constitutional cases, 1995-2010



Source: *Constitutional review judgements dataset* (see Appendix I).

The case of the federal budget mentioned in the previous chapter is a good illustration of how the Supreme Court makes strategic decisions. In December 2004 when President Fox sued the Chamber of Deputies for the approval of the 2005 budget, justices Aguirre Anguiano y Gudiño Pelayo granted the suspension, thereby preventing the application of the budget as passed by the Federal Congress. When the Supreme Court issued a final judgement on May 17<sup>th</sup> of 2005, the executive branch had already achieved what it originally sought: applying its own version of the budget.

This case became even more controversial because of the consequence it produced in the Supreme Court's administrative organisation. Interviewee 29 explains that the by-then head of the Unit for Actions of Unconstitutionality and Constitutional Controversies premeditatedly altered the pre-established order for case assignment to avoid appointing reporting justice any of the justices he thought would be more reluctant to grant the suspension requested

by President Fox. According to interviewees 25 and 29, in 2004 the influence of the head of the unit was such that governors used to visit him directly to discuss the cases their states were involved in. The federal budget case along with the arrival of new justices provoked in 2005 the removal of the head of the Unit for Actions of Unconstitutionality and Constitutional Controversies, and the elimination of most of the functions of this administrative organ.

This transformation led to a drastic change in the way the Supreme Court managed its decision-making process, visible in an increase in the proportion of cases in which the Supreme Court granted the suspension, as well as in the decrease in the percentage of cases that produced one *jurisprudencia* at least. Interviewees from inside the Supreme Court commented that the number of *jurisprudencias* increased as a result of the economic incentive law clerks received according to the number of precedents established as *jurisprudencia* they were involved in. This observation, however, is not completely right as the previous figures show. The ‘economic incentive hypothesis’ proves to be mistaken by the fact that the average number of *jurisprudencias* by judgement went from 5 in 1995 to 0.43 in 2010 –being below two since 2005.

The structure of the Supreme Court’s decision-making process has affected its performance as policy-maker. Albeit they represent a minor contribution to the caseload, actions of unconstitutionality and constitutional controversies have undoubtedly been part of the most salient cases the Supreme Court has adjudicated: 1 of every 5 cases decided by justices working ‘en banc’ has been either a constitutional controversy or an action of unconstitutionality. The Supreme Court has actively employed the policy-making tools it has available. In the first years following the reform it made timid use of its capacity to strike down legislation but recourse to create setting case law, in part for filling procedural provisions that had been omitted in the law regulating constitutional cases, in part for making policy without requiring to use invalidations. Nonetheless, as the country turned into a more plural polity and the Supreme Court became a more stable and experienced

decision-making body, justices began to be less reluctant to render strike down decisions.

### **4.3 The Supreme Court as Policy-Maker**

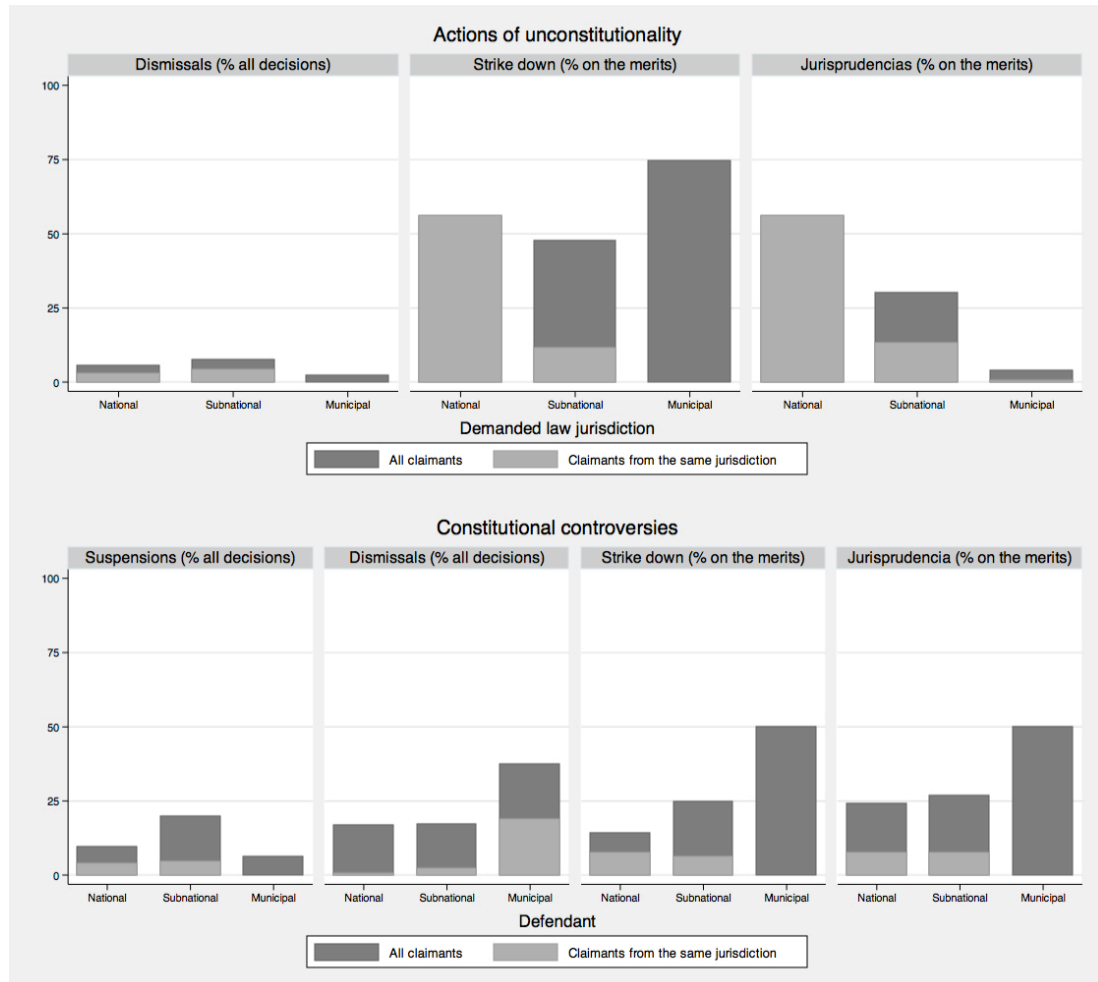
Once provided, a general, longitudinal explanation of the way the Supreme Court has transformed the use of its policy-making tools related to constitutional review, this section explains how such instruments have allowed it to arbitrate conflict and create norms of general application in practice. In particular, this section explores whether the Supreme Court's decisions are related to the hierarchy and political affiliation of the actors involved in constitutional cases. The argument advanced along the section is that the hierarchy -conceived as the level to what different actors belong within Mexico's federal system (national, subnational and municipal)- has been a factor particularly affecting decisions in constitutional controversies. Political affiliation -which refers to the political party to what different actors are affiliated - has also had an impact in procedures of this nature, but it has been even more visible in actions of unconstitutionality. The section is divided into two parts, one for each of the criteria proposed.

#### **4.3.1 Hierarchy**

The previous chapter explains why in the case of actions of unconstitutionality judicialisation has been produced from 'above', while for constitutional controversies it has mainly come from 'below'. 'Judicialisation from above' has been linked to conflicts between more equal forces; 'judicialisation from below' has essentially consisted of the opposite. The influence of hierarchy has been more visible in the case of constitutional controversies, a procedure in which the Supreme Court has tended to be less 'aggressive' with national and subnational actors. Albeit less intense, hierarchy's impact on actions of unconstitutionality has been particularly

clear in cases challenging municipal-level laws, as well as in creation of precedents.

Figure 4.4 Policy-making decisions to constitutional cases: hierarchy



Source: *Constitutional review judgements dataset* (see Appendix I).

Note: for constitutional controversies the calculations exclude all cases linked to the 2001 Indigenous Rights Constitutional Reform.

Figure 4.4 depicts the way the four relevant policy-making decisions are distributed according to the type of procedure and the hierarchy of the case. Regarding actions of unconstitutionality –a procedure for which granting suspensions is not possible- it is noticeable, first, that the use of dismissals has been marginal -only 5% of the cases were dismissed- so arbitration has particularly been displayed through decisions *on the merits*. The Supreme Court has struck down at least one legal disposition in 56.8% of the 662 cases decided *on the merits*. In the case of the 34 actions challenging national-level



laws, invalidations were equivalent to 55.8%, 52.6% for the 415 subnational, and 74.6 for the 213 municipal ones.

The Supreme Court has certainly been more prone to strike down the laws with the narrowest jurisdiction. The Attorney General was claimant in 210 out of 213 actions of unconstitutionality challenging municipal-level laws, resulting in successful petitions in 3 of every five cases. This evidence may indicate that the Supreme Court has been biased in favour of the presidentially appointed Attorney General. Nonetheless, when analysing the success of this actor in national and subnational cases this hypothesis seemed less clear. In national cases its rate is above that of the mean of the rest of federal claimants (55.8%), but equal to the one of federal legislative minorities (66.7%); in subnational ones the Attorney General has been less successful (37.5%) than the average claimant (47.7%).

As was explained in the previous chapter, the design of the action of unconstitutionality impedes subnational actors challenging a federal law, so all cases from different jurisdictions emerge from 'above'. Looking at the subnational level it is noticeable that there seems to be a bias in favour of national level actors. A revision of how cases distribute to the level of the claimant reveals that this tendency does not in fact exist. Additionally, actions of unconstitutionality also stand out for the proportion of cases that had established case law through *jurisprudencia*: 22% of cases have originated at least one *jurisprudencia*. This proportion has been considerably higher in the cases challenging laws of national of jurisdiction (56%) and so much more marginal in those demanding municipal ones (4%).

The salience of the cases related to national level laws is, for the broad jurisdiction of them, regularly higher than for the rest. Besides, all actions demanding national statutes necessarily mean a clash between national level actors, which makes them even more relevant. Yet, as the section explains in more detail, the creation of *jurisprudencia* is more linked to strike down decisions than to the hierarchy of the parties involved. In any case, what is

relevant for the purpose of this analysis of policy-making by the Supreme Court is the plausible relationship between strike down decisions and the formation of case law.

The impact of hierarchy is even more evident in the decisions the Supreme Court renders to constitutional controversies. First, as figure 4.4 shows, the proportion of cases where a suspension was granted is similar for decisions by national and municipal actors, and higher for subnational ones. However, looking at how cases distribute according to the level of the claimant rather than to the defendant offers a different perspective: when the claimant is national the Supreme Court grants the suspension in 23.5% of the cases, in 20.6% if it is subnational and 16% if municipal.

The link between dismissals -the other arbitration-related decision that is not a product of *on the merits* judgements- and hierarchy is also clear. Leaving the 326 indigenous-rights controversies aside<sup>7</sup>, the Supreme Court has proportionally dismissed more cases challenging municipal authorities than national or subnational ones. As Magaloni and Sanchez (2008), observe the Supreme Court does not only dismiss cases for procedural reasons but also as a strategy to filter risky cases. In figure 4.4 it is visible that in the case of national and subnational defendants there have been dismissals for both vertical and horizontal conflicts (claimants from the same jurisdiction), but there has been no dismissal for cases confronting national level authorities. This means that even though the Supreme Court has aimed to elude what it may be perceived as 'risky' cases, it has employed this strategy for disputes between the executive and legislative federal branches.

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<sup>7</sup> Indigenous rights controversies were excluded from this large-n analysis presented in this chapter for considering them *atypical* cases. All of them were presented in a single year and against the same combination of norms and acts; and virtually all of them were decided in the same way. The purpose of this chapter is to find out if certain patterns have distinguished the decision whereby the Supreme Court makes policy and law, so including atypical cases may lead to mistaken conclusions regarding the Supreme Court's performance. In their study of the Supreme Court's decision-making, Magaloni and Sanchez (2008) also exclude these cases for the same reasons.

The main and far-reaching policy outcomes rely on cases decided *on the merits*. The Supreme Court has issued strike down decisions in 22% of constitutional controversies decided *on the merits*. This proportion varies significantly according to the hierarchy of the defendant party though. The Supreme Court struck down 50% of the 10 controversies against municipal authorities, 24.6% of the 541 against subnational and 14% of the 149 against national ones. In the case of the latter, more than a half of the invalidations came from demands by national authorities, while for the subnational ones the horizontal conflicts led to just a quarter of all strike down decisions. These numbers support the contention that there is a negative relationship between invalidations and the hierarchy of conflicts.

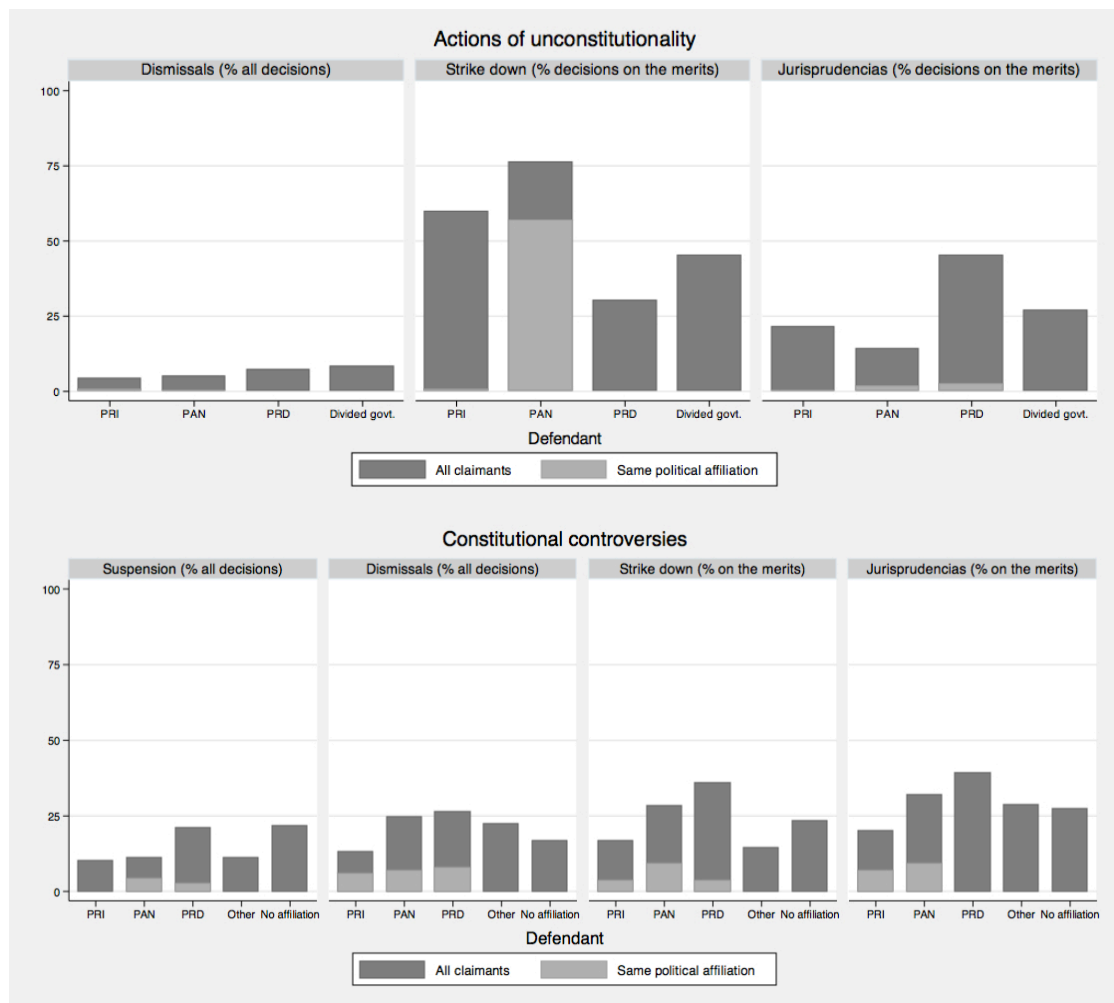
With *jurisprudencias* something very similar than with strike down decisions happens: the proportion is greater for defendant municipal authorities but in a scarce number of cases, but this proportion decreases in the by far larger volume of cases that have subnational and national authorities as defendants. This is an interesting fact because it is exactly the opposite of what characterises actions of unconstitutionality. The explanation for this relies precisely in the volume of cases targeting municipal level decisions: 213 actions of this type have been ruled *on the merits* and just 16 controversies. Since municipal level cases are regularly less salient cases, the Supreme Court has opted to set a marginal number of *jurisprudencias* because of the limited effect they may produce.

#### 4.3.2 Political affiliation

The impact of political affiliation in Court's policy-making has been different for actions of unconstitutionality than for constitutional controversies. In the case of the former, it has been more noticeable in the decisions rendered *on the merits* than in dismissals. As was mentioned above, decisions where the Supreme Court has struck down at least one of the challenged norms represents 55.6% of all actions ruled *on the merits*. A revision of how this

invalidation distributes among the different legislatures, shows that the two parties (PRI and PAN) that have held the presidency in the period of analysis (1995-2010) have been particularly affected by strike down decisions. The Supreme Court struck down the 59.6% of all actions of unconstitutionality passed by PRI-controlled legislatures, this figure being even higher for the PAN (76.1%).

Figure 4.5 Policy-making decisions to constitutional cases: political affiliation



Source: *Constitutional review judgements dataset* (see Appendix I).

Note: the calculations for constitutional controversies exclude all cases linked to the 2001 Indigenous Rights Constitutional Reform.

At first glance, these figures seem to make it clear that the Supreme Court has been biased against these two political parties. Nonetheless, as figure 4.5 clarifies, in the case of the PAN strike down decisions have predominantly resulted from demands submitted by actors also affiliated to this party (75%).

An example of the cases of this kind are the 61 demands whereby the Attorney General demanded the PAN-controlled Yucatan state Congress for the approval of an equal number of Municipal Revenues Laws for the 2007 fiscal year. On that occasion, the Supreme Court struck down all of the 61 municipal provisions, and did the same with a group of 10 similar cases originated in the state of Aguascalientes.

Two factors contribute to explain why the Supreme Court has been more prone to strike down in disputes between actors of the same affiliation: first, the vast majority of same party disputes occurred between PAN affiliated actors. This group of cases has had the Attorney General as the claimant party, in other words, the federal executive has been the actor behind the case, and so the Supreme Court has predominantly sided with this, the highest ranked actor. Second, most of these cases have targeted laws of municipal jurisdiction that, as it was already mentioned, would be less harmful because of their slight salience.

Excluding the analysis of same-party cases but considering only laws of state jurisdiction confirms that proportionally the Supreme Court has been more prone to strike down laws passed in legislatures controlled by the parties that have held the presidency during the period of this study (1995-2010). The Supreme Court invalidated at least one legal norm in 55% of state-level laws passed in PAN-controlled legislatures; 48% of those under the control of the PRI, 48% in divided legislatures and only the 31% approved by PRD legislative majorities. It is appropriate to bear in mind that these figures are based on added information that does not account for the impact of factors varying across the time such as political fragmentation and the experience gained by justices working in a more stable Supreme Court. In the next section is provided a more detailed analysis that incorporates these as well as other variables.

Actions of unconstitutionality against federal laws offered preliminary evidence about the impact that political fragmentation and alternation in the

presidency have had in the Supreme Court's performance. Five out of 34 cases of this kind were submitted before September 1997, that is, when the PRI still held the majority in the Chamber of Deputies. While the Supreme Court did not strike down any of these five cases it did so in 19 out of the remaining 29 filed under divided government. The Supreme Court therefore avoided openly confronting the PRI, by then the dominant party. As the next section explains in more detail, the Supreme Court became less reluctant to openly oppose the PRI and, in general, more influential actors as it became a more stable decision making body, justices gained experience and the political fragmentation increased.

Political affiliation has also been related to the creation of case law, but in an opposite way from that of strike down decisions. The PRD is the party that presents the largest proportion of cases originating *jurisprudencias* with 45%, followed by divided legislatures with 26%, the PRI with 21% and PAN with 14%. All but one of the 19 actions of unconstitutionality challenging PRD legislatures particularly targeted laws approved by Mexico City's Legislative Assembly, the local congress that has passed some of the most controversial pieces of legislation the Supreme Court has adjudicated. Illustrations of them are the files 10/2000 and 02/2010, the former related to decriminalisation of genetic abortions and which led to the establishment of nine *jurisprudencias*, the latter linked to the legalisation of same-sex marriage, from which emerged another 14. The next chapter examines in detail the involvement of the Supreme Court in abortion regulations including an analysis of the precedents created under that case. It is important to stress in this section though, that *jurisprudencias* have helped the Supreme Court to, in certain cases, establish general norms without invalidating the laws under its review.

In the case of constitutional controversies, political affiliation has played a more discreet role. All policy-making decisions have affected the PRD the most, it is the party that concentrates the greatest proportion of suspensions, but also the party with the largest proportion of dismissals; it has also been

the party with the highest percentage of strike down decisions as well as the one whose cases have led to a wider proportion of *jurisprudencias*. Nonetheless, all these characteristics have been linked to the small amount of cases among the three largest parties, a volume that represents a third of the controversies challenging PAN-affiliated authorities and a fifth of those having the PRI as defendant.

The PRI affiliated authorities, on the other hand, have been the authorities for which the impact of the Supreme Court's decisions has been slighter. Indeed, in all suspensions, dismissals, strike downs and *jurisprudencias* the PRI is the party with the lowest percentage. The fact that of every 10 cases against authorities affiliated to this party nine were submitted by municipal authorities helps to explain why policy-making by the Supreme Court has affected this party the least. In other words, what this evidence shows is that in the case of constitutional controversies hierarchy has been a more decisive factor than political affiliation.

Political fragmentation fostered the development of a more proactive Court. But in addition to political fragmentation, the transformation of the Supreme Court, including its composition, were decisive for the transformation of the Supreme Court. Certainly, justices become more prone to exercise their power to strike down legislation and government acts. Stability and experience and allowed the Supreme Court to become a more effective political arbitrator; more effective because its performance began to show more autonomy from the formerly hegemonic party system, which had been the one in charge of promoting the reform that gave it broader powers and nominated and appointed a new generation of justices.

#### **4.4 The Determinants of Arbitration and Rule-Making**

With the main patterns that the Supreme Court's policy-making has followed outlined, this section presents the results of the statistical analysis conducted to assess in more detail the hypotheses founding this research. Instead of

examining all policy-making decisions, this analysis only includes the decisions the Supreme Court has rendered *on the merits* because they contain the two most relevant policy outcomes: the disposition of the case which establishes which party prevails in legal disputes and the reasoning supporting such disposition that materializes in a *jurisprudencia*.

The account presented in this section is based on the application of two different models: cross-sectional logistic regression combined with cross-sectional negative-binomial regression. Since the first objective is to find out determinants of *strike down* decisions logistic regression is employed because it is the appropriate model for a dichotomous categorical response variable (Agresti and Finlay, 2009). The second objective of this analysis to discern the extent to which the number of *jurisprudencias* established in a case is explained by political and other variables related to the Supreme Court's performance. Accordingly, negative-binomial regression was selected because it is specifically intended to account for count response variables that present a zero-inflated distribution (Hilbe, 2011; King, 1988), which is precisely the case of *jurisprudencias*.

The response variables employed in the analysis are the following:

Strike down:	1 if the struck down at least of the dispositions challenged in the case, 0 otherwise.
Jurisprudencias:	count of <i>jurisprudencias</i> originated from the case.
ENP deputies:	effective number of legislative parties in the Chamber of Deputies at the moment the case was decided (this variable is employed as an indicator of the country's general degree of political fragmentation).
SCJN stability:	mean average days (logged) seating justices have passed in the Supreme Court at the moment the case was decided (this variable is particularly intended as a measure of justices' average experience as an indicator of its stability).
PRI defendant:	1 if the defendant is PRI-affiliated actor, 0 otherwise.
PAN defendant:	1 if the defendant is PAN-affiliated actor, 0 otherwise.
PRD defendant:	1 if the defendant is PRD-affiliated actor, 0 otherwise.
National claimant:	1 if the claimant belongs to the national jurisdiction, 0 otherwise.
Subnational claimant:	1 if the claimant belongs to the subnational jurisdiction, 0 otherwise.
Same party:	1 if the claimant and the defendant are both affiliated to the same party, 0 otherwise.
No fiscal or electoral:	1 if the subject of the case is not fiscal or electoral, 0 if it does.



The dataset employed in the analysis was constructed from the sources cited in the Appendix. The following table reports descriptive statistics for all data.

Table 4.1 Descriptive statistics of variables explaining policy-making

Variable	Actions of unconstitutionality					Constitutional controversies				
	Obs.	Mean	Std. Dev.	Min	Max	Obs.	Mean	Std. Dev.	Min	Max
Strike down	662	0.57	0.50	0	1	700	0.23	0.42	0	1
Jurisprudencias	662	0.97	3.03	0	39	700	0.82	2.13	0	22
ENP deputies	662	3.33	0.31	2.29	3.56	700	3.18	0.32	2.29	3.56
SCJN stability	662	8.00	0.30	5.72	8.32	700	7.87	0.42	5.83	8.32
PRI defendant	662	0.44	0.50	0	1	700	0.23	0.42	0	1
PAN defendant	662	0.20	0.40	0	1	700	0.12	0.32	0	1
PRD defendant	662	0.06	0.24	0	1	700	0.04	0.19	0	1
National claimant	662	0.84	0.36	0	1	700	0.05	0.21	0	1
Subnational claimant	-	-	-	-	-	700	0.05	0.21	0	1
Same party	662	0.13	0.34	0	1	700	0.07	0.26	0	1
No fiscal or electoral	662	0.25	0.43	0	1	700	0.64	0.48	0	1

Based on the theoretical arguments proposed in the first chapter as well as at the beginning of this chapter, this analysis aims to test -for both actions of constitutionality and constitutional controversies- to what extent the policy-making by the Supreme Court displayed through strike down decisions (arbitration) and the creation of *jurisprudencias* (rule-making) is determined by different degrees of political fragmentation as well as by changes in the Supreme Court. The analysis employs the following as explanatory (independent) variables: ENP deputies, SCJN stability, defendant's political affiliation (i.e. PRI, PAN, PRD), claimant's hierarchy (i.e. national, subnational, municipal). In particular, *ENP deputies* is used as an indicator of the country's general degree of political fragmentation, while *SCJN stability* is intended to be a measure of justices' average experience, but it also captures changes in the Supreme Court's composition. On the other hand, *same party* and *no fiscal or electoral* are employed as control variables. Accordingly, the analysis aims to test the following hypotheses:

H1a. Strike down odds will vary positively with ENP deputies.  
H1b. Strike down odds will vary positively with SCJN stability.  
H1c. Strike down odds will vary positively with defendant's affiliation to the PRI.  
H1c. Strike down odds will vary positively with national claimants.

H2a. *Jurisprudencias* (count) will vary positively with strike down decisions.  
H2b. *Jurisprudencias* (count) will vary negatively with ENP deputies.  
H2c. *Jurisprudencias* (count) will vary negatively with SCJN stability.

Table 4.2 Determinants of Supreme Court's policy-making decisions

Response variable: Strike down (logistic)			Response variable: Count of <i>jurisprudencia</i> (negative binomial)		
	AU (1)	CC (2)		AU (3)	CC (4)
PRI defendant	0.819*** (-0.21)	-0.433 (-0.28)	PRI defendant	-0.543* (-0.26)	-0.949*** (-0.27)
PAN defendant	0.874* (-0.36)	-0.065 (-0.31)	PAN defendant	-0.199 (-0.44)	-0.179 (-0.3)
PRD defendant	-0.084 (-0.41)	0.319 (-0.45)	PRD defendant	0.511 (-0.45)	-0.248 (-0.45)
ENP deputies	1.434*** (-0.42)	-1.120** (-0.41)	ENP deputies	-1.705** (-0.57)	-0.133 (-0.40)
SCJN stability	0.946* (-0.45)	0.950* (-0.40)	SCJN stability	0.41 (-0.46)	-0.55 (-0.31)
Federal level claimant	-0.409 (-0.26)	1.808*** (-0.38)	Federal level claimant	-0.214 (-0.3)	1.595*** (-0.39)
State level claimant	- (-0.23)	0.584* (-0.23)	State level claimant	- (-0.22)	0.796*** (-0.22)
Same party	1.066* (-0.49)	0.816* (-0.38)	Same party	-3.214*** (-0.77)	0.886* (-0.36)
No fiscal or electoral	-1.459*** (-0.23)	-0.128 (-0.20)	No fiscal or electoral	1.110*** (-0.28)	0.335 (-0.19)
			Strike down	1.151*** (-0.24)	1.384*** (-0.2)
Constant	-11.949*** -2.93	-5.307* -2.53	Constant	1.674 -2.69	3.519 -1.81
			In alpha	1.738 (-0.12)	1.151 (-0.13)
Observations	662	700	Observations	662	700
Chi2	154.267	46.656	Chi2	82.657	113.839
P value	0	0	P value	0	0
Pseudo R2	0.17	0.062	Pseudo R2	0.059	0.075
Area u/ROC curve (%)	76.6	66.37	Log-likelihood	-661.04656	-699.71012
Sensitivity (%)	76.6	10.69			
Specificity (%)	61.54	98.15			
Pos. Pred. Value (%)	72.36	62.96			
Neg. Pred. Value (%)	66.67	78.9			
Correctly classified (%)	70.09	78.29			

Coefficients with standard errors in parentheses \* p<0.05, \*\* p<0.01, \*\*\* p<0.001  
Actions of unconstitutionality (AU), Constitutional Controversies (CC)

Table 4.3 summarises the results of the two types of analysis conducted divided for the two classes of procedures included in this study. Models 1 and 2 present the estimates of the cross-sectional logistic regression model and models 3 and 4 those of the cross-sectional negative binomial regression. Using strike down decisions as response variable the first two models aim to find out whether the aforementioned explanatory have determined or not invalidations declared by the Supreme Court. The last two models on the other hand seek to elucidate whether the Supreme Court strategically creates *jurisprudencia* as means for establishing norms of general application.

#### 4.4.1 Strike down decisions

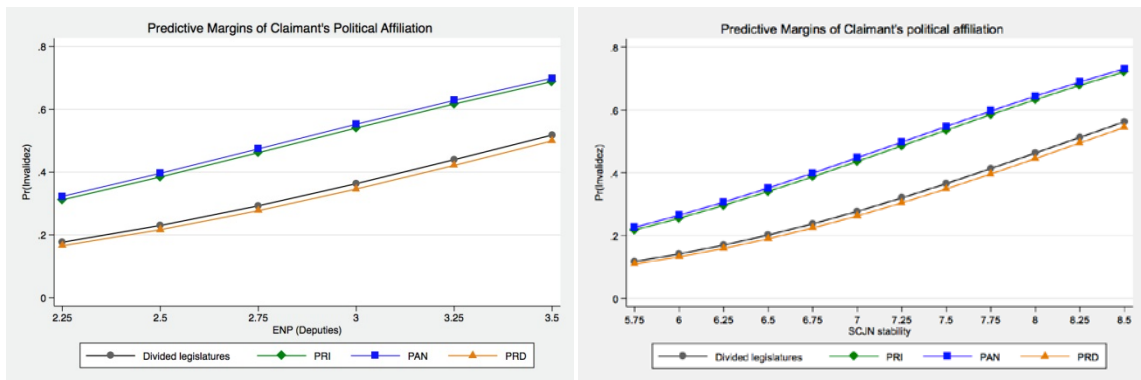
Four aspects distinguish the results for strike down decisions. First, they confirm that there is an association between political fragmentation and arbitration decisions by the Supreme Court. Second, they also confirm that changes in the Supreme Court's stability have a positive impact on the probability of the Supreme Court rendering a strike down decision. Third, they reveal that political affiliation produced an impact in the Supreme Court's performance. Fourth, they show that hierarchy is a relevant and statistically significant variable. However, variables perform differently for actions of unconstitutionality than for constitutional controversies. The next paragraphs present a separate analysis for each of these two types of legal procedures.

In the case of actions of unconstitutionality, save claimant's level, all variables perform as expected. The estimates for *ENP deputies* are positive and statistically significant, the same occurs with *SCJN stability* as well as with both control variables, *Same party* increasing the odds of a case to be struck down by the Supreme Court, while *No fiscal or electoral* the opposite. Moreover, an outstanding finding is that not only *PRI defendant* is positive and statistically significant, this also happens with *PAN defendant*. The best way to

illustrate these results is by plotting the predicted effects of the statistically significant response variables.

Figure 4.6 makes clear that both political fragmentation and the experience gained by justices under a more stable composition have had a positive effect on the Supreme Court's arbitration performance but also that this effect has varied according to the affiliation of the defendant's party. Certainly the odds have increased but have always been higher for the PRI and PAN, the parties that have held the presidency during the period of study. The results of *SCJN stability* effects on the Supreme Court's performance constitute a contribution to literature of Mexican judicial politics, showing that internal factors have also played an essential role in the development of more effective and proactive courts. Figure 4.6 illustrates that in the case of *SCJN stability* effects have also varied according to political affiliation, being higher for the PRI and the PAN. More experienced justices working in a stable composition gradually become in charge of performing a function similar to the one played by Mexican presidents during the authoritarian period: the role of ultimate political arbitrator.

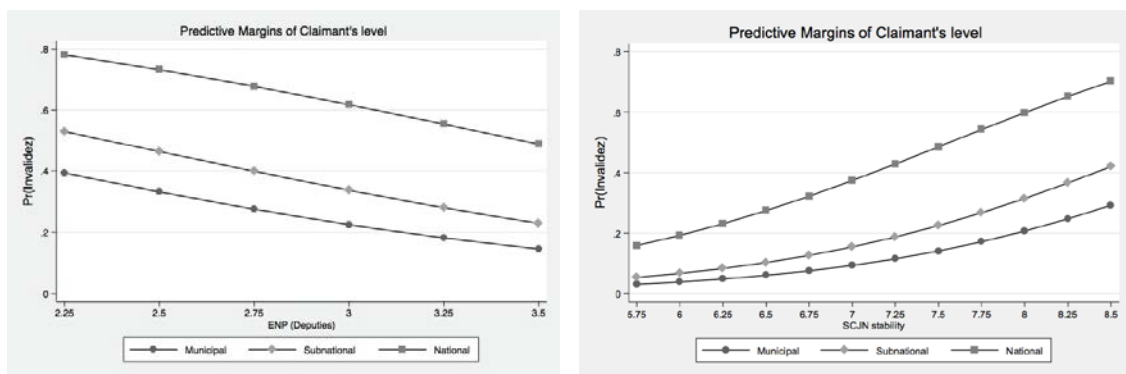
Figure 4.6 Actions of unconstitutionality: effects on arbitration



Above was underlined that in the case of constitutional controversies, instead of political affiliation, hierarchy is the variable associated to the performance of the Supreme Court. Figure 4.7 shows that strike down decisions have largely depended on the hierarchy of the actor bringing a case into the Supreme Court. But unlike actions of unconstitutionality, the effects

of political fragmentation and experience from stability move in opposite directions. *ENP* deputies variable decreases the probabilities of invalidation by the Supreme Court which seems a reasonable effect, particularly by connecting it with hierarchy, because it makes clear that as fragmentation grows the Supreme Court becomes less biased in favour of the national, and more influential actors. On the other hand, the results for *SCJN stability* confirm that for arbitration this was a decisive factor.

Figure 4.7 Constitutional controversies: effects on arbitration



The findings presented for strike down decisions, particularly those related to actions of unconstitutionality, are in tune with the results of Rios Figueroa (2007) about the positive impact of fragmentation in the probability of a decision against the former hegemonic party. Additionally, they provide evidence that questions the conclusion by Magaloni and Sanchez (2006) that claim that after alternation the Supreme Court has remained biased in favour of the PRI.

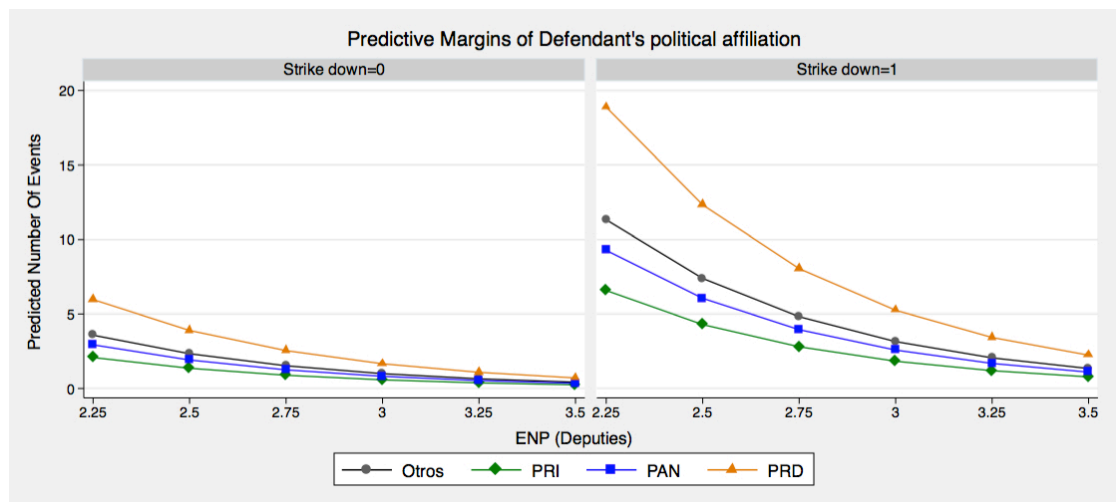
The main conclusion of this analysis is that factors varying across the time have indeed provoked the emergence of a more effective arbitration body. Under more plural conditions, the role of Supreme Court as arbitrator has gradually turned more frequent and decisive, whereas the opposite has occurred with the presidency. Political fragmentation has created new incentives for political actors resorting to the Supreme Court. Litigation, political fragmentation and stability have fostered the development of an autonomous Supreme Court. Since strike down decisions have an impact on

the parties but not necessarily on the normative structure, the Supreme Court has employed case law as the preferred means for creating rules of general application.

#### 4.4.2 Case law

The results for case law confirm the strategic use the Supreme Court gives to precedent. Five aspects stand out from the analysis of the determinants for the creation of *jurisprudencias*. In the first place, the strike down variable does produce a positive effect in the expected number of *jurisprudencias* and it is statistically significant. This result confirms the hypothesis above mentioned, and reveals that the Supreme Court took advantage of striking down decisions to introduce new rules for both, delineate its own jurisdiction and, second, to give legal substance when it rendered its most far-reaching decisions.

Figure 4.8 Actions of unconstitutionality: effects on rule-making

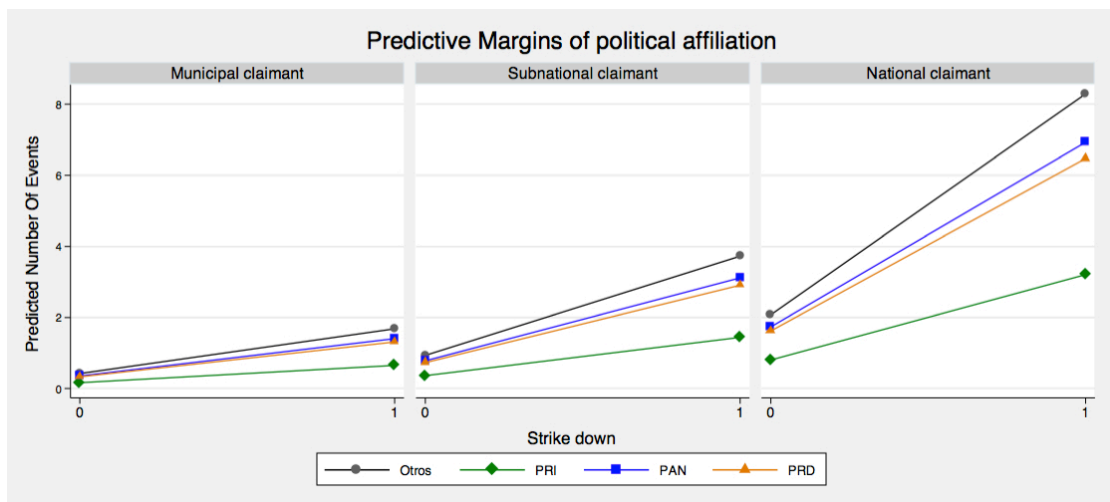


Second, the results show that political fragmentation is linked to the response variable (only for actions of unconstitutionality), but in the opposite direction than for strike down decisions. This result therefore disconfirms the second hypothesis regarding the creation of case law. Figure 4.8 presents the estimates of political fragmentation and strike down variables for actions of unconstitutionality, the only procedure for which the latter is statistically significant. The figure illustrates how, as fragmentation has increased, the use

of case law by the Supreme Court has decreased; this makes it clear that effects have been different for actors of different affiliation; and shows that strike down has been associated with a larger number of expected *jurisprudencias*. In short: the use of case law played a major role when political power was more centralised.

The third relevant result from the analysis is that *SCJN stability* on *jurisprudencia* is not statistically significant, neither for actions of unconstitutionality nor for constitutional controversies. This result disconfirms the third hypothesis enunciated at the beginning of the section. Albeit further research is required, a preliminary interpretation of this evidence is that case law more clearly reflects judges' policy preferences while striking down resolutions more clearly shows strategic decision-making. Case law does not necessarily affect parties involved but it does influence further cases because of its binding precedent nature. In the end, this evidence shows that, unlike what occurred in strike down decisions, justices were not required to undergo a learning process to be inclined to use case law in an active way.

Figure 4.9 Constitutional controversies: effects on rule-making



Fourth, political affiliation is significant for both legal procedures examined but only for the PRI and in the opposite direction than for the strike down variable (see figure 4.8). Hierarchy is also positive and statistically significant at 1% but only for constitutional controversies. Figure 4.9 plots

estimates of *jurisprudencias* according to hierarchy, political affiliation and strike down variables. It illustrates how the number emerging from a constitutional controversy has been linked to invalidations and has greatly varied for the different jurisdiction to which claimants belong. Additionally, it illustrates that affiliation has had an effect. In this point it is right to recall that only the PRI is statistically significant. The results regarding hierarchy support the findings presented for strike down decisions, which make it clear that in the case of this type of procedure the Supreme Court has been biased in favour of high-ranked claimants.

The evidence presented in this section supports the contention that political fragmentation and the experience gained by justices stimulated the development of more a politically-oriented Supreme Court in terms of its capacity to effectively arbitrate conflict as well as for creating legal norms. The analysis of *on the merits* rulings also proved that the political affiliation of defendant parties has had an effect on the probabilities for the Supreme Court to render a decision to strike down but only in the case of actions of unconstitutionality. Instead of political affiliation, what affects constitutional controversies is the jurisdiction to which the claimant party belongs (hierarchy): the more influential the claimant, the higher the odds of getting a positive outcome in the Supreme Court.

On the other hand, the number of *jurisprudencias* emerging from a case is linked with more fragmented conditions, but only for actions of unconstitutionality. Again, hierarchy is positively related and statistically significant in the case of constitutional controversies. But the common, most relevant variable is strike down: when the Supreme Court invalidates a norm or official act it takes advantage of the decision to create binding precedent. This section provided an assessment of the factors that determined the Supreme Court's decision-making and, therefore, shaped its performance as national policy-maker. It is now time to offer a general balance of the findings presented along the whole chapter.



## 4.5 Conclusion

This chapter has positively answered the question of why the Supreme Court became a more active policy-maker in Mexico. The first relevant factor was institutional change from judicial reform: the Supreme Court gained broader constitutional review powers; political actors the right to bring political conflict into the Supreme Court. Political fragmentation fostered the active use of constitutional litigation by political actors and, at the same time, influenced Court's performance by creating incentives for justices to be less reluctant to put into practice their right to strike down laws and official acts, as well as to establish precedents subject to become norms of general application. In addition to political fragmentation, the Supreme Court went through a learning process to adapt its organisation and decision-making processes to its new constitutional review powers. This chapter proved that experience gained by justices was the third determinant of the emerging policy-making roles of the Supreme Court.

The structure of decision-making gives the Supreme Court the capacity to arbitrate conflict without being forced to render a decision *on the merits*. Cases such as the 2004 Budget reveal that the Supreme Court has avoided the direct confrontation implied for instance in decisions to strike down by resorting to dismissals and suspensions grants. The most relevant outcomes of the Supreme Court's policy-making, however, have relied on decisions *on the merits*, because they have permitted the Supreme Court to continue arbitrating political conflict, but also shaping administrative decisions and the contents of laws passed in legislative bodies.

This chapter shows that the Supreme Court has been strategic when deciding constitutional cases. The statistical analysis provided makes it clear that political variables have played a major role. The rulings of the Supreme Court seem to have been linked to a strategic assessment of the capacity of reaction of the different parties in conflict. This capacity has been reflected in

role of hierarchy and political affiliation in the Supreme Court's decision-making.

This chapter presented a systematic, exhaustive large-n analysis of the Supreme Court's resolutions to constitutional cases. This account allows us to find out the most important patterns followed by its performance in policy-making terms. Once these main, macro trends have been demonstrated, it is time to explain how the Supreme Court has displayed its arbitration and rule-making functions in the micro level.

## **5. The Supreme Court and the Legal Status of Abortion**

Since the 1950s countries from different regions of the world have adopted less restrictive regulations for performing legal terminations of pregnancies. According to recent estimates 4.2 million induced abortions are performed annually in Latin America (Kulczycki, 2011), one of the regions of the world with the toughest laws on the matter. Criminalisation has not prevented Latin American women from resorting to abortion services, but has triggered clandestine and unsafe conditions that particularly affect the poorest patients. In Mexico, for example, abortion is the fifth leading cause of maternal mortality (CONAPO, 2004) and hence, a serious public health issue that has demanded special attention from public authorities.

The advent of more democratic conditions that the world has witnessed during recent decades (Diamond, 1994) has gradually transformed the environment for abortion to be publicly debated. Political actors have become less reluctant to include abortion in their agendas. For instance, both El Salvador and Guatemala, once among the few Latin American countries with liberal abortion regulations, recently passed new laws that have virtually prohibited all legal terminations of pregnancy. In Uruguay a president nominated by a left wing coalition vetoed the legalisation of first-trimester abortion, while in Colombia the Constitutional Court eased the general ban to authorise abortions in cases of rape, incest or when the life of the mother or the child are at risk.

Mexico is no exception to this trend. In 2000, the same year the PRI lost the presidency to the PAN, Mexico City's congress passed reforms on the local criminal dispositions to legalise abortion for genetic causes in order to widen the scope for women to access safe services. As a reaction, legislators that opposed the reform submitted to the Supreme Court, a demand that gave

justices the opportunity to validate or strike down with general effects a piece of legislation related to abortion matters. In the resolution rendered to this case the Supreme Court held the incorporation of exceptions for the prosecution of abortion as constitutional, so it ruled the 2000 reform as valid. The Supreme Court, however, set a precedent whereby it established that a Mexican constitution does protect the right to life from conception. The Supreme Court, therefore, opted not to invalidate a decision by a left-wing legislature but at the same time created a conservative and authoritative rule that sought to deter the development of further liberalising reforms.

Induced abortion reached the Supreme Court again in 2007. Mexico City's left-wing local congress passed an even more liberal reform that legalised abortion on request during the first 12 weeks of pregnancy. This time the reaction came from both the Attorney General and the President to the National Commission for Human Rights, who challenged the constitutionality of the reform. The Supreme Court endorsed the reform, but this time through an interpretation of the Constitution holding that, as abortion falls within state jurisdiction on criminal matters, local legislatures have the right to establish their own regulations on the subject. The Supreme Court again ruled in favour of Mexico City's left wing legislature, but established a new rule that by deciding in terms of competences rather than rights opened the door for each state to set a different legal configuration according to the ideology of the party or parties controlling the local legislative assembly. Between 2008 and 2011, 18 out of the 32 Mexican states have included in their constitutions a clause establishing that the right to life is protected from conception.

What has happened in Mexico that policy issues as controversial as abortion are now falling under the Supreme Court's jurisdiction? How has the Supreme Court's 'voice' become so loud as to encourage local congresses to pass laws reacting to its decisions? Throughout this thesis it has been argued that the convergence of institutional change, political environment and stability, has permitted the Supreme Court to become a more effective source

of law and policy. Institutional change took place in 1994 when stronger constitutional review powers were granted to the Supreme Court. Since the 1990s, Mexico has become more pluralistic and politically fragmented, not only at the national level but at the sub national too. The Supreme Court has, since 2003, undergone a gradual renovation of its membership through the appointment of new seven justices.

The previous two chapters presented a large-n analysis of the Supreme Court's performance to support the thesis that the Supreme Court has become a more effective policy-maker as democracy has developed in Mexico. The objective of this one is to provide further evidence to support such a claim through the examination of the Supreme Court's impact in one of the most controversial policy issues contemporary societies face. Using abortion as a case study, this chapter presents an evaluation of the Supreme Court's policy-making role at the micro level based on a research strategy that combines the following elements: a review of abortion law transformation over the last forty years; interviews to key actors -including law clerks and civil society organisations leaders; and an in-depth analysis of the Supreme Court's decision to landmark abortion cases and their effects on state level regulations.

The chapter is structured as follows: the first section analyses abortion reform trends at international level to set a theoretical framework for later assessing the Mexican experience. The second explains how domestic abortion politics transformed as a result of the democratisation process started in the late 1980s. The third section presents an in-depth study of the decision-making processes related to the two landmark cases on abortion matters: one ruled in 2002 and the other in 2008. Finally, the chapter concludes that, despite the prominence the Supreme Court has gained in recent years, there still exists in Mexico a significant gap between law and social practices which prevents the consolidation of the rule of law.

## 5.1 Abortion, Politics and Courts

Abortion is a controversial issue connected to the most entrenched cultural values of a society; it entails fundamental questions about life and the role the institutions of the state have to play in its protection. Different cultures have different orientations regarding how it should be regulated. Despite such differences abortion is regularly and extensively practiced at the global level: recent estimates show that 43.8 million abortions were performed in 2008 worldwide (Sedgh et al., 2012). The rates per 1,000 women aged 15-44 across the different regions of the world fluctuate from 17 in Oceania to 32 in Latin America. Similar rates in different regions—29 in Africa, 28 in Asia and 27 in Europe—confirm that even though cultural values are important they do not significantly affect the incidence of abortion; however, they do influence the way the state regulates its practice.

The legal status of abortion greatly varies across different regions. Save Poland and Ireland –both predominantly Catholic countries– in Europe abortion is broadly legal and safe: only 9% of the procedures in those countries are carried out under unsafe conditions. In contrast, Latin America and Africa have some of the world’s more restrictive regulations as well as the highest levels of unsafe abortions –95% and 97% respectively (Cohen, 2009). Stricter rules do not inhibit women from terminating their pregnancies, but they do foster the development of unsafe conditions affecting the poorest social sectors the most.

The struggle to control the legal status is at the core of the politics of abortion. The social implications that the legal status produces focuses the debate on how executive, legislative and judicial institutions must intervene to either impose tougher rules or adopt more permissive ones. In a democracy, executive authorities are regularly considered as the most plausible institutions to implement policies that might mitigate the negative effects of abortion on public health. They can propose and promote reforms in any direction, but the capacity to change the legal status is beyond its

competences. The activity of legislative and judicial institutions is necessarily linked to the normative structure of a society. They can either modify the legal system or preserve the *status quo*. This possibility makes the debate surrounding abortion become focused on the intervention of legislators and judges.

This section presents a revision of the recent trends in abortion regulation. It proposes a typology of abortion's legal reforms based on the different nature they may have (criminalisation-decriminalisation-liberalisation), as well as the sources from which they come (legislative or judicial decisions). The next sections employ this analysis as a framework to understand the nature and scope of the recent transformation of abortion's legal status in Mexican states.

During the second half of the twentieth century the world witnessed a global trend towards more liberal abortion laws. In 1967 the United Kingdom<sup>1</sup> approved the *Abortion Act* to authorise procedures on demand during the first 28 weeks of pregnancy. This reform was followed by similar changes in other European nations (David, 1992)<sup>2</sup>. In the Americas, Canada approved abortions for therapeutic cases in 1969 and, through the decision rendered by the Supreme Court in the landmark case *Roe v. Wade*, the United States legalised first-trimester abortion (Driscoll, 2005). Developing countries as different as China, Cuba, India, South Korea, Tunisia and Zambia, also adopted more liberal abortion regulations (Crane, 1994).

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<sup>1</sup> In England, as it is pointed out by Moher (1978), abortion was allowed by common law during the first 16-18 weeks of pregnancy (quickening), but this legal provision changed in 1803 considering all abortions carried out after quickening felonies. Since 1861 and until 1967 all surgical abortions at any stage of gestation were prohibited, thus establishing criminal sanctions for those committing the offence.

<sup>2</sup> From 1970 to 1990 abortion regulations were liberalised in: the German Democratic Republic (1972), Denmark (1973), France (1975), Federal Republic of Germany (1976), Netherlands (1980), Turkey (1983), Portugal (1984), Spain (1985), Greece (1986) and Belgium and Bulgaria (both in 1990)

By the mid-1980s this liberalising trend became less apparent. While some countries like Mexico enacted laws to permit certain types of abortions -rape and genetic mainly- some others promoted changes in the opposite direction (Kulczycki, 1999). In the United States, the Supreme Court upheld the adoption of stricter regulations for the provision of abortion services, while constitutional courts in Colombia (1994) and Poland (1997) blocked the adoption of exceptions for the prosecution of abortions (Rahman et al., 1998). In this century abortion reforms have not followed a clear path; some countries have imposed stricter rules –El Salvador and Nicaragua, for example- and some others have created less restrictive norms (Singh et al., 2009).

This brief review of the global trends shows that abortion law reform has occurred in three different directions: there have been reforms authorising abortion on demand during a specific period of the pregnancy (liberalisation), there have been changes oriented to decriminalise abortion under certain circumstances, and there have modifications to de-authorise all procedures (criminalisation). This review shows too that legal change has come from two different sources: legislatures and constitutional and last resort courts<sup>3</sup>. Legislative reforms imply the regular legislative process determined by political parties' correlation of forces and ideological orientations.

On the other hand, abortion reforms resulting from the intervention of courts involves a more complex process that requires a controversial law, the use of litigation, and the resolution of the Supreme Court to set rules affecting the *status quo* (see figure 5.1). To change the normative structure courts require institutional instruments allowing them to render authoritative and generalizable judgements (i.e. *erga omnes* effects and binding precedent). Furthermore, in order to bring courts opportunities to rule on controversial

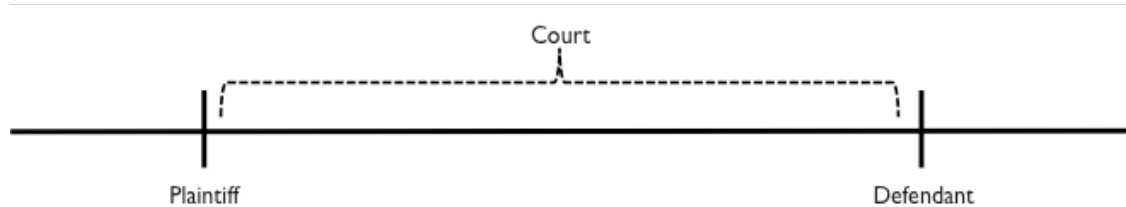
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<sup>3</sup> I consider as criminalisation those cases in which the higher tribunal (Supreme Court or Constitutional Tribunal) struck-down a law that liberalised or decriminalised abortion. The reason for doing this is because when a tribunal decides in this way it is also preserving the criminal character of abortion, thus establishing precedent that prevents further reforms.



matters like abortion, the rules of standing need to be open enough to allow political and social actors to strategically employ litigation. Legislative bodies are mostly constrained by political factors; institutional tools are more relevant for courts.

Figure 5.1 Judicial abortion law-reform



The case of the United States provides a good illustration of how judicial abortion reforms operate. In *Roe v. Wade* (1973) the Supreme Court held that under the right to privacy granted by the due process clause included in the fourteenth amendment of the United States Constitution women have the right to decide over their own health. The main outcome of the reform was disallowing all the provisions restricting the exercise of this right during the first-trimester of pregnancy (Epstein and Kobylka, 1992). In *Planned Parenthood v. Casey*, however, the Supreme Court upheld some of the more restrictive provisions established by Pennsylvania, including the parental consent in the case of minors, and the 24-hour waiting period for having access to abortion services. Later in 2007, in *Gonzales v. Carhart*, the Supreme Court again contributed to re-criminalise abortion by upholding the restrictions prohibiting late-term abortions specified in the 2003 Partial-Birth Abortion Ban Act<sup>4</sup>.

The case of Colombia is representative of how abortion law reforms work under an institutional design that centralises constitutional review in a single court. In 1994, the Constitutional Court upheld a law criminalising all abortion

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<sup>4</sup> The Partial-Birth Abortion Ban Act does not specify a period for determining what exactly a partial-birth abortion is. However, it has been commonly understood that partial-birth abortion implies performing an abortion when the product of the conception is a viable human being.

types, rape and genetic included (Uprimny and Garcia Villegas, 2004). Later in 2006, the Supreme Court ruled that absence of exceptions constituted a violation of women's fundamental rights to liberty, health, life and dignity, all of which are recognised in the 1991 Colombian Constitution as well as in the international instruments ratified by Columbia (Undurraga and Cook, 2010).

Table 5.1 Types of abortion law reforms in selected countries

	Liberalisation	Decriminalisation	Criminalisation
Legislative	UK and other European countries	Mexico and other Latin American countries	Chile, Indonesia, El Salvador
Judicial	USA (1973)	Colombia (2006)	Poland, Colombia (1994), USA (1992)

The doctrine of *stare decisis* has been a decisive factor for the United States Supreme Court in becoming an important source of law. Under *stare decisis* the Supreme Court has been able to set authoritative rules that have shaped abortion regulation. In Colombia, the *erga omnes* effects of the Constitutional Court's judgements were the main institutional factor behind legal change. As the second chapter emphasized, the institutional design of constitutional review is decisive for courts to make policy and law. The tools they have available make some Courts more prone to change the *status quo* than others. A lack of instruments to produce generalizable judgements deters judges from engaging in more proactive forms of policy-making. The previous chapters explained how the Supreme Court has employed its policy-making instruments for arbitrating conflict and making law. The next sections show how the Supreme Court has enough discretion to strategically employ such instruments in different directions, first for solving a specific dispute; second, to set a rule beyond the boundaries established by that concrete case.

## 5.2 The Legal Status of Abortion in Mexico

Mexico City legalised first-trimester abortion in 2007, becoming the first place in Latin America authorising women to end their pregnancies with no other restriction than their own decision<sup>5</sup>. Since then, abortion has been accessible and freely provided in public clinics. In the rest of Mexico, however, it remains criminalised and authorised only under specific circumstances such as rape or foetal malformations. The absence of a substantial, national-scale transformation of abortion's legal status has been accompanied by a limited change of its incidence. According to the available estimates the number of procedures performed annually during the 1980s ranged from 230,000 according to official data (CONAPO, 2004) to 850,000 from non-official sources (Kulczycki, 2007). The most recent calculations report 875,000 abortions in 2006, a rate of 33 per 1,000 women aged 15-44 (Juarez et al., 2008).

Abortion still is mostly criminalised and at the same time recognised by public authorities as the fifth leading cause of maternal mortality in the country (Hausman, 2005). It constitutes a tragic but very illustrative example of the significant distance that exists in Mexico between legal dispositions and social practices. This section provides an analysis of the main transformations to abortion's legal status since the 1970s in order to contextualize the

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<sup>5</sup> To illustrate the relevance of this reform, it is convenient to recall what the *The Economist* published on the 26<sup>th</sup> of April 2007: “The idea of legalising abortion has long been a taboo in Latin America, thanks largely to the influence of the Catholic church. Most countries in the region allow abortion only in exceptional cases, such as foetal malformation, rape or danger to the mother's life. Chile, El Salvador and, since last year, Nicaragua prohibit termination in all circumstances. Only communist Cuba (and Puerto Rico, part of the United States) allows abortion on demand. This makes the decision on April 24th by Mexico City's legislative assembly all the more noteworthy. More than two-thirds of the assembly members voted to approve a law that will allow abortion on demand during the first 12 weeks of pregnancy. It requires the Federal District's hospitals to perform abortions and potentially opens the way for specialised private clinics. There is nothing in the law to stop unhappily pregnant women elsewhere in Mexico, or in other Latin American countries, from travelling to Mexico City to obtain the safe and legal abortion they cannot get at home (...) Perhaps the biggest change has been a new willingness among politicians to debate social and moral issues since Mexico became a full democracy with the defeat of the PRI in 2000. Only a few years ago feminists would say that legalising abortion was impossible. Equally, conservatives were shy about calling for a crackdown on illegal abortion. There was an unstated pact of avoidance”.

significance of the Supreme Court's intervention in the regulation of this highly controversial public issue. This section shows that the emergence of abortion in the public agenda preceded democratisation. In fact, the main steps towards the adoption of less restrictive regulations were made during the authoritarian period. Even under *presidencialismo*, presidential determination in favour of more open abortion rules was not enough to successfully establish a complete legalisation. Instead of encouraging legal changes, the advent of democracy led to an impasse that only concluded when the Supreme Court became involved in the debate.

The peculiar mixture of Catholicism and laicism that characterises the Mexican political culture has framed the public debate surrounding abortion. 90% of the population is Catholic, however, religiosity is not the decisive factor defining social and political orientation towards public issues (Basañez, 2006)<sup>6</sup>. Catholicism converges with a deep-rooted laicism inherited from nineteenth century struggles to separate state from church; the opinions of Mexicans “reflect an intriguing blend of nineteenth-century liberalism and Christian moral education” (Camp, 1994). In the absence of a dominant, long-lasting position the politics of abortion has been episodic and polarized.

Abortion became formally prohibited in Mexico with the enactment of the 1871 Federal Criminal Code. Since then and until Mexico City's legalisation the main feature of the evolution of abortion regulations was decriminalisation or the gradual incorporation of exceptions –or *extenuating circumstances*- for its prosecution (Barron and Najera, n.d.)<sup>7</sup>. The first antecedent of decriminalisation occurred in 1931 when Mexico City's Criminal Code authorised abortion in cases of rape. Having Mexico City establish a new standard in the 1940s three states approved similar reforms, all of them

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<sup>6</sup> Accordingly to Basañez (2006) the other two pillars are nationalism originated by the proximity to the United States; and revolution, produced by the 1910 revolution.

<sup>7</sup> However, this legislation is introduced as an extenuating circumstance for the application of the punishment in cases related to “honour”, thus opening a frame for legally practicing abortion.

also decriminalising therapeutic –those practiced to save a pregnant woman’s life- and miscarriages.

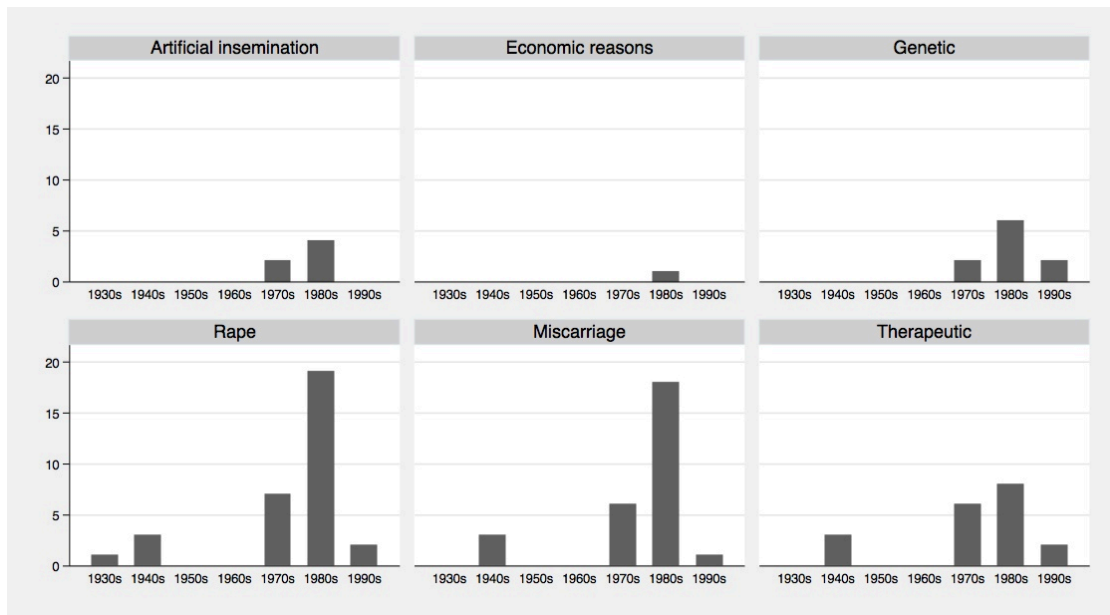
No other state passed any abortion law reform until the emergence of a decriminalising wave that took place between the 1970s and the early 1990s. For this wave to occur the incorporation to the agenda of both public institutions and social organisations was essential. The convergence of three factors gave abortion unprecedented public attention in the 1970s: demographic pressure, political liberalisation and the international debate. Mexico’s population exploded from 25.7 million in 1950 to 97.4 million in 2000 and the 1970s saw Mexico become a predominantly urban country (Garza, 2003). In the late 1970s the country reformed its electoral system to permit opposition parties access to legislative and executive positions. Finally, Mexico organised in 1975 the first World Conference on Women, an event that prompted the creation of a domestic feminist movement<sup>8</sup> advocating the establishment of liberal abortion laws (Crane, 1994; Lamas, 2001a)<sup>9</sup>.

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<sup>8</sup> The First International Women’s Conference, organized in Mexico City in 1975, distinguished itself on abortion matters by being a forum in which this topic was evaded by government delegations. This fact contrasts with what occurred in simultaneous meetings organized by nongovernmental organizations, where abortion legalisation appeared as a central demand (Crane 1994; Lamas 2001b). Again in Mexico City, in 1985 the United Nations organized the International Conference on Population attended by 147 government delegations. The conditions in this conference were different from previous experiences. Whereas in the conference held in Bucharest developing countries considered developed countries’ assistance as an imperialistic and even racist policy, in Mexico City’s meeting the intervention of developed countries was accepted in population policies (Finkel 1985). Furthermore, the change of United States policy resulted in one of the most relevant conference’s outcomes. The United States’ delegation, after considering population growth as a “neutral phenomenon”, stated that its government did not accept abortion as an adequate method for family planning matters (Kulczycki 1999). This change in the United States’ policy affected international debate because by that time the United States was the principal donor for research on population control, including the diffusion of methods for family planning in which abortion was included. Moreover, the papacy of John Paul II reinforced the Vatican’s antiabortion policies with the pope himself becoming an actor opposed to abortion and throughout his travels he actively spoke against any potential change to national policies.

<sup>9</sup> The 1994 International Conference on Population and Development held in Cairo marked a turnaround in the international perspective of abortion, producing a more liberalised understanding. The Cairo Conference was characterised, firstly, by an increasing participation of women’s organizations demanding a more active role of women in

Figure 5.2 Reforms to state of abortion laws by type



Source: author's elaboration with data from Barron & Najera (n.d. chart 1) and Aguinaco et al (2002).

Mexico institutionalized population policy control in 1974 with the National Council for Population (CONAPO). One of the Council's first actions was the creation of the Group for the Study of Abortion in Mexico (GIA) as the entity in charge of the design of empirically based policies to monitor abortion prevalence in the country. GIA conducted different studies to determine the extent to which abortion was a national scale public health problem. Based on this body of research GIA concluded that abortion was in fact a serious problem that required not only sanitary actions by executive authorities but drastic legal changes. GIA particularly proposed the derogation of all regulations prohibiting abortions and the establishment of appropriate

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population policies at global level. In particular, women's organizations demanded the implementation of more secure policies on abortion matters due to the negative effects produced by illegal abortions in developing countries (Cohen and Richards 1994). Secondly, the United States' modified conception of population growth as a "neutral phenomenon", as well as its previous position against abortion. Finally, the Vatican's anti-abortion strategy sought to create an alliance with other religious leaders to prevent a declaration supporting abortion as a birth-control method. The Cairo conference signified a symbolic change in the international perspective regarding abortion, since the conference's recommendations explicitly declared: "In no case should abortion be promoted as a method of family planning. All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortions" United Nations, 1994.

sanitary norms to provide the safe termination of pregnancies in public health institutions (Lamas, 2001a).

GIA's recommendations were made public in a context where the lame-duck president Luis Echeverria no longer had the power required to successfully promote such far-reaching proposals. Nonetheless, the report published by this group indicated a turning point in the way public institutions were dealing with abortion; it constituted the recognition by government authorities of the perverse consequences produced by norms incompatible with social practices (Kulczycki, 2007). The political context along with the opposition by conservative actors –the Catholic hierarchy and the National Action Party, mainly- prevented the adoption of national scale reform<sup>10</sup>. However, the emergence of abortion in the public agenda instigated the start of a legal renovation trend at state level, which mainly consisted of the establishment in local laws of further exceptions to avoid abortions being prosecuted.

The abortion reform trend began when the states of Hidalgo and Tabasco changed their criminal status to adopt less restrictive regulations, but was consolidated only after Mexico held the Conference and GIA published its report. Between 1976 and 1982 ten more states joined this trend, thereby creating a new environment favourable for the promotion of a new national reform. In 1983, one year after taking office, president Miguel de la Madrid submitted to the Federal Congress a bill of reforms intended to liberalise abortion in the whole country (Kulczycki, 2007). Again, the reaction of anti-abortion advocates was immediate and effective enough to force the president

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<sup>10</sup> According to Kulczycki (2007: 55), the announcement in 1990 of the intention to legalise first trimester abortion in Chiapas state “re-galvanised feminist voices in support of abortion rights, but the Catholic Church and Church-linked organisations reacted sharply and the central government did not want to risk putting new obstacles in the way of mending church-state relations. Within two weeks, the Chiapas state legislature had suspended the process. The extensive media comment included television discussion involving prominent figures holding diverse views about abortion, a subject still taboo until then. The federal government defused the issue by shifting it to the National Human Rights Commission which avoided ruling on whether the revision violated human rights”.

to withdraw his proposal (Lamas, 2001a). Evidently not even presidentialismo and the hegemony of his party allowed the president to successfully promote a national reform.

The response to this second defeat followed the same path as the previous one. In the period 1983-1989 fourteen states reformed their criminal codes to authorise abortion in cases of rape; eight of them also approved therapeutic procedures, six for genetic causes and two more in cases in which the conception resulted from non-consensual artificial insemination. The state of Yucatan also legalised abortion for economic reasons, available only for those women who were already mothers of three or more children. The decriminalising wave reached its peak with this reform. In the 1990s abortion regulations entered a process of gridlock that lasted until the Mexico City's left-wing legislature was established in 2000 with a wider scope for legally conducted abortion procedures.

The new turning point occurred when in 1990 the Chiapas state Congress unsuccessfully attempted to establish abortion as a proper-birth control method in the state. That year the administration of President Salinas was negotiating the re-establishment of diplomatic relations with the Vatican, so Salinas managed to block the reform's enactment notwithstanding that it had already been approved by the local Congress (Lamas, 2001b). The 1990s was the decade when opposition parties substantially increased their legislative and executive positions, as well as the number of municipal governments under their control. Political pluralism expanded, in theory, the possibilities for abortion to be introduced to the legislative agenda. However, the damaging consequences emerging political actors perceived that openly endorsing abortion would be for their careers prevented the development of further reforms on the subject.

The arrival of the conservative PAN to the presidency transformed the correlation of forces and once again fostered the public debate. The first event to occur was the infamous case of Paulina, a 13-year old victim of rape who,



despite getting an order by the approved authority, was denied access to abortion services in the PAN-governed state of Baja California (Taracena, 2002). Public attention gained by this case influenced Guanajuato state authorities to informally promote a reform to de-authorise abortion in cases of rape. Once again, mobilisation successfully prevented the revision of abortion regulations, this time however, the opposition came from pro-choice groups.

The last, and for the purpose of this study, most decisive event of 2000 was the approval in Mexico City of a reform legalising therapeutic abortions. Its relevance, as the next section explains in-depth, relies on three factors: firstly, it was the first change after a ten year stalemate; second, it was promoted by Mexico City's first elected government; third, it culminated in the first case that confronted the Supreme Court with the obligation of analysing abortion on constitutional grounds. The involvement of the Supreme Court reflected the on-going transformation of Mexico's political system, where new institutional means for processing political conflict were on the way to become consolidated.

Despite the efforts made along the last forty years, abortion is still predominantly criminalised across Mexico. The process of transformation towards more liberal regulations mainly consisted of successive reforms to introduce exceptions for its prosecutions, rather than to establish a general liberalisation. The main features of this decriminalisation have been: a) taking place at state level instead of at the national level -even under authoritarian rule federal authorities were unable to create a national reform; b) occurring mostly during authoritarian times rather than in democratic times. Political pluralism has made the decision-making process more complex provoking, amongst other consequences, the Supreme Court to become a decisive national policy-maker. At the same time, it has increased the costs for political actors to abandon the *comfortable centre*. Controversial policies are only lucrative when the risks of affecting electoral outcomes are minimal. The next section addresses this question when explaining how abortion reforms ended

in the Supreme Court and why the Supreme Court ruled on them the way it did.

### **5.3 Induced Abortion and the Right to Life**

In 2000 the Supreme Court admitted a petition demanding reform to Mexico City's criminal statutes authorising therapeutic abortions. This was the first abortion case to be brought into the Supreme Court through the use of one of the constitutional review procedures emerging from the 1994 judicial reform. The admission itself revealed the new role the Supreme Court had begun to play in a new democratic contest where the president was not the ultimate political arbitrator. The objective of this section is to provide evidence to illustrate by analysing abortion law, how the Supreme Court has strategically employed different tools for different purposes; it has rendered decisions to avoid short-term conflicts with political actors but at the same time it has resorted to judicial precedents in order to issue long-term norms. Precedent therefore has been the instrument that has reflected with more clarity the policy preferences of the Supreme Court's majority.

#### **5.3.1 The decriminalisation reform of 2000**

In 1928 a constitutional amendment proposed by president-elect Alvaro Obregon abolished municipalities in Mexico City, and established the practice that all local authorities would be appointed directly by the president (Marvan Laborde, 2009). In 1997 the citizens regained the right to directly elect local authorities, and elected Cuauhtemoc Cardenas, an experienced politician -son of the president who nationalised the oil-industry in 1938, former member of the PRI, runner-up in the 1988 presidential race, and founder of the left-wing Party of the Democratic Revolution (PRD)- as the city's first elected Head of Government since 1928 (Lawson, 1997).

His victory in the 1997 election made Cardenas one of the favourite contenders for the 2000 presidential race. During the campaign he offered to promote more liberal abortion policies in the case of being elected. However, in order to avoid political costs, he made no public endorsement to the legalisation of abortion during his two years in office (Lamas, 2001b). Cardenas resigned from his post in September 1999 to being for third consecutive time PRD's presidential candidate. To replace him, the local congress appointed Rosario Robles, the Secretary of Government during Cardenas' administration.

The 2000 electoral process in Mexico City was not particularly successful for the PRD. By a very small margin, the party preserved the control of the local executive but lost its majority in the local Congress. Noticing that the PRD's legislative dominance was coming to an end, lame-duck Rosario Robles submitted a bill proposing the legalisation of genetic abortion (Billings et al., 2002). On August 18, twelve days before the new legislature's inauguration, the lame-duck PRD majority approved a reform that, a) amended the 334 of the Federal District Criminal Code (*Codigo Penal del Distrito Federal*) to establish that abortion shall not be prosecuted in those cases when two specialized physicians had diagnosed genetic or congenital alterations in the 'product of the conception; and b) established in article 131 of the Federal District Criminal Proceedings Code (*Codigo de Procedimientos Penales del Distrito Federal*) that local public prosecutors (*Agentes del Ministerio Publico*) would be in charge of authorising the corresponding procedures.

This reform –which has been known as *Ley Robles* because of the surname of the persona who sponsored it- meant a limited expansion for legally performing abortions in Mexico City and, in fact, it established provisions that were already in force in other states. Nonetheless, unlike what occurred in other jurisdictions, the *Ley Robles* attracted public attention because it was conducted in Mexico's capital as well as for being the first legal change made to the legal status of abortion after the PRI's defeat in the presidential race.

The reform immediately generated opposition from conservative groups, including the Catholic clergy, the PAN and civil society organisations. As part of this reaction, the incoming –but not yet sworn- deputies submitted an action of unconstitutionality (AI 10/2000) requesting the Supreme Court to invalidate the reform. On their demand, the incoming deputies argued the following:

- a) From the very moment of conception exists a human being protected by the constitutional right to life establishing that no one shall be deprived from his or her own life but by judicial judgment. Accordingly, the reform to the Federal District Criminal Code constituted a violation to the constitution because it authorised depriving a human being of his life without a trial as required by the Constitution.
- b) As no one shall be deprived of their life but by the judgement rendered by a legally constitutional judicial authority, the reform to the Federal District Criminal Proceedings Code authorising public prosecutors to order abortion for genetic causes also constituted a violation of the right to life established by the 1917 Constitution.

The first legal dilemma the Supreme Court faced was to rule over the admissibility of the case. On the one hand, it had to define whether a demand presented in the 31<sup>st</sup> day following the enactment of law is admissible or has to be dismissed for not complying with the 30-day window required by the Constitution. On the other, it had to determine if deputies-elect have the proper standing to endorse actions of unconstitutionality before being sworn in.

The case was assigned to Olga Sanchez Cordero, then the only woman in the Supreme Court. Justice Sanchez Cordero admitted the case and determined that: when the 30-day period finishes on a non-working day the window to submit actions of unconstitutionality extends to the next working day. Her admissibility decision also established that deputies-elect do have legal standing because actions of unconstitutionality are not intended to control

laws approved by specific legislatures, but by legislative bodies as institutions (Aguinaco Aleman et al., 2002).

Having admitted the case, Justice Sanchez Cordero proceeded to require the parties to present their arguments. On one hand, both the Legislative Assembly and the Head of Government of the Federal District argued that the reform did not constitute a threat to human life because no living being exists until several weeks after conception. On their submissions, these authorities claimed that instead of threatening life, the reform protected the life of those women that only had access to unsafe and clandestine services. On the other hand, the Attorney General endorsed a concept of life beginning at the moment of conception, and disputed the reform with his understanding being based on suppositions rather than on scientific evidence (Aguinaco Aleman et al., 2002).

As it mentioned earlier in Chapter 4, unlike its counterpart in the United States, the Mexican Supreme Court has limited tools for selecting the cases to resolve, but it does have control over the timing to discuss and vote on a case (Magar et al., 2010). Justice Sanchez Cordero circulated her judgement projected on the 25 of October of 2001, thirteen months after the case was brought into the Supreme Court. The Supreme Court working ‘en banc’ dedicated 12 private sessions to the analysis of the case (Aguinaco Aleman et al., 2002). This unusual and remarkably long process was followed by two public sessions where justices made public some of their arguments for either supporting or opposing the reform.

The Supreme Court divided the analysis in two parts, one concerning the Penal Code, the other related to Criminal Proceedings Code. Regarding the former, seven justices voted to uphold and the other four voted to override the reform.<sup>11</sup> The majority concluded that “[the reform] does not authorise the

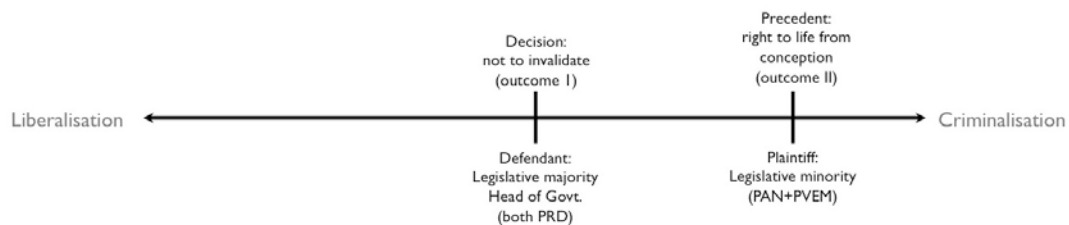
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<sup>11</sup> The justices that voted for not invalidating the reform were: Azuela Güitron, Castro and Castro, Gudiño Pelayo, Roman Palacios, Sanchez Cordero and Chief Justice Gongora

deprivation of life of *the product of conception*, but it does establish a possibility for not applying the sanction” (*Accion de Inconstitucionalidad 10/2000*, 2002: 112).

The Supreme Court drew this conclusion from the interpretation of articles 14 and 123. On one hand the Supreme Court argued that the right to motherhood implicit in Article 123 that regulates labour relations, protects women from the moment of conception and in so doing it protects the product of conception. The judgement is explicit in this regard: “the Federal constitution protects the human life and equally protects the product of the conception as a manifestation of human life regardless of its biological stage”<sup>12</sup>. On the other hand the product of conception, once defined as a legal human being, the Supreme Court determined that the right to life established in the Article 14 protects individuals from not being deprived from their own life without a recognised court is also applicable to the product of conception.

Figure 5.3 The Supreme Court judgement to *Ley Robles*



In relation to the Code of Criminal Proceedings, a majority of six justices is needed to vote to override the reform, but as the Statutory Law of the 105 Constitutional Article (*Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitucion Politica de los Estados Unidos Mexicanos*) requires a qualified-majority of eight judges to invalidate laws, no declaration of unconstitutionality resulted from the case. The Supreme Court again resorted

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Pimentel; while against it were: Aguirre Anguiano, Diaz Romero, Aguinaco Aleman and Ortiz Mayagoitia.

<sup>12</sup> Translation from the judgement rendered by the Supreme Court in the Action of Unconstitutionality 10/2000.

to Article 14 to conclude that public prosecutors are not constitutionally permitted to authorise genetic abortion procedures.

This judgement produced two policy outcomes. In terms of arbitration, the ruling of the Supreme Court endorsed –or at least did not strike down- a decision previously made by the PRD majority in Mexico City’s local congress. However, in terms of rule-making, the Supreme Court set a precedent similar to the arguments provided by the plaintiffs in the original demand. This precedent, as it is explained below, had an impact on the development of further reforms.

None of the people interviewed in relation to this case explicitly admitted that the Supreme Court’s resolution sought to discourage legislators in the states from carrying out further liberal reforms. However, most of them responded positively when they were asked if, in general, the Supreme Court employs precedent when seeking to intervene in certain legal areas. In particular, interviewee 34, a law clerk working in one the Supreme Court’s chambers, explained that justices have enough discretion to require clerks to prepare *jurisprudencias* (see chapter 2 for a definition of this concept) two or more years after a decision was formally rendered. A former Chief Justice interviewed for this thesis recognised that the relevance of precedent was such that when he presided the Supreme Court (1991-1995), the institution implemented a policy to systematize the *jurisprudencias*.

Overall, the decision rendered by the Supreme Court was strategic in at least three ways: a) none of the parties involved became the absolute ‘winner’ of the dispute; b) an authoritative enough precedent was established to inhibit political actors to undertake further reforms; c) the reasoning rather than the resolution was the element of the judgement reflecting the justices’ policy preferences.

### 5.3.2 The Liberalisation Reform of 2007

In 2003 the Federal District Legislative Assembly approved a new reform to the local Criminal Code and Health Law, particularly focused on four aspects: a) the reinforcement of punishment for people or doctors performing abortions without consent, b) the authorisation to local public-health institutions to provide free and safe legal termination of pregnancy services to women complying with the pre-established requirements, c) the creation of the necessary conscientious objection regulations to guarantee the availability of non-objecting providers, d) the elimination of abortion's criminal status by removing the clause restricting legal abortions only to those cases established in law as exceptions. The reform went out in 2003, albeit almost unnoticed by the general public, and meant a substantial change in the legal status of abortion in Mexico City, setting a good framework for the eventual achievement of a genuine liberalisation (GIRE, 2008).

After the 2006 electoral process, the PRI parliamentary group submitted a bill to the Federal District Legislative Assembly proposing the decriminalisation of abortion authorising abortions on request during the first 12 weeks of gestation. A left-wing coalition formed by deputies of *Alternativa* (a social-democratic party founded shortly before the previous general election), Labour Party and *Convergencia* –another centre-to-left party– presented a second bill also proposing first-trimester liberalisation, but including more detailed provisions decreasing the risk of an eventual challenge in the Supreme Court (Lamas, 2009).

After a six-month process, that included a legislative bargaining process to gather the support of the PRD, on April 24, 2009 the Legislative Assembly approved the legalisation of legal termination of pregnancy during the first 12 weeks of gestation. The core of the reform was the establishment of new legal definitions of abortion and pregnancy and the creation of norms to regulate the public provision of safe services. The Federal District Penal Code adopted a definition of abortion as “the termination of pregnancy after 12 weeks of



gestation”, and pregnancy as “the part of the human reproductive process that begins at the implantation of the embryo in the endometrium”. Moreover, the Federal District Health Law established that local health institutions should provide legal terminations of pregnancy regardless of the access that women may have to other public or private health services.

On May 24 the Attorney General and the President to the National Commission for Human Rights (CNDH) each filed actions of unconstitutionality in the Supreme Court. Both demands coincided in claiming that new legal definitions of abortion and pregnancy constituted a violation to the right to life of the product of conception; but while the Attorney General emphasized the contradiction between the reform and the precedent established by the Supreme Court in the judgement rendered to *Ley Robles*, the CNDH underlined the apparent overlap of federal and local competences on health matters.

Justice Aguirre Anguiano, a member of the minority that opposed *Ley Robles*, was designated as responsible for drafting the opinion of the Supreme Court. Due to the relevance and the public attention gained by the case, the Supreme Court Organised a series of public hearings where 186 people including legislators, social organisations, political parties, members of academic institutions, amongst other actors, manifested their positions in support or opposition to the reform. A special micro-site was also implemented to provide the public with information about the different parts comprising the whole jurisdictional process. The Supreme Court employed an unprecedented strategy to conduct its decision-making process in a more transparent and open way. This occurred greatly due to the visibility that for those times the Supreme Court had already acquired. Moreover, this strategy was also linked to the own salience of abortion as well as to the relevance of some of the actors linked to the case (i.e. the presidency and Mexico City’s government).

On August 26<sup>th</sup> of 2008, Justice Aguirre Anguiano presented a judgement project proposing to strike down the new criminal definitions of abortion and pregnancy. Using *porciones normativas* (literally ‘normative portions’), an interpretation of the constitution the Supreme Court employs to virtually edit the pieces of legislation under review by removing and eliminating words or sentences but not the complete challenged articles, Aguirre’s project aimed to eliminate any reference to 12 weeks as the limit delineating the possibility of performing a legal termination of pregnancy (Interviewee 22).

The Supreme Court took six public sessions to reach a final decision. The resolution included six votes to the different aspects composing the process, including the admissibility of the case and the dismissal of certain flagrantly inapplicable considerations posed by the plaintiffs. Regarding validity of the reform, the core of the demand, in an 8-3 decision the Supreme Court held as constitutional the new legal definitions and the obligation of the public authorities to provide safe abortion services in public clinics. The rejections of most parts of Aguirre’s project required a different justice to draft the final judgement. The majority gave this responsibility to Justice Jose Ramon Cossio who wrote a project merging aspects from the original one with the dispositions ruled. This official judgement was accompanied by concurring opinions by all justices composing the majority as well as of the dissenting opinion written by the three justices forming the minority.

The final ruling asserted that the constitution does not provide an unlimited protection to the right to life, concluding that state legislative bodies have complete autonomy to legislate on criminal matters, abortion and pregnancy legal definitions included. As the Supreme Court established in its ruling:

“This Court considers that the measure employed by the legislator is suitable to safeguard the rights of women, since the no-criminalisation of pregnancy termination is pregnancy has as women’s freedom to decide on their body, their physical and mental health, and even their life” (*Accion de Inconstitucionalidad 146/2007 y su acumulada 147/2007* 2008, 183).

In 2008 the Supreme Court reached a more liberal but equally strategic decision. A new composition integrated by four new justices was decisive for breaking the division prevailing in the resolution rendered in *Ley Robles*. As Table 5.3 shows, two of the justices that in 2002 expressed more restrictive views (Aguinaco Aleman and Diaz Romero) were replaced with two lawyers who were more open to legally permit the terminations of pregnancies (Cossio Diaz y Franco Gonzalez Salas). The other two justices who came to the bench after the first case was ruled (Luna Ramos and Valls Hernandez) also endorsed the less restrictive regulations adopted by Mexico City's legislative branch.

Table 5.2 The Supreme Court vote on the legal status of abortion in Mexico City

Ley Robles (2002)			Liberalisation of first-trimester abortion (2008)	
Justice	Genetic abortions	Authorisation of genetic abortion by Public Prosecutors	Justice	Re-definition of abortion & pregnancy
Aguinaco A. (1995-2003)	DO	MO	Cossio D. (2003-2018)	MU
Aguirre A. (1995-2012)	DO	MO		DO
Azuela Güitron(1995-2009)	MU	MO		DO
Castro y Castro (1995-2003)	MU	DU	Luna Ramos (2004-2019)	MU
Diaz Romero (1995-2006)	DO	MO	Franco G.S. (2006-2011)	MU
Gongora P. (1995-2009)	MU	DU		MU
Gudiño Pelayo (1995-2015)	MU	DU		MU
Ortiz Mayagoitia (1995-2012)	DO	MO		DO
Roman P. (1995-2004)	MU	DU	Valls H. (2004-2019)	MU
Sanchez C. (1995-2015)	MU	MO		MU
Silva Meza (1995-2015)	MU	DU		MU
Decision		6/5		8/3
	7/4 to uphold	to override		to uphold

Note: MU= majority to uphold; DO=dissent to override; MO=majority to override; DU=dissent to uphold

Under this new composition, the Supreme Court rendered a decision upholding Mexico City's abortion liberalisation. This decision, instead of seeking to *constitutionalise* the right to abort, was supported in a legislative deference argument (interviewee 22). In this case, Mexico City's authorities

again prevailed in the dispute. Nonetheless, as opposed to what occurred in *Ley Robles*, where the Supreme Court established a strict rule in terms of rights as a form to prevent the development of further reforms, in 2008 the Supreme Court created a precedent based in an interpretation of the jurisdiction of local authorities to regulation abortion rather than in an consideration in terms of human rights.

The strategy employed by pro-choice groups was decisive for the Supreme Court making a liberal ruling. Interviewee 17, a historical leader of the feminist movement in Mexico, explains that since the Supreme Court reviewed *Ley Robles*, pro-choice groups paid special attention to judicial issues. When the case was brought to the Supreme Court they employed the *amicus curiae* figure to explain to justices the position regarding the constitutionality of abortion legalisation. One of the clerks involved in the final draft of the judgement (interviewee 22) confirms the proactive position of the pro-choice sector –he explicitly said “feminists had come to the Supreme Court requesting *their* right to abort to be constitutionalised”.

Figure 5.4 The Supreme Court decision to the legalisation of first-trimester abortion

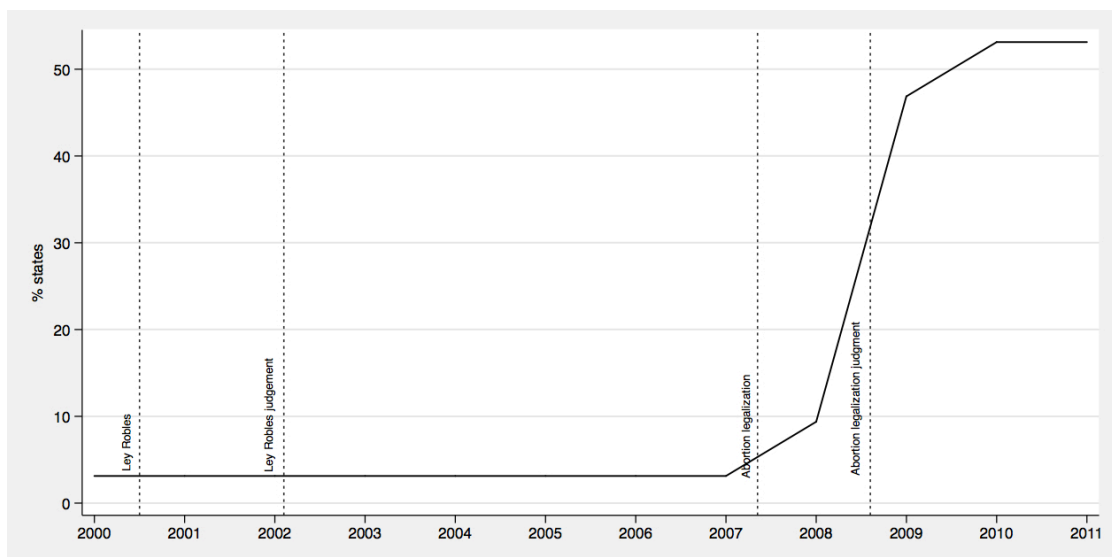


The Supreme Court’s 2008 resolution was highly covered by the media as well as celebrated by pro-choice groups around the country (GIRE, 2008). Mexico City became the first place in the whole of Latin American where abortion had been legalised and regulated to be freely and safely provided in public institutions (Kulczycki, 2011). The Supreme Court emerged more visible

for the public and more relevant for political actors, which became more interested in following –and even reacting- to its resolutions.

In 1994 the state of Chihuahua approved a reform to its local Constitution to protect the right to life from the moment of conception. The Chihuahua state reform was not followed by any other state but constituted a model for conservative legislatures to prevent the development of further reforms. The Supreme Court ruled the case related to Mexico City’s legalisation of first-trimester abortion on the 28<sup>th</sup> of August 2008. After less than three months, the local congress in the states of Morelos and Baja California, both with no-single party majority, reformed their local constitutions to introduce the right to life from conception clause. Fourteen more states adopted similar changes in 2009 and 2010, and another eight bills were submitted to the local congress but not approved. In other words, a half of the states reacted to the Supreme Court’s ruling by imposing regulations intended to block more liberal changes.

Figure 5.5 Mexican states protecting the right to life from conception



Source: author’s elaboration with data from GIRE (2012)

The backlash engendered by the validation of first-trimester abortion has been possible because the Supreme Court based this resolution on a competences argument. The legislative deference premise supporting the judgement was employed by conservative actors to successfully promote

reforms to state constitutions as a sort of insurance policy to prevent further liberalisation. This reaction, instead of being a sign of weakness, constitutes strong evidence of the relevance gained by the Supreme Court as effective arbitrator and rule-maker within the political system. The 'dialogue' that has emerged between the Supreme Court and legislative bodies makes it clear that Mexico is in the process to consolidate a conception of the Supreme Court as an influential policy-player that always has to be considered when promoting substantial legal transformations.

#### **5.4 Conclusion**

The norms on abortion matters constitute one of the most important pieces of evidence of how the state regulates life and humanity. The legal status of abortion is a good indicator of how public institutions process highly controversial issues. As in many other countries, criminalisation does not inhibit women from resorting to abortion as a birth-control method, but it does contribute to the development of unsafe services affecting the poorest of women most. In the end, abortion sheds light on an even clearer gap between law and practice and the distance that remains for Mexico to consolidate the rule of law.

International factors, demographic pressure and political liberalisation contributed to make abortion a relevant policy issue and part of political parties' agendas. From the 1970s pro-choice and pro-life movements have contended in the public sphere to promote further reforms. Anti-abortion advocates have, since the 1980s, been successful in preventing a national, general liberalisation reform, but at state level decriminalisation has gradually been established. Under democratic conditions and following this trend to ease abortion regulations, Mexico City has promoted unprecedented reforms to expand the scope for legally terminating pregnancies. In the absence the great arbitrator represented in authoritarian times by the president, political forces

have resorted to the Supreme Court in looking for an ultimate decision on the matter.

The introduction of abortion on constitutional grounds itself is evidence of the relevance gained by the Supreme Court. Whereas a centralised jurisdiction and standing have both been determinant for abortion via judicialisation to happen, *erga omnes* effects together with the force of precedent have allowed the Supreme Court to issue more effective, far-reaching resolutions. The judicialisation of abortion politics has not led to a 'constitutionalisation' of the right to terminate a pregnancy, but neither to a general criminalisation. The legal status of abortion is still at stake in Mexico and, in this regard, the Supreme Court has been particularly relevant. Although the resolutions rendered on abortion have been problematic and to some extent contradictory, they have also encouraged political actors to resume the debate and promote further changes. Some reforms have been passed to adopt less restrictive regulations, while others have been carried out to prevent further liberal amendments. In any case, all of these reforms have been reactions to what the Supreme Court has said in previous cases, evidence that supports the hypothesis that democracy, stronger institutions and new judges have all transformed the Supreme Court into a more effective policy-maker.

## 6. The Supreme Court and Expropriation Law

In 1938 President Lazaro Cardenas nationalised the Oil Industry through a decree that expropriated the concessions, facilities and assets mostly owned by foreign companies. One year later the Supreme Court of Justice determined that the right to prior hearing was inapplicable to expropriations in the decision rendered to the *amparo* lawsuit whereby the affected owner had challenged the constitutionality of the decree. Since then, this has been the dominant interpretation employed by federal courts when facing expropriation cases. In 1997, under a new institutional design and composition, the Supreme Court ratified the validity of this precedent inherited from authoritarian times. After nine years, however, the Supreme Court overrode this legacy and established that the 1917 Constitution does grant owners the right to prior hearing in expropriations.

Having analysed in the previous chapters the determinants of judicialisation, as well as the main patterns followed by the Supreme Court's performance as a policy-maker, the purpose of this chapter is to address the question of to what extent the Supreme Court has transformed the precedents established before its reconfiguration in 1994. In particular, this chapter examines the determinants of the overriding of precedent in the Supreme Court, as well as the effects that legal changes like this have produced in the legal system. The objective, hence, is to provide an understanding of how the Supreme Court has explicitly sought to make policy by modifying specific rules established in precedents.

In order to accomplish this objective, expropriation was selected to undertake this subject-centred case study because of the following reasons: first, it is a subject where the overriding has not been implicit but formally established through the corresponding formal proceedings. Second, as in the case of abortion, a subject analysed in the previous chapter, the Supreme



Court has ruled on more than one landmark case, a condition that permits us to carry out a comparison of the Supreme Court's performance in a relatively short period of time. Third, the capacity of the state to expropriate has been a highly salient issue in Mexico's history; it is highly symbolic for having been linked to landmark events such as the nationalisation of the Oil Industry, but which was also employed as a tool in the construction of the clientelistic networks that characterised the authoritarian period.

The chapter is structured as follows: the first section analyses the activity of the Supreme Court in the creation of case law, paying particular attention to files where a formal request of *jurisprudencia*-modification exists. The second consists of a revision of the main features of expropriation law and practice to establish a framework for understanding what the involvement of the Supreme Court has implied. The third section presents a detailed examination of two judgements, one in which the Supreme Court ratified the inapplicability of the right to prior hearing in expropriations, and another related to the overriding of such *jurisprudencia*. The fourth section explains the effects of this change in the legal system through the analysis of the evolution of both subnational regulations and the Supreme Court's case law related to right to prior hearing in expropriations. Finally, this chapter concludes that although the Supreme Court has timidly assumed the challenge of analysing the legacy from authoritarian times, its resolutions have become a more important source of legal change.

## **6.1 Overriding *Jurisprudencia***

The first chapters of this thesis explained the process of transformation of the Supreme Court since 1994. In particular, it has been argued that the judicial reform along with democratisation and stability within its composition make the Supreme Court to gradually gain an unprecedented policy-making role in terms of arbitration and law making, but in addition to this function, the Supreme Court has also been confronted with the challenge of using legal

concepts and interpretations inherited from authoritarian times. The purpose of this section is to provide an account of the extent to which the Supreme Court has, since its transformation in 1994, overridden the precedents inherited from the authoritarian period. For doing so, it first provides a general account of the jurisprudential activity by the Supreme Court, and, second, it presents the results of a revision of the cases originated from formal requests of case law overriding (*solicitudes de modificacion de jurisprudencia*).

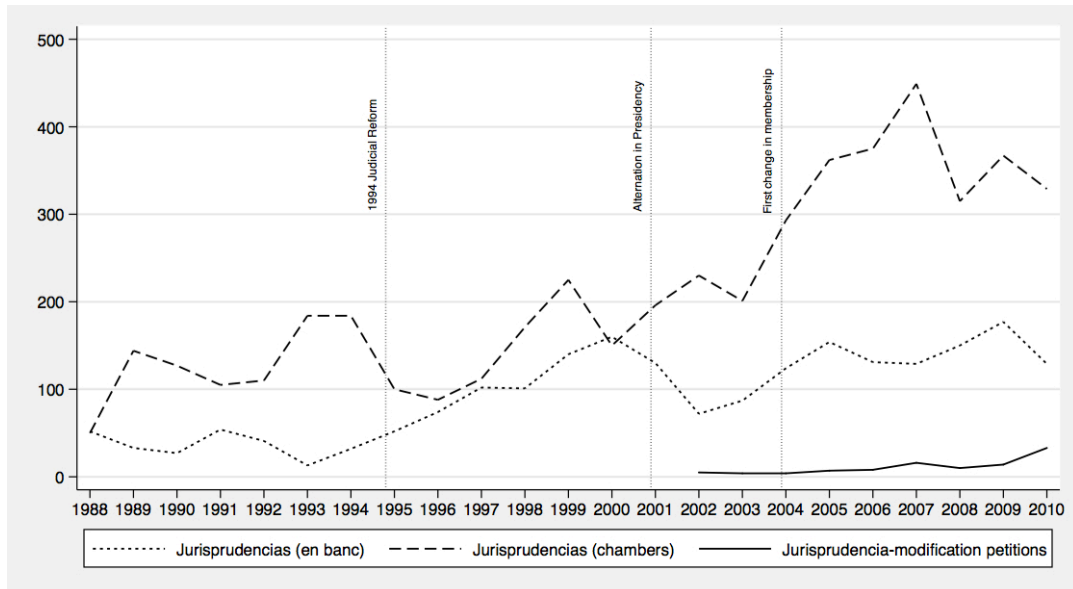
The rules for the creation and application of *jurisprudencia* have undergone a process of transformation since the enactment of the 1917 Constitution. As it was explained in the second chapter, up until 1967 the Supreme Court centralised the power to create “multiple-ruling” *jurisprudencia*. A disproportionate increase in the Supreme Court’s caseload occurred in 1960s, led in 1967 to the authorisation for circuit courts to also create *jurisprudencia*. The precedents established by these appellate courts, however, become applicable and thus binding only for courts within their own circuits (Zamora et al, 2004). This change also led to the incorporation of a new form of case law: single-ruling *jurisprudencia*. With circuit courts having the capacity to produce multiple-ruling *jurisprudencia*, the Supreme Court received the responsibility of ruling between opposing criteria established by different circuit courts.

In order to override its own *jurisprudencia* -or the precedents by lower courts- the Supreme Court employs the formal proceeding of ‘modification of *jurisprudencia*’. This procedure operates through petitions requesting a specific *jurisprudencia* to be replaced by a new precedent, which can be brought into the Supreme Court by either one of its justices or a judge from circuit courts.

The Supreme Court has modified or interrupted the application of specific precedents without following such formal procedure. Nonetheless, the relevance of formal requests relies in the fact that that they do reveal that the Supreme Court explicitly sought to make openly public that a change in case

law is taking place. Hence, to provide a clearer idea of the extent to which the Supreme Court has been able to transform the legacy from previous, undemocratic times, this chapter analyses in first place the override of *precedent in* comparison to the volume of *jurisprudencias* established per year.

Figure 6.1 Case law by the Supreme Court, 1917-2010



Source: *Expropriation law and precedents dataset 1917-2011* (see Appendix I).

Note: calculations only include formal binding precedents known as *jurisprudencia*, “persuasive” precedents known as *tesis aisladas* are excluded from the analysis.

Figure 6.1 shows how both the number of *jurisprudencias* and *jurisprudencia*-modification petitions have evolved. It reveals that the volume of binding precedents (*jurisprudencias*) established by the Supreme Court substantially increased with the renovation of its institutional design in December 1994 and also with alternation in the presidency. Before 1994, the average number of *jurisprudencia* created by the Supreme Court working *en banc*, was 36, while for four chambers together it was 129. Once the Supreme Court decreased its size from 26 to 11 justices, *en banc jurisprudencias* increased to 93.8 per year and those created by the chamber of the Supreme Court reached 139.2. These numbers increased even further after alternation in the presidency up to an average of 131 and 297, respectively for “en banc” and “chambers”.

The creation of precedent by the Supreme Court has constantly increased but also that this change has not been accompanied by a process of proper elimination of the case law inherited from authoritarian times. Certainly, not even a single *jurisprudencia*-modification petition was filed before 2002. From that year and until 2010, 101 cases of this nature were presented before the Supreme Court. The activity of this subject has rapidly gained more relevance: it went passed from 5 and 4 cases in 2002 and 2003, respectively, to 33 in 2010.

The increasing volume of this sort of cases has come from petitions by circuit judges rather than from requests by their own justices. Circuit judges submitted seven out of every ten petitions, while justices have endorsed only 11 cases. Indeed, only five out of the 18 justices that composed the Supreme Court in the period 1995-2010 employed its right to request the overriding of precedent. This fact provides evidence that shows certain reluctance by the Court's members to formally replace precedents.

The mixed system the Supreme Court employs for creating *jurisprudencia* permits overrides without making explicit reference to specific precedents. For instance, the Supreme Court has discretion enough to establish a *jurisprudencia* in direct contradiction with a previous one, which effectively gives us two valid but contradictory *jurisprudencia*. However, as interviewee 34 explains, the supervision mechanisms that exist in the federal judiciary promote a constant monitoring of compliance with the more recent criteria the Supreme Court establishes.

Although some signs of change have emerged in recent years, the Supreme Court has barely addressed the question of eliminating the legacy left by the justices that integrated the Supreme Court before democracy. This fact makes even more outstanding what occurred in 2006 regarding the right to prior hearing in expropriations. There have only twelve cases where their own justices have requested a modification of precedent. This chapter analyses one of them to assess the effects of rulings and precedents beyond the judicial arena.

## 6.2 Expropriation in Law and Practice

Expropriation was an essential instrument in the construction of the authoritarian regime that ruled Mexico for seven decades. It was the legal institution the PRI administrations employed to nationalise complete sectors of the economy as well as for implementing an enduring land redistribution policy (called *reparto agrario*). In democratic Mexico it has also had a considerable salience for being linked to some of the most acute conflicts that have emerged in the country since alternation in the presidency began in 2000. The impeachment of Andres Manuel Lopez Obrador, Mexico City's Head of Government in 2005, the unsuccessful construction of a new airport in Mexico City and the failed nationalisation of sugar mills, just to mention a few examples, all originated in expropriations.

The symbolism around expropriation is such that every 18<sup>th</sup> of March children in primary schools commemorate the decision whereby the Mexican government nationalised the Oil Industry in 1938. Nonetheless, diffusion of power and political fragmentation both have translated into more difficult scenarios for public authorities to carry out expropriations. This legal procedure has been frequently depicted in public debate as an aggressive, undemocratic instrument, a legacy from the authoritarian period preventing economic development and the establishment of the rule of law (Del Duca, 2003; Katz, 2001).

This section provides an examination of expropriation in law and practice in order to set a framework to later explain why it has been relevant for the performance of the Supreme Court and, particularly, how the decisions of this decision body have produced effects beyond judicial boundaries. Accordingly, the legal aspects are first reviewed before an analysis of the three notable experiences that clearly illustrate why this legal instrument has been so salient in Mexico's contemporary history is conducted.

The 1917 Constitution combines features typical of western constitutionalism such as individual rights, and a republican democratic system with an unorthodox approach to social rights inherited from the demands embraced by some sectors of the revolutionary movement, originating in 1910 and which culminated precisely in the promulgation of this charter (Diaz Diaz, 1997; Madrazo, 1985). The 1917 Constitution establish a bill of rights as well as the founding rules of the political regime, but it also created some norms that in practice constituted a political program inspired in the re-distributional aspirations of the regime that emerged from Revolution. There has been a latent but permanent tension between individual and social rights<sup>1</sup> that, certainly, has conditioned the way the state has intervened in the economy (Carbonell, 2004).

Article 27 of the Constitution set the foundations for property relations in the country. Under this article, the nation has original ownership over all lands, waters and natural resources in the country. The nation transfers this ownership to the state for its regulation and administration. The state must conduct this duty guaranteeing the observation of the ‘social function of property’ clause, promoting a fair distribution of wealth and guaranteeing that the public interest is to be held above private interest. On behalf of the nation, the state is entitled to establish different ‘modalities’ to allow property to be controlled by private parties. In practice, the notion of ‘property modalities’ derived from the constitution materialises in two different types of property regulation: individual, mostly included in civil codes and statutes, and collective, fundamentally established in the agrarian laws that differentiate between *comunidades* and *ejidos* property<sup>2</sup> (Azuela and Cancino, 2006).

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<sup>1</sup> Such social rights are mainly regulated in articles 3, 27 and 123; respectively about education, property and labour regulations.

<sup>2</sup> *Communities* are those groups whose ancient rights were recognised and protected by the 1917 constitution. *Ejido*, on the other hand, is also a collective form of ownership but instead of having a historical nature, it was created by the state through a lasting program of land distribution.

Under the Mexican constitution, according to some commentators, individual rights are extremely weak while the state is overwhelmingly powerful (Del Duca, 2003; Elizondo Mayer-Serra, 2001; Katz, 2001). Other authors argue that, if any, the weakness of property rights lies in political practices and not in legal norms (Azuela, 1989; Herrera, 2006). Both positions, however, agree that in practice the government has played a leading role in the development of property relations in the country. The relevance of expropriation relies precisely on its connection to this point as one of the government's favourite instruments to intervene in specific sectors of the economy, implement long-term policies and create clientelistic links to corporative organisations.

As a legal figure intrinsically linked to property, the essential rules governing expropriations also derive from article 27. In particular, five features distinguish Mexican constitutional expropriation regulations: first, they are only authorised for reasons of public use (*causa de utilidad pública*) and by means of economic compensation (*mediante indemnización*). Second, unlike other countries' experiences, expropriations do not have to be paid before the consummation of expropriating acts, so administrative authorities can take control of an expropriated property and compensate the affected owner afterwards (Diaz Diaz, 1992; Lowenfeld, 1971). Third, compensations should be granted according to the values established in government land registries (*catastros*). Fourth, the constitution explicitly prohibits any kind of judicial adjudication different to compensation amounts<sup>3</sup>. Finally, there is no regulation addressing how the expropriation process must be followed and, therefore, in which stages the authorities have to respect what specific rights.

For almost twenty years, in the absence of a secondary law, the government conducted expropriation only following constitutional rules. In

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<sup>3</sup> The increased or decreased value of such private property due to improvements or depreciation, which occurred after such assessments, is the only portion of the value that shall be subject to the decision of experts and judicial proceedings. This same procedure shall be followed in the case of property whose value is not recorded in the tax offices”.

1936 the administration of Lazaro Cardenas successfully promoted the creation of a specific expropriation law. The main goal that this statute sought to accomplish was to establish a more detailed definition of 'public use', as well as creating specific proceedings for expropriations to be carried out. The 1936 Expropriation Law distinguished between two general categories of public use reasons: those concerning the provision of public services and others related to the re-distribution of wealth and development of companies (without clarifying whether they should be private or public). Moreover, this law formalised the use of expropriation exclusively by decree issued by administrative institutions (i.e. the presidency and governorships).

As an instrument that contributed to the permanence of the authoritarian regime's power, the Expropriation Law remained essentially the same until 1992, a year when in the context of the negotiations of the North-American Free Trade Agreement (NAFTA), article 27 suffered its major renovation. The 1992 reform led to the termination of *reparto agrario*, the creation of a new federal agency for managing land titling, and to the elimination of a clause that explicitly prohibited collective owners -*ejidos* and *comunidades*- (Cornelius and Myhre, 1998).

The counterparts of domestic reforms were the new rules established in the NAFTA. These rules implied, according to some commentators, that Mexican owners were to have less legal guarantees than foreigners (Puig 2007). According to NAFTA's article 1110, in expropriations cases the compensation must be of at least the commercial value, an amount that, unlike what the constitution determines, has to be paid in a single instalment without delay. Moreover, NAFTA's provisions also differ from the constitution in the fact that they explicitly give investors the right to a prior hearing when facing expropriations.

Certainly, the main source of change in expropriation matters came from an international disposition rather than domestic law. Under NAFTA foreign investment has broader guarantees against administrative decisions than



those the constitution grants to Mexican citizens, a condition that puts the latter, at least in formal terms, in a disadvantaged position. The literature regarding the use of expropriation has underlined that in developing countries legal institutions, instead of creating more security, frequently imply more risks for foreign capital<sup>4</sup>. In Mexico, the symbolism surrounding the 1938 Oil Industry Nationalisation has reinforced this perception, disregarding the effects of international regulation in the way expropriations are conducted in practice.

From the extraction of oil to its trade, foreign companies dominated the oil industry since it was first established in Mexico. When the 1917 Constitution was enacted, foreign investors observed that article 27 failed to provide enough protection to private capital, causing their investment to be at latent risk to what government authorities may do to them (Meyer 1995). Even though a tension existed after 1917, it wasn't until 1937 that a labour controversy unleashed the conflict between foreign companies and the Mexican federal government (Del Duca, 2003).

In 1937 the Oil Workers Union (*Sindicato Unico de Trabajadores Petroleros*) requested private companies to confirm an agreement invalidating all previous contracts they had signed with the small unions. Upon rejection by the industry, the Union Organised a ten-day strike and sued companies in the Federal Board of Arbitration and Conciliation, an administrative court in charge of labour related cases. In December of the same year, the Board rendered a decision condemning oil companies to compensate workers 26 million pesos for lost wages, a decision that was ratified by the Supreme Court on April 1st, 1938.

Since companies refused to comply with the judgements rendered by both organs, President Lazaro Cardenas himself held negotiations with their representatives requesting them to pay the compensation, promising that he

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<sup>4</sup> See for example Minor (1994).

will convince the union to end the strike. Companies rejected the offer under the argument that no real guarantees existed assuring the unions would comply with their part of the agreement (Meyer and Aguilar Camin, 1990). Under the argument that the labour dispute had already produced harsh consequences in the country, on the 18<sup>th</sup> of April 1938 the Mexican government issued a decree declaring the expropriation of the 17 companies involved in the labour conflict.

The consequences of this decision are well known: at the international level it provoked difficulties in diplomatic relations with the United States, United Kingdom and Netherlands, to which most of the companies belonged (Jayne 2000); at the domestic level it allowed Mexico to have control over a resource that from the 1980s contributed a large proportion of their federal expenses. The Oil Expropriation is paradigmatic for being a symbol of nationalism rather than for becoming the model of public-private relations in the country. Indeed, Mexico nationalised banks using expropriations (1982), but in the case of the electric industry (1960) the government employed an ordinary acquisition procedure.

The relevance and most evident social effects of expropriation are the visible land policies implemented by Mexican governments since the 1930s. Expropriation was extensively used for taking land from private hands to be later re-distributed in the form of *ejidos*, a portion of land collectively owned intended to be mainly used for agricultural purposes (Warman, 2001). Nonetheless, as Mexico became a more urban country, the government began to expropriate land from *ejidos*, as a means to regularise the informality produced by the ban imposed on *ejidatarios* on selling their land (Jones and Pisa, 2000).

Between 1968 and 2004 the federal government expropriated an extension of land equivalent to 25% of the area classified as urban, more than a half from *ejidos y comunidades* (Saavedra, 2006). As Varley (1998) points out in a text devoted to the study of the political uses of illegality in Mexico, the relevance

of expropriation was such that it contributed significantly to the stability of the authoritarian regime because it allowed the PRI to incorporate the urban poor in to the corporatist system originated in the 1930s.

### **6.3 The Right to Prior Hearing in Expropriations**

Until 2006, the dominant interpretation of the right to prior hearing by federal courts was that it was inapplicable in cases originating in expropriations (Herrera, 2006). That year, however, the Supreme Court analysed two cases that led to the establishment of new precedents holding that all public authorities must concede and protect the right to prior hearing before taking property from private owners. This change required for the Supreme Court to first override a *jurisprudencia* and, later, to set a new precedent explicitly specifying that according to the constitution hearings must be held before expropriation decrees are formally issued. Why did the Supreme Court transform this long-lasting interpretation? The hypothesis proposed by this thesis is that legal change through the overriding of precedent occurred as a result of political fragmentation, changes in the Supreme Court's composition and also in the decision of more experienced justices to more proactively seek to advance their policy preferences.

In 1999 the Supreme Court published "The Right to Prior Hearing and Expropriation", a volume compiling the debates, judgements and dissenting opinions related to the decision rendered to the *amparo* 1956/1994, the case wherein the Supreme Court created a *jurisprudencia* confirming the inapplicability of this right in expropriations. A publication like this is not a common practice by the Mexican Supreme Court, so it revealed the relevance that justices conceded to the ruling.

The *amparo* filed as 1956/1994 challenged a decree issued by the federal government to expropriate for the regularisation of 68.5 hectares located in Mexico City. The demand submitted by *Inmuebles Pridi*, a real-estate company,

was not in itself particularly salient; it was an ordinary case similar to thousands filed every year before federal courts. Upon the expropriation by federal authorities, *Inmuebles Pridi* submitted an *amparo* petition that was denied by the district court in charge of its resolution. The plaintiff, represented then by Vicente Aguinaco Aleman who would be appointed Chief Justice two months later, presented an appeal in the Supreme Court in November 1994 just one month before the enactment of the 1994 judicial reform<sup>5</sup>. Under its new institutional design, the Supreme Court took more than two years to render a decision on the case.

The final judgment, drafted by reporting justice Mariano Azuela, ratified the decision by the district court, through the unanimous vote of all justices *en banc*. But despite the agreement regarding the specific effects of the cases, the Supreme Court could not reach a consensus around the constitutionality of the right to prior hearing in expropriation. On one side, reporting justice Azuela along with Justices Castro, Diaz Romero, Ortiz Mayagoitia, Roman Palacios and Sanchez Cordero formed a coalition opposing the argument in favour of the right to prior hearing. This group of justices based its position in three arguments: a) the prior hearing is not a requirement included in article 27; b) there is no contradiction between article 14 –which prohibits depriving a person of their own property without a trial- and 27 because the former is related to a subjective, individual right that is always subject to the authority of social rights like those included in article 27; c) expropriation must be undertaken only under urgent circumstances, so the action of judicial authorities can be required to define whether an expropriation decree complies with the social need requirement.

On the other side, the justices in the minority -Aguirre Anguiano, Gongora Pimentel, Gudiño Pelayo and Silva Meza- drafted a dissenting

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<sup>5</sup> It is proper to bear in mind that 1994's judicial reform came in to force on the first day of 1995. Given the nature of the reform the cases under its jurisdiction had to be analysed under the new rules of the time.

opinion defending the applicability of the right to prior hearing to expropriation. Their arguments can be summarised as follows: a) the right to prior hearing contributes to make expropriation more rational; b) some state expropriation laws do protect this right, condition that has produced no conflict with constitutional provisions; c) the NAFTA does grant this right to foreign investors, leaving Mexican citizens at a disadvantage.

Albeit divided, the Supreme Court's final judgement led to the creation of *jurisprudencia* holding that "the right to prior hearing does not rule on expropriations". The Supreme Court did so by adapting a previous *jurisprudencia* determining that the right to hearing does not rule on expropriations. In other words, the Supreme Court introduced the concept of "prior" to begin eliminating rules permitting excessive discretion held by administrative authorities, the first step to the adoption of a completely different interpretation of the constitution.

In 2006 the Supreme Court once more faced the question of the applicability of the right to prior hearing in expropriations. A combination of two rulings allowed the Supreme Court to override the 1997 precedent. It first overrode the precedent and in a second case established a new *jurisprudencias* holding that prior hearing does apply to expropriations. The overriding and establishment of a new precedent meant the culmination of the process of liberalisation that had started a decade before. This evidence is relevant in the context of this dissertation because it makes clear how political fragmentation and the experience justices gained a result of stability in the bench had both been determinant for the Supreme Court to actively engage in policy-making. Additionally, this change was also linked to the orientations justices have towards the relationship between supranational and domestic regulations.

In September 2001, President Vicente Fox issued a decree expropriating the assets and facilities of 27 sugar mills in order to secure the provision of sugar in the country, a subject that the decree considered of public interest. The affected owners filed different *amparo* petitions requesting federal courts

to annul the measures implemented by the federal government. Among these judicial controversies the one submitted by *Fomento Azucarero* stood out for receiving positive responses from both district and circuit courts. The Secretary of Agriculture, on behalf of the federal executive, appealed in the Supreme Court the decisions by lower courts, requesting the Supreme Court to ratify the constitutionality of this expropriation.

As explained in chapter 4, the Supreme Court has limited powers for controlling the docket but it has the capacity for discretion in managing the timing for resolving a case. In the *Fomento Azucarero* case, the Supreme Court waited until 2006, President Fox's last year in office, to debate and render a final decision. Reporting justice Juan Diaz Romero circulated in January of that year a project proposing to confirm the constitutionality of the decree based on the application of the 1997 precedent. Under a different composition –three new justices had joined the Supreme Court- the Supreme Court rendered an 8/3 decision to override the precedent impeding the application of the right to prior hearing to expropriations, and therefore, to ratify the invalidation of the Sugar Mills decree.

The decision rendered by Supreme Court was the product of a majority composed by: the four justices in the minority in 1997, plus justice Margarita Luna Ramos, who had been appointed in 2004, and, surprisingly, three justices that voted with the majority in 1997- Ortiz Mayagoitia, Sanchez Cordero and Azuela Güitron –the latter was reporting justice in the 1997 case. Certainly, Diaz Romero was the only member of the previous majority ratifying his previous position, this time joined in the minority by justices Cossio Diaz and Valls, who had come to the bench in 2003 and 2004 respectively.

Table 6.1 The Supreme Court and the right to prior hearing on expropriations

	1997 Inmuebles Pridi (en banc)		2006 Fomento Azucarero (en banc)	2006 <i>Jurisprudencia</i> Second Chamber
Aguinaco (1995-2003)	Absent	Cossio (2003-2018)	DU	-
Aguirre (1995-2012)	DO		MO	MO
Azuela (1995-2009)	MU**		MO *	-
Castro (1995-2003)	MU *	Luna (2004-2019)	MO	MO
Diaz (1995-2006)	MU		DU **	SU
Gongora (1995-2009)	DO		MO	MO **
Gudiño (1995-2015)	DO		MO	-
Ortiz (1995-2012)	MU		MO	MO
Roman (1995-2004)	MU	Valls (2004-2019)	DU	-
Sanchez (1995-2015)	MU		MO	-
Silva (1995-2015)	DO		MO	-
Decision	6/4 MU		8/3 MO	4/1 MO
Main Litigants	Real Estate firm vs. PRI-Controlled Executive		Sugar Industry vs. PAN-controlled Executive	-
Expropriated Property	68.5 hectares of urban land		Facilities and assets of Sugar Mills	-
Concrete Effect	Refuse <i>amparo</i> /Defendant Prevails		Concede <i>amparo</i> / Plaintiff prevails	-
Case law	The right to prior hearing does not rule on expropriation		Overrode but did not replace <i>jurisprudencia</i>	The right to prior hearing does rule on expropriation

Note: MU= majority to uphold; DO=dissent to override; MO=majority to override; DU=minority to uphold.

(\*)= Chief Justice; (\*\*)=Reporting Justice

What factors made this change possible? The composition of the Supreme Court was a first relevant factor. Three new justices had come into the bench at the moment the second was solved; two of the justices that composed the majority in the first case were among the three justices that left the court. The second one was political fragmentation. Political power was so much more diffused in 2006 than in 1997. When the Supreme Court rendered the 1997 *jurisprudencia* the PRI was in power and still in control of both chambers of the Congress. Nine years later, the PAN was in control of the presidency and the congress had been with no single-party majority since September 1997.

Political fragmentation has created incentives for justices to decide the cases at hand seeking to establish their policy preferences. Moreover, after a

decade in the bench, many of them gained an important amount of experience that caused them to be less reluctant to render decisions challenging for the other branches of government. In short: in 2006 justices were already completely aware of the political power entailed in their posts and were more eager to actively employ it to take part in the policy and law making process in the country.

A third element involved in this legal change was the tension between NAFTA and domestic regulations. At least formally, the goal some justices sought to achieve was to attend to the weak position of Mexican owners to that of foreigners regarding expropriations. The arguments advanced by the justices that changed in the second case the position they adopted in the first one confirm that they did not only become less reluctant to transform interpretations inherited from the authoritarian era but also more eager to amend what they understood as contradictions between domestic and supranational regulations.

One of the justices in the 2006 minority, who was interviewed for this dissertation, explained that his major concern when deciding that case was the declining capacity of state institutions to effectively regulate private interests, so his position was for preserving some basic rules allowing the state to continue effectively representing the public interest. Interviewee 3, a Mexican lawyer working for the World Bank in property regulation issues, claims that one of the most important concerns that encouraged overriding the 1997 precedent was not so much about adapting Mexican regulations to NAFTA but rather to impose harder requirements on expropriations, a condition that would be particularly important in the case of the eventual victory of leftist Andres Manuel Lopez Obrador in the 2006 presidential election.

Certainly, the Supreme Court overrode a precedent but it did not establish a formal replacing rule: it just held the inapplicability of the right to prior hearing in expropriations should no longer be in force. Tracing what



happened afterwards shows that once the 2006 elections passed, the Second Chamber of the Supreme Court created a new *jurisprudencia* to formally establish as binding precedent the prior hearing rule on expropriations. Later on, the Supreme Court complemented this case law by including exceptions for allowing administrative authorities to expropriate without being required to hear the cases before formally issuing the corresponding decree.

Elizondo endorses the ‘targeted overriding’ hypothesis and Perez de Acha (2010) in an article published in 2010. They considered that this decision was part of a group of initiatives that emerged in the context of the 2006 election intended to create limits for the eventual victory of left-wing party. So, were justices more sincere or were they acting as delegates of the coalition that was in power at the time? The evidence reviewed shows that the decision resulted from the convergence of both factors: some justices were mainly motivated by their understanding of the disadvantaged position of nationals in comparison to foreign owners; others endorsed this change to contribute to the establishment of stricter rules more protective of private interest. In any case, what this dissertation aims to underline is that the overriding of precedent has not been usual practice by the new Supreme Court. The next section analyses this aspect and provides evidence to show how the new political context permitted this new interpretation to generate effects in local expropriation regulations.

#### **6.4 The Effects of *Jurisprudencia* beyond Judicial Boundaries**

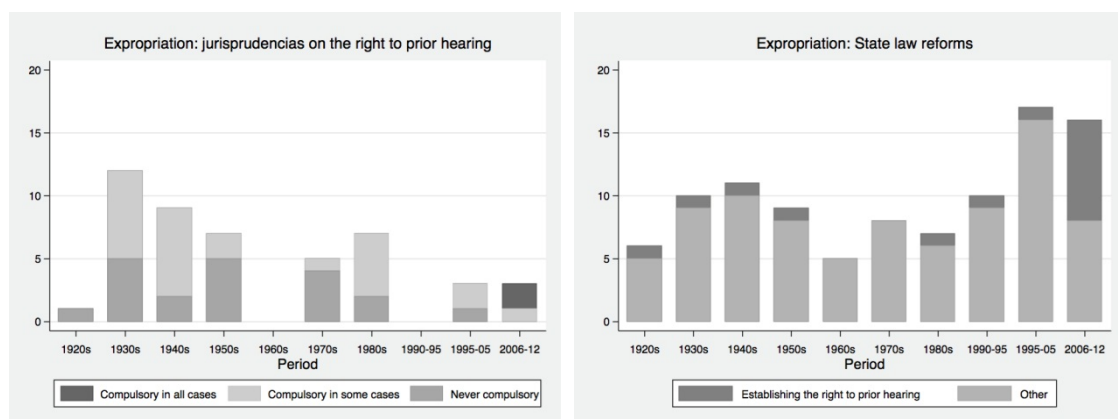
The purpose of this section is to show how, in democratic times, the Supreme Court’s judgements and precedents have become a source of legal change at subnational level, particularly encouraging state legislatures to adapt local regulations to new constitutional interpretations. This section therefore provides an account of the Supreme Court's activity related to the

establishment of case law (*jurisprudencia*), followed by a specific analysis of the evolution of the constitutional interpretation of the right to prior hearing in expropriations.

In order to have a clear vision of the significance of the 2006 decision, this research carried out a review of the 47 precedents established by the Supreme Court from 1917 to 2012 on the subject, as well as of the 99 amendments to the subnational expropriation laws conducted in the same period. Regarding the first element it is important to note that, under the 1917 Constitution, the judiciary was explicitly prohibited from reviewing anything different to the compensation in cases emerging from expropriations.

Nonetheless, as figure 6.2 reveals, the Supreme Court has constantly ignored such clauses by establishing different interpretations of the right to prior hearing in expropriation cases. The Supreme Court, which had already established some precedents, became more active in creating *jurisprudencia* in the 1930s, the decade when the secondary law was created (1936), but most importantly, a period when the government expropriated the oil industry from foreign investors.

Figure 6.2 Expropriation state laws and case law, 1917-2012



Source: *Expropriation law and precedents dataset 1917-2011* (see Appendix I).

Note: these calculations include both proper *jurisprudencia* as well as *tesis aisladas*.

Among the claims the expropriated companies presented to challenge the constitutionality of the 1938 decree, was that the federal government did not comply with the right to a prior hearing that they were entitled to. The

Supreme Court at that time held that this right was inapplicable to expropriations. Before the enactment of the 1934 Expropriation Law –the secondary law at federal level- 7 out of 8 *jurisprudencia* authorised the right to prior hearing under specific circumstances, in cases involving *ejidos* for example. After the 1938 Oil Expropriation, the dominant constitutional interpretation on the subject essentially took the opposite stance, a feature that continued even after the renovation of the Supreme Court in 1994.

Turning to subnational regulations, the great variance that exists among them is remarkable. In the state of Jalisco, for example, local expropriation law has been amended five times, but in states such as Hidalgo no change was made for more than seven decades until 2010. Indeed, in the states where there has been alternation in the governorship, the average length of a law has been 18.6 years, while in the states that have always been governed by the PRI this figure reaches 31.3 years. Since 1995 it is evident that there has been increasing legislative activity on the subject, but whilst before 2006 the link to the right to prior hearing was not particularly apparent, afterwards the relationship became very clear.

The effect of democratisation on subnational expropriation regulations has been especially noticeable in the provisions related to the right to prior hearing. Before 1935 only the state of Jalisco required administrative authorities to comply with this right before conducting expropriations. By 2006, the number of states conceding this right had increased only to seven; in the period 2007-2012 the states of Aguascalientes, Hidalgo, Michoacan, Puebla, San Luis Potosi, Sonora, Tamaulipas, Veracruz, all passed amendments to introduce this right to their legal systems. In other words, eight out of the fifteen justices granting the right to prior hearing in expropriations incorporated this provision after the Supreme Court rendered in 2006 a decision establishing this rule.

The Supreme Court, therefore, provoked the most substantial change on this matter since the Constitution was promulgated in 1917. This evidence

shows, first, that subnational authorities are aware of how the Supreme Court decisions may affect their performance. To put it another way, if subnational authorities adapt their local legal systems to the Supreme Court's judgements and case law it is because they seek to avoid the legal costs of not complying with them as it may, for example, signify the start of an increasing number of cases demanding expropriations proceedings.

The enactment of a federal expropriation law had a great impact on further legislative innovations and judicial interpretations. The incorporation of national level regulations accompanied by the landmark event that was the Oil Expropriation provoked the development of subnational expropriations regulations. Save some exceptions, state level laws mostly resembled federal ones, excluding a specific reference to the right to prior hearing. In contrast to the transformation that distinguished the authoritarian period, under increased pluralism the most important changes have been linked to the ratification of NAFTA, showing therefore the prominence gained by international law in domestic affairs. However, if there has been a noticeable change in the most recent years it was the emergence of the Supreme Court's precedents as a source of legal transformation on a national-scale.

## **6.5 Conclusion**

The objective of this chapter was twofold: first, it sought to explain that precedent overrides are influenced by political factors, and, second, to show that in democratic conditions the effects of judicial rulings and precedents are expansive. In authoritarian times, the Supreme Court used to endorse highly salient presidential policies, a characteristic that did not automatically change with institutional enforcement resulting from the 1994 judicial reform. The key factor that allowed legal change was the emergence of a more plural and competitive political context, but also the experience gained by justices themselves. The Supreme Court has passed from a period of transition to a

period of consolidation that has led to the more active use of all of its policy-making instruments.

The evidence presented in this chapter makes clear that in recent years the Supreme Court has become a very important source of change in expropriations regulations. The Supreme Court has overridden precedent with the intention of producing effects in the political arena. In the case of expropriation the impact was not particularly related to the original intention but it nonetheless led to a relevant legal transformation. The Supreme Court has gradually gained the role of ultimate arbitrator that presidents used to play in the authoritarian period. Additionally, democratic times have also raised its influence as a source of nation-wide legal change. In short: the Supreme Court has become a more active political referee and a more effective legislator.

## 7. Summary and Conclusions

Over the last decades, countries of different regions of the world have witnessed the emergence of judicialisation and democratisation. On one hand, judicialisation meant the transference of an extraordinary amount of political power from executive and legislative institutions to courts (Tate and Vallinder, 1995). On the other, democratisation led to the emergence of genuine representative institutions in countries formerly governed under authoritarian rule (Huntington, 1991). In the countries where these processes have converged a substantial transformation in the policy-making processes has been produced. Paradoxically, as representative institutions became genuine sources of policy and law, an increasing volume of government actions and laws began to be ultimately defined inside the courtroom.

Judicialisation has been linked to different factors, from the establishment of supra-national judicial bodies (Stone Sweet and Brunell, 1998) to the spread of human rights rhetoric (Epp, 1998; ten Kate and van Koppen, 1994). At the domestic level, however, the adoption of broader constitutional review powers has been underlined as a source of the empowerment judicialisation has implied (Couso et al., 2010; Epstein et al., 2001; Ferejohn and Pasquino, 2003; Ginsburg and Moustafa, 2008; Hirschl, 2008; Shapiro, 2002; Sieder et al., 2005; Stone Sweet, 2000). The literature on comparative judicial politics has in recent years asserted that authoritarian rulers have resorted to the incorporation of stronger forms of constitutional review as a method to preserve their hegemony in the case of their eventual demise (Ginsburg, 2003; Hirschl, 2004). However, even where such insurance policy/hegemonic preservation strategy has been employed, courts have gradually emerged as more relevant sources of law and policy.

Why do courts established under authoritarian become effective policy-makers in democracy? Drawing on both the scholarship on Latin American

judicial politics and the separation-of-powers approach for the study of courts (Epstein and Knight, 1998; Ferejohn, 2002; Ferejohn et al., 2004; Magaloni et al., 2011; Rios Figueroa, 2007), and by using Mexico as a case study, this thesis has, through the previous six chapters, argued that the emergence and consolidation of courts as policy-makers has occurred as a result of the convergence of three factors: institutional change, democratisation and stability in the bench.

First, Mexico passed in 1994 an ambitious constitutional reform that adopted broader constitutional judicial review powers of the exclusive jurisdiction of the Supreme Court. The reform substantially expanded the authority of this decision making body, virtually transforming it into a constitutional court but without removing its role as the last resort court within the federal judiciary. The institutional change implied in this reform meant the provision of veto power to the political actors that receive legal standing for submitting constitutional demands to the Supreme Court. The adoption of broader mechanisms of constitutional review created a new set of incentives for political actors to judicialise government action and legislation.

Second, Mexico has undergone a process of democratisation in recent decades that has permitted opposition forces to gain an equally unprecedented influence over policy-making processes at national and subnational levels. Democratisation has led to a process of political fragmentation in a country that, up to the 1990s, was distinguished for being an authoritarian regime dominated by the combination of a strong *presidencialismo* with the hegemony of a single political party. Political fragmentation from democratisation substantially transformed policy-making processes, but also triggered the use of constitutional litigation by political actors and provided increasing incentives for the Supreme Court to more proactively engage in policy-making.

Third, throughout Mexican history instability has been one of the main features of the Supreme Court. Since the 1994 judicial reform came in to force,

the Supreme Court's composition has gained an equally unprecedented stability creating a scenario for justices to become more experienced and aware of their political influence. Experience from stability has allowed justices to more proactively and strategically seek to engage in policy making in terms of arbitration and rule-making. In a more democratic context and with more effective tools, the Supreme Court emerged as an effective policy-maker.

The purpose of this final chapter is threefold: first, it presents a summary of the conclusions which emerged from the empirical analysis of Mexico as a case study; second, it provides a discussion of the contributions of this thesis to the corresponding literature; and third, it assesses both conclusions and implications in the light of future research. The chapter is structured in five sections: the first re-assesses the theoretical foundations of this thesis and explains why the approach employed constitutes an insightful contribution for the empirical study of courts. The second examines the conclusions this dissertation arrived at regarding the relationship between judicialisation and democracy, explaining why policy-making by courts is essentially determined by the extent to which political actors delegate political power in judicial institutions. The third analyses the effects of political fragmentation and stability in policy-making by courts in terms of arbitration and rule-making, paying particular attention to the different institutional tools courts employ to produce effective policy outcomes. The fourth section focuses on the effects of judicial rulings on the crafting of policy and law beyond the judicial arena. Finally, the fifth section presents an examination of the paths that future research on the subject may follow.

## **7.1 Courts as Policy-makers**

The empirical inquiry of courts from political science is based on a single but fundamental premise: courts are important because their decisions produce effects on society. The endeavour of researching the policy effects of courts



implies two particular challenges: first, it requires establishing the appropriate conceptualisation of policy to explain how courts can be considered as policy-makers. Second, it involves defining what specific outcomes produced by courts can be regarded as policy decisions. The judicial politics scholarship has provided insightful contributions for the understanding of courts as policy-makers. However, due to the difficulty of researching the policy content in the highly technical texts, this scholarship has predominantly targeted decision-making as a proxy for explaining policy-making (McGuire et al., 2009) The emphasis made in explaining the process (decision-making) rather than the product of judicial decisions (policy-making) has not only been ironic but also problematic as it has led to a partial assessment of courts performance.

The main purpose of this research was, by analysing in-depth the case of Mexico, to provide a comprehensive explanation of why courts established under authoritarian rule become effective policy-makers in democracy. This research faced the challenges of conceptualising policy-making by courts and operationalizing such conceptualisation in a plausible and objective way. The theoretical and methodological choices used in this thesis aimed to address such challenges by analysing the nature of adjudication in order to better apprehend the complexity implied in the rulings handed down in constitutional review cases. As a result, this thesis considered that a comprehensive account of policy-making by courts should not be based on an understanding of judicial rulings as sum-zero decisions, but on the awareness that they at the same time include elements that arbitrate political conflict and establish rules of general application.

The lack of enforcement instruments has been regarded as the feature that determines the infeasibility of policy-making by courts. Having no formal abilities to make their decisions binding, some commentators claim, make courts largely depend on other institutions to enforce their rulings (Ronsenberg, 2008). Certainly, unlike executives and legislatives, courts do not

have direct control neither over the purse nor over the sword. Nonetheless, this dissertation has ascertained, this condition by no means implies that courts do not exercise political power when allocating political resources among the litigants that submit cases before their jurisdiction, and creating norms that produce effects beyond judicial boundaries.

The dispositions courts establish in the rulings they render in constitutional review cases create a concrete, particular and retrospective rule that defines the party that prevails in a legal dispute. Furthermore, judicial rulings found such dispositions in a specific interpretation of the relevant law that establishes another rule, this of an abstract, general and prospective nature (Stone Sweet, 2002; Hansford and Spriggs, 2006). In other words, judicial rulings do make policies in terms of principles, or general views regarding how public issues should be conducted; policy lines, or strategies related public authorities have to deal with such public issues; and specific measures, or concrete instruments that display policy lines.

Constitutional review allows courts to perform two policy-making roles: arbitrators through dispositions and rule-makers through the reasons founding such dispositions. To perform these policy-making roles, however, courts largely depend on the inputs litigants bring before their jurisdiction, as well as in the formal and informal rules determining the effects judicial rulings can produced within and beyond the judicial realm. Noticing the relevance of institutions, this thesis proposed that in the design of constitutional review there are four elements that particularly influence the capacity of courts to make policy: standing (how accessible is the court to different types of actors); jurisdiction (how centralised is constitutional review within an specific legal system); effects of rulings (what actors are bound to follow dispositions); and precedent (to what extent reasons founding dispositions constitute binding rules).

Based on this analytical framework, this thesis claimed that up to the 1994 judicial reform, the institutional design of constitutional review provided the

Mexican Supreme Court with limited tools that prevented its emergence as an effective policy-maker. Since the birth of Mexico as an independent nation in the nineteenth century, the Supreme Court underwent a complex process of institutional consolidation. It acquired the power of constitutional review with the creation of *amparo* and later its rulings gained authority with the incorporation of *jurisprudencia*. However, the nature of these tools along with the emergence of an authoritarian regime prevented the development of a proactive Supreme Court in policy-making terms. The 1994 judicial reform constituted a revolution for the Supreme Court as it provided justices with unprecedented constitutional review powers. The establishment of centralised jurisdiction, standing to privileged actors, *erga omnes* effects and the reinforcement of *jurisprudencia* together, set a completely new institutional framework to be employed by the Supreme Court in an increasingly competitive political context.

The literature on Mexican judicial politics has gradually developed since the 1994 judicial reform came in to force. This literature has particularly agreed in underlining the effects democratisation has produced on the Supreme Court's performance. Nonetheless, this concurrence has not been accompanied by an agreement on partisan bias and autonomy. Moreover, little attention has been paid to the effects of the transformation lived within the Supreme Court on its own decision-making processes. Furthermore, in methodological terms there has been an understanding of judicial rulings as sum-zero outcomes that affect only the parties in conflict. Overall, the literature on Mexican judicial politics (Magaloni, 2003; Magaloni, 2008) has fallen in to the same paradox as the one analysing what occurs in other latitudes: it has researched the Supreme Court because it is important in policy terms, but has not provided an comprehensive account of its policy-making role.

The research design employed in this thesis constitutes an innovative approach for the study of courts since it concurrently examined policy-

making in terms of arbitration and rule-making. As this thesis has argued, analysing decision-making without paying attention to the judicial outcomes and their effects results in a partial view of what is at stake in courts. The diachronic within case analysis of Mexico employed permitted this thesis to attain the objective of providing a comprehensive account of policy-making by courts. It did so not only by making an effort to clarify the complexity implied in judicial rulings, but also by considering the effects of the political environment and stability on the performance of courts.

This approach contributed to the scholarship on Latin American judicial politics particularly by considering the role of non-institutional factors as determinants of the way courts engage in policy-making. A study sponsored by the Inter-American Development Bank shed light on this subject by proposing that in the region courts intervene in the policy-making process in four different ways: as referees, veto players, policy players and alternative social representatives (Sousa, 2010). The results of this dissertation contributed to explain that courts could simultaneously perform more than one of these roles. According to what has been claimed in this thesis, policy-making by courts is concurrently displayed through its arbitration of conflict, but also by creating rules of general application. Therefore, a second contribution of this study was to provide an account of how courts make use of all the tools they have at hand to influence policy-making processes.

## **7.2 Democracy and Judicialisation**

This thesis was particularly interested in examining the effects of the convergence of democratisation and judicialisation. In order to study in-depth how this convergence took place in Mexico and why it has influenced policy-making by the Supreme Court, it aimed to explore the way political fragmentation from democratisation has fostered a process of judicialisation of politics whereby an increasing number of more complex cases have been brought into the courtroom. The importance of researching this in the context

of study devoted to elucidate why courts established under authoritarian rule become more effective policy-makers in democracy, relied on the premise that policy-making by courts is substantially determined by the inputs litigants bring to its jurisdiction. Therefore, clarifying how judicialisation has unfolded contributed to explain to what extent the dynamics of a democratic regime have affected the interaction amongst political actors so as to encourage them to resort to the Supreme Court, a traditionally discreet and limited political actor.

Mexico has gone through a radical transformation in the last thirty years. Democratisation provoked this country to transit from an authoritarian hegemonic-party regime to a democratic regime with alternation in the presidency as well as in more than half of the 32 states. Political fragmentation has been one of the main features of this process of change to more democratic and plural conditions. At both national and subnational levels, it has transformed the way political parties interact both within and outside of legislative and executive arenas. In a context where the authorities from the three levels can all belong to different parties, having an institutional mechanism to process potential conflicts is fundamental to guarantee governability. Even if the president remains a highly influential player, in democratic times the holder of this position no longer plays the role of ultimate referee in disputes arising amongst actors from the different branches and levels of government.

Democracy has resulted in more fragmentation and this in turn has led to a greater need for an effective arbitrator able to institutionally process and settle political disputes. It is in this context that, due to its constitutional review powers, the Supreme Court has appeared as the most qualified actor to undertake the arbitration of the conflicts of federal and republican systems. The procedures established by the 1994 judicial reform have been particularly determinant for the emergence of the Supreme Court as an effective policy-maker. This transformation, however, resulted not from judicial activism but

from a process whereby the use of litigation by political actors has delegated an increasing amount of power to the Supreme Court.

The political actors with access to the Supreme Court through the constitutional review procedures established by the 1994 judicial reform, the constitutional controversy and action of unconstitutionality, have regarded standing as a strategic tool for advancing their agendas and protecting their interests. In the case of constitutional controversy, procedure intended to process conflicts proper of federalism, judicialisation has emerged 'from below', that is, from low-ranked political actors suing decisions made by highly ranked ones. 'Judicialisation from below' shows that as political power has become less centralised political actors have become less reluctant to challenge more influential ones in institutional arenas. This path indicates a substantial transformation in the dynamics of political systems characterised by the centralisation of power and the resolution of conflicts through informal mechanisms.

In the case of action of unconstitutionality, procedure meant to control the constitutionality of legislation passed at federal and state levels, the opposite has occurred: litigation has been predominantly employed by federal level authorities targeting the laws of sub-national and municipal application. This process of 'judicialisation from above' also reveals that as political power has become more fragmented the capacity of high-ranked federal actors to influence policy and law-making processes has declined. Certainly, as low-level actors are more prone to judicialise conflict and high-ranked actors are also more to resort to litigation, legislation and government action has become increasingly re-centralised in the Supreme Court. The result of this process of delegation has been the progressive development of more proactive policy-making decisions by the Supreme Court.

This thesis has explained that the 1994 judicial reform set the institutional foundations for judicialisation to occur. Although a necessary condition, such institutional change itself did not completely explain the emergence of this

process. Political fragmentation from democratisation was the factor that decisively contributed to the judicialisation of Mexican politics. Interested in strengthening the understanding of judicialisation and democracy, this thesis explored whether higher degrees of political fragmentation necessarily lead to higher levels of constitutional litigation. The result of this analysis shows that the relationship between political fragmentation and litigation takes an inverse “U shaped” form; indicating that when the former reaches certain levels its effects on litigation reverse.

This particular finding may constitute a contribution to the judicial politics literature as it provides evidence that shows that the effects of democracy on judicialisation are limited by the own dynamics of democracy. In other words, what this thesis has found is that democracy produces fragmentation and fragmentation fosters the use of litigation. However, when political fragmentation reaches high levels the use of litigation declines. Political actors have more incentives to litigate when they are excluded from decision-making processes. When fragmentation is high enough that a wide coalition is required to pass any piece of legislation political actors found fewer incentives to judicialise a decision in which they were probably involved. Still, further research is required on this matter in order to confirm or discard the conclusions provided by this thesis.

This study provided specific insights regarding why certain actors more actively resort to the Supreme Court for advancing their agendas. As mentioned above, the relevance of this question relies on the limited explanations that on this matter characterise the Mexican judicial politics literature. The results of this thesis reveal that the current design of constitutional review has fostered, in democracy, a process of judicialisation commanded by political actors but not from other sort of players. This institutional design has not provided incentives enough to promote the development of strategic litigation by social organisations. The result of this

has been an essentially political form of judicialisation that has translated in the emergence of an essentially political Supreme Court.

### **7.3 Arbitration and Rule-making**

Explaining why, under the institutional design established by the 1994 judicial reform, democratisation fostered the use of litigation by political actors constituted a decisive step to comprehend how the Supreme Court gradually turned into a more effective policy-maker in the Mexican political system. Once such a goal was achieved, this thesis concentrated on providing an account of the way the Supreme Court displayed policy-making by arbitrating political conflict through the dispositions established in the rulings handed down in constitutional cases and creating generally applicable rules through precedents. Accordingly, this study performed a systematic and synchronized analysis of both policy-making functions, based on strike down decisions as the most plausible evidence of arbitration and *jurisprudencias* as the most effective measure of rule-making. This strategy was defined in order to attain the objective of comprehending the complexity judicial rulings imply.

The 1994 judicial reform produced a significant change in the decision-making process of the Supreme Court. It did not only mean the provision of new constitutional review powers but the need of creating the proceedings needed to deal with new types of cases. The Supreme Court went through a process whereby justices and their respective staff learnt how to deal with this volume of more complex cases. The structure of the Supreme Court's decision-making process that emerged from the 1994 judicial reform certainly affected its performance as policy-maker. Although constitutional controversies and actions of unconstitutionality represent a minor contribution to the total caseload, cases originated in both procedures have unquestionably been part of the most salient cases the Supreme Court has adjudicated: 1 of every 5 cases decided by justices working 'en banc' has been either a constitutional controversy or an action of unconstitutionality.



The Supreme Court has actively employed the policy-making tools it has available. In the first years following the reform it made timid use of its capacity to strike down legislation but not in its recourse to the creation of case law, in part for filling procedural provisions that had been omitted in the legislation regulating constitutional cases, in part for making policy without requiring to use invalidations. Nonetheless, as the country turned into a more plural polity and the Supreme Court became a more stable and experienced decision-making body, justices became less reluctant to render strike down decisions.

This thesis provided an assessment of the way the Supreme Court has transformed the use of its policy-making tools related to constitutional review according to four factors: political fragmentation, hierarchy and political affiliation of the parties involved in constitutional review cases, and the experience gained by justices as a result of stability in the composition of the Supreme Court. This analysis demonstrated, first, that political fragmentation is positively related with the number of strike down decisions rendered by the Supreme Court. This finding implies that as political power became less centralised –particularly in the presidency- the Supreme Court became more prone to proactively use their power to invalidate decisions by public authorities.

Second, hierarchy has been a decisive factor affecting arbitration and rule-making but only in constitutional controversies. In other words, in cases resulting from disputes proper of federalism, the Supreme Court has consistently been inclined to rule in favour of the highest-ranked authority. This finding means that ‘judicialisation from above’ has produced limited effects for low-ranked authorities using litigation, but also that the Supreme Court has been strategic in their decision-making process. Certainly, the Supreme Court has avoided engaging in political struggles with more influential and powerful authorities through strike down decisions but it has

resorted to *jurisprudencia* as a method for creating rules affecting such authorities.

Third, with political affiliation has occurred the opposite of that with hierarchy: it has affected the actions of unconstitutionality but not constitutional controversies. In the years that followed the 1994 judicial reform, the Supreme Court was less prone to strike down decisions made by authorities affiliated to the most relevant political parties (i.e. PRI and PAN) and less inclined to create *jurisprudencias* in cases involving the declining hegemonic PRI. Nonetheless, as political power became more diffused, the Supreme Court became more inclined to invalidate cases regardless of political affiliation of the parties involved.

Fourth, the stability in the Supreme Court's composition has translated into a decision making body integrated by more experienced justices. The analysis regarding experience from stability shows that it has produced an effect in arbitration but not in rule-making, in both actions of unconstitutionality and constitutional controversies. Justices have been more prone to declare the unconstitutionality of legislation and government action as they have become more experienced and work under a more stable composition. This conclusion implies that the unprecedented stability that has existed in the bench has resulted in higher degrees of autonomy and this in increasing incentives for judges to more proactively employ the tools they have available. Moreover, this finding provides evidence that questions the conclusion by Magaloni and Sanchez (2006) that claims that after alternation the Supreme Court has remained biased in favour of the PRI.

The systematic analysis of these four factors varying across the time has certainly demonstrated the emergence and consolidation of the Supreme Court as an effective arbitration body. Under more plural conditions the Supreme Court has gradually filled part of the space a declining presidency has left. Political fragmentation has expanded the incentives political actors have for resorting to a third party –the Supreme Court- to protect or advance

their interests. Litigation, political fragmentation and stability have fostered the development of an autonomous court that has been gradually developing its own agenda. Since strike down decisions have an impact on the parties but not necessarily in the normative structure, the Supreme Court has employed case law as the preferred means for making law. This thesis showed that the Supreme Court has been strategic when deciding constitutional cases. The statistical analysis provided makes it clear that political variables have played a major role. The Supreme Court has decided according to the capacity it has to react to the actors implied in the cases before its jurisdiction. This capacity to influence has been reflected in both the hierarchy of the different political actors in the federal system, as well as the affiliation they have to the different political parties.

#### **7.4 Effects of Policy-making**

One of this thesis' main goals was to provide an in-depth account of policy-making by courts. In doing so, it not only focussed on the decisions rendered by the court but also on their impact beyond the judicial realm. As Kapiszewski and Taylor (2008) have underlined, the literature on Latin American judicial politics still lacks research devoted to the analysis of the aftermath of judicial decisions. Hence, demonstrating that the Supreme Court's policy outcomes indeed produce effects on the activity of executive and legislative institutions. This is one of the most important contributions of this study.

A major challenge this thesis faced was constructing the appropriate approach to study judicial effects from an objective, unbiased perspective. The response to this challenge was to select two policy areas –abortion and expropriation- rather than seeking to conduct a large-n systematic account of more than two-thousand constitutional cases presented before the Supreme Court in the period 1995-2010. These policy areas were selected because of their political salience and, most importantly, because of the different

trajectories they both have followed in the judiciary. The constitutionality of induced abortion is a question which until recently remained outside the courtroom. The first case where the Supreme Court was forced rule upon its constitutionality was submitted only in 2000. Expropriation on the other hand has a long tradition as a matter that has been regularly subject to the adjudication of federal courts. The combination of this approach sought to avoid selection bias and thus to permit this dissertation to arrive at objective conclusions.

In the first place, regarding the legal status of induced abortion, this thesis demonstrated that the Supreme Court has been strategic while rendering its rulings. The Supreme Court has avoided confronting the legislatures that passed more permissive regulations, but sought to advance the policy preferences of the majority of justices through the creation of case law. Certainly, in both cases analysed on abortion matters, the Supreme Court did not declare any invalidation but established *jurisprudencias* that produced effects on the development of further regulations. The first decision holding that the protection of the right to life was protected from conception, among other consequences, provided litigants with legal arguments to contest the constitutionality of the subsequent reform that legalised abortion on request in Mexico City. In the second decision the Supreme Court again held the reform as constitutional, but determined that regulating the interruption of pregnancies fell under the jurisdiction of subnational legislators and not within the jurisdiction of the judiciary. This second decision produced a backlash of more than half of the Mexican states passing stricter abortion regulations.

Second, in relation to expropriation regulations, the Supreme Court was confronted with rulings whether governments are allowed to employ this legal figure without protecting the right to prior hearing. In a first case, the Supreme Court determined that this right was inapplicable to expropriations, as judicial precedents had consistently established. Nonetheless, in the case

the Supreme Court adjudicated under more democratic conditions, the majority of justices advanced a different argument: they determined and established as binding precedent that public authorities are bound to protect the right to prior hearing in all expropriations. In the case of expropriation, the new precedent provoked eight states reforming the local regulations to adapt them to the new constitutional interpretations.

The emergence of this sort of ‘dialogue’ between the different authorities with capacity to shape legal contents is not uncommon in democratic systems (Barnes, 2004; Roach, 2006). In the United States, for example, after the Supreme Court held in *Kelo v. City of New London* that the use of eminent domain is permitted to transfer property from a private owner to another private owner for the purpose of promoting economic development forty-three states enacted legislation establishing stricter eminent domain rules (Somin, 2008). Judicial decisions in both the United States and Mexico have been authoritative enough as to led to a massive backlash. In the case of the former the Supreme Court has traditionally been an influential policy-making actor. In Mexico on the other hand, the backlash resulted from the abortion decisions and the effects produced by expropriation jurisprudencias do constitute outstanding evidence that does not correspond to the discreet role it has played through the country’s history.

## **7.5 Implications and Future research**

The analysis developed in this thesis has contributed to comprehend the relevance of courts in recent democracies. In contrast to what has distinguished Latin American history, constitutional and supreme courts have in recent years confronted questions of the utmost relevance for their respective political systems, producing effects that have decisively and extensively affected societies and the dynamics of political systems. To conclude this study, this section provides a brief discussion of the most

relevant implications implied in the results of study about policy-making by the Supreme Court of Mexico.

In first place, the results of this thesis demonstrate that institutions matter. The institutional change implied in broadening the scope of constitutional judicial review gradually transformed the performance of an institution traditionally characterised for its subordination to political power. Moreover, this thesis made clear that increasing the capacity of courts to check public authorities does not only affect the organ holding this power but the behaviour of those actors receiving the power of standing. Therefore, as the access to courts shape the behaviour of political actors and influences the performance of such judicial organs, any reform of the design of constitutional review requires considering that its effects will not be circumscribed to the judicial sphere. Therefore, it is fundamental to emphasise the importance of conducting more comparative research about the effects of standing on the development of different types of court.

Second, the conclusions of this study demonstrated that the political environment is decisive for the success or failure of a given institutional change. In particular, as it has been asserted in this text, the fragmentation of power in democracy is determinant not only for courts to conduct their function with independence but also for political actors to resort to litigation. Certainly, democracy activates litigants and litigants then activate courts. The regular use of constitutional litigation indicates, therefore, the emergence of courts as arenas where political conflict is institutionally processed. This thesis focused on the innovations in the constitutional review framework produced by a specific institutional change. As a result it did not address the question of whether democratic politics transforms the performance of judicial institutions in the absence of institutional change. Further research on this topic is needed to clarify to what extent the emergence of policy-making by courts is possible under static institutional designs.

Third, this thesis provided interesting insights regarding the effects of stability on the performance of courts. Under stability judges gain experience and become less reluctant to proactively use the tools they have to advance their policy goals. This conclusion highlights the importance of establishing and guaranteeing prolonged tenure terms in order to enhance independence. However, as this conclusion is based only on the results of the Mexican case, more comparative research on this matter would be important to better comprehend the extent to which tenure and experience transform the performance of judges.

Fourth, while stressing the impact of non-legal factors on decision and policy-making by courts, this study provided empirical evidence regarding the essentially indeterminate nature of law. Certainly, judges do have a fair amount of discretion to decide upon the cases they have at hand. This means that law does not provide a unique response to a legal dilemma; instead, it permits different interpretations that allow the people in charge of adjudication to decide in different directions. The field of judicial politics has consistently demonstrated that non-legal factors determine judicial decisions. However, the discussions of the theoretical implications this field has provided are insufficient and sometimes superficial. Therefore, further research is needed to overcome the weakness of the link between empirical work and theoretical implications that distinguishes the field.

Finally, in the emergence of policy-making by courts is implied a more independent performance of the judicial function. More independent and proactive judges are required, as are the rest of the public officers in charge of creating policies, to be more accountable to society. One of the most relevant challenges that face courts in the era of judicialisation is to strengthen their social links. Accountability and transparency are two elements that could substantially contribute to achieving such goals. In countries like Mexico, authoritarian rulers empowered courts as a means to preserve their hegemony. The advent of more democratic and competitive conditions,

however, has allowed courts to gradually gain an unprecedented capacity to make policy and law. At this stage of the process the challenge is not to debilitate judges but to shape the institutional design in order to make them perform in a more transparent, accountable fashion.



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# Appendix I. Datasets

## ***Constitutional Review Judgements Dataset 1995-2011***

The *Constitutional Review Judgements Dataset* registers the 2001 judgements the Mexican Supreme Court of Justice handed down to constitutional controversies and actions of unconstitutionality in the period 1995-2011.

Three main sources of information were employed in its integration:

- a) The official information published by the Supreme Court on its Judicial Statistics Website *@lex*, which, at the time it was consulted in the first semester of 2012, included information for every constitutional controversy and action of unconstitutionality case filed from the moment the 1994 judicial reform came in to force on the first day of 1995 to December 2011. *@lex* registers information for all “original, complete and closed files”, excluding those incomplete and/or unclosed ones. *@lex* registers general identification data for every case, including date of submission, date of resolution, claiming party (specific for every file as well as a typology according to the dispositions of the 105 constitutional article), defendant party (both specific and the type of party according to the disposition of the 105 constitutional article), political affiliation of the parties involved, reporting justice, legal matter, type of resolution, articles of the constitution referred in the claiming party’s demand, among other.
- b) The 2011 edition of *IUS*, is an electronic compilation published by the Supreme Court of Justice that compiles every unit of case law created by the Supreme Court since the promulgation of the 1917 Constitution. In particular, for the integration of the *Constitutional Review Judgements Dataset* were employed all case law units (*tesis aisladas y jurisprudencias*) originated from constitutional controversies and actions of unconstitutionality decisions.

- c) The *Local Congresses Dataset* (CIDAC, 2008), electronic tool, created by Mexico City-based think-tank *Centro de Investigacion para el Desarrollo*, that provides information regarding the composition of state congresses from 1980s to 2008.

The following procedure was employed for the integration of this data:

- 1) it was first downloaded standardized the information from *@lex*;
- 2) it was captured and also standardized the information from *IUS*;
- 3) it was selected the data from CIDAC's dataset according to the needs of the one in process of construction;
- 4) it was cross-referenced with the information from *IUS* with the data selected from *@lex* dataset in order to have a registry compiling not only the information regarding judgements but also of the precedents (case law) which emerged from them;
- 5) it was then cross-referenced with the integrated information from *@lex* and *IUS* with those previously organised from CIDAC's dataset with the purpose of incorporating data to depict more precisely the affiliation and fragmentation features of the actors taking part in constitutional judicial review procedures;
- 6) as the information from CIDAC was incomplete for the period of study (1995-2011), it was later compiled with information from Lujambio (2000) as well as from both state congresses and state electoral bodies' websites to complete missing data;
- 7) finally, with information complete for every case, a process for deriving variables analytically relevant for this thesis' purposes was undertaken.

The *Constitutional Judgements Dataset* consists of 2001 observation units classified according to thirty different variables. These variables are:

*ID*

Description: consecutive number ordered according to the date of submission.

Values: 1 to 2001

Source: @lex

*File*

Description: identification code as determined by the Supreme Court.

Values: Consists of 10 alphanumeric codes, 2 for the type of file (CC for constitutional controversies and AI for actions of unconstitutionality), 4 for the consecutive number of case submitted in a given year, and 4 for the year of submission.

Source: @lex

*File type*

Description: the type of procedure originating the case.

Values: "1" for constitutional controversies and "2" for actions of unconstitutionality.

*Date of submission*

Description: the date the case was submitted to the Supreme Court.

Values: day-month-year

Source: @lex

*Date of resolution*

Description: the date the judgement to the case was handed down by the Supreme Court.

Values: day-month-year

Source: @lex

*Length*

Description: the number of days that passed between the date of submission and the date of resolution.

Values: 0 to 3224

Source: @lex

*Claiming party*

Description: the specific public authority or party filing the case.

Values: textual reference to the claiming party as mentioned in @lex

Source: @lex

*Claiming party jurisdiction*

Description: the jurisdiction to what the claiming party belongs to.

Values: "1" for national, "2" for subnational, "3" for municipal.

Source: @lex

#### *Claiming party territorial origin*

Description: the territorial origin to which the claiming party belongs.

Values: “0” for national and 1 to 32 in alphabetical order for every state composing Mexico’s federation (Aguascalientes, Baja California, Baja California Sur, Campeche, Chiapas, Chihuahua, Coahuila, Colima, Distrito Federal, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, Mexico, Michoacan, Morelos, Nayarit, Nuevo Leon, Oaxaca, Puebla, Queretaro, Quintana Roo, San Luis Potosi, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatan and Zacatecas).

Source: @lex

#### *Claiming party branch*

Description: branch to which the claiming party belongs.

Values: “1” for executive, “2” legislative, “3” judicial and “0” for others.

Source: @lex

#### *Type of claiming party*

Description: the type of claiming party according to the Mexican Constitution's article 105.

Values: In the case of constitutional controversies: “1” for federal executive authorities, “2” for federal legislative authorities, “3” for state executive authorities, “4” for state legislative authorities”, “5” for state judicial authorities”, “6” for municipal authorities.” For actions of unconstitutionality: “6” for Attorney General, “7” federal legislative minorities, “8” for state legislative minorities”, “9” for national political parties, “10” for state political parties, “11” federal human rights commission, “12” for state human rights commissions”, “13” for others.

Source: @lex

#### *Claiming party political affiliation*

Description: political party to what the claiming party was affiliated at the time of submission.

Values: 1 for “PRI”, “2” for PAN, “3” for PRD, “4” for others, “5” for no affiliation.

Source: @lex, CIDAC’s dataset and information from the websites of state level electoral and legislative authorities.

#### *Defendant*

Description: the specific public challenged through the case

Values: textual reference to the claiming party as mentioned in @lex

Source: @lex

#### *Defendant jurisdiction*

Description: the jurisdiction to what the defendant belongs to.

Values: “1” for national, “2” for subnational, “3” for municipal.

Source: @lex

#### *Defendant territorial origin*

Description: the territorial origin to which defendant belongs to.

Values: “0” for national and 1 to 32 in alphabetical order for every state composing the Mexico’s federation (Aguascalientes, Baja California, Baja California Sur, Campeche, Chiapas, Chihuahua, Coahuila, Colima, Distrito Federal, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, Mexico, Michoacan, Morelos, Nayarit, Nuevo Leon, Oaxaca, Puebla, Queretaro, Quintana Roo, San Luis Potosi, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatan and Zacatecas).

Source: @lex

#### *Defendant branch*

Description: branch to what the defendant belongs to.

Values: “1” for executive, “2” legislative, “3” judicial and “0” for others.

Source: @lex

#### *Type of defendant party*

Description: the type of defendant according to the Mexican Constitution's article 105.

Values: In the case of constitutional controversies: “1” for federal executive authorities, “2” for federal legislative authorities, “3” for state executive authorities, “4” for state legislative authorities”, “5” for state judicial authorities”, “6” for municipal authorities.” For actions of unconstitutionality: “6” for federal congress, “7” for state congresses and “8” for others.

Source: @lex

#### *Defendant political affiliation*

Description: political party to what the defendant was affiliated at the time of submission.

Values: 1 for “PRI”, “2” for PAN, “3” for PRD, “4” for others, “5” for no affiliation.

Source: @lex, CIDAC’s dataset and information from the websites of state level electoral and legislative authorities.

#### *Type of conflict*

Description: categorisation about whether the case involves parties from the same or different jurisdiction/origin.

Values: “1” for horizontal (same jurisdiction) and “2” for “vertical” (different jurisdiction).

Source: own definition taking into account defending and claiming parties jurisdiction of origin.

#### *Same party*

Description: cases involving parties with the same political affiliation.

Values: “1” for same affiliation, “0” otherwise.

Source: own determination considering defending and claiming parties affiliation.

#### *Jurisdiction of the challenged act or law*

Description: categorisation about the jurisdiction where the challenged action or law is to be applied.

Values: “1” for national, “2” for subnational, “3” for municipal.

*Legal matter*

Description: legal matter of the challenged law or action.

Values: “1” electoral, “2” fiscal, “3” other.

Source: @lex

*On the merits*

Description: reference to the type of decision rendered by the Supreme Court.

Values: “1” for the decisions ‘*on the merits*’, “0” otherwise.

Source: own definition.

*Strike down*

Description: definition about whether the Supreme Court invalidated at least one component of the norms or actions challenged in the case.

Values: “1” for strike down, “0” otherwise.

Source: @lex

*Suspension*

Description: definition about whether the Supreme Court granted a ‘suspension’ in the case (only for constitutional controversies).

Values: “1” for ‘suspension’, “0” otherwise.

Source: @lex.

*Jurisprudencias*

Description: count of the number of case law units emerged from the case.

Values: 0 to 39.

Source: *IUS 2011*.

*Challenged articles*

Description: count of the number of different articles of the Constitution that the claiming party considered infringed.

Values: 0 to 24.

Source: @lex

*Fundamental rights articles*

Description: reference to whether the articles considered as infringed by the claiming party referred to fundamental rights or not.

Values: “1” when at least one article referred to fundamental rights, “0” otherwise.

Source: own’ definition with information from @alex.

*SCJN stability*

Description: mean average count of days (logged) seating justices have passed in the Supreme Court at the moment the case was decided.

Values: 0.72 to 11.28

Source: own calculation.



*ENP deputies*

Description: effective number of legislative parties in the Chamber of Deputies at the moment the case was decided.

Values: 2.28 to 3.56

Source: own calculation with data from the Chamber of Deputies historic compositions.

### ***State/year Constitutional Litigation Dataset***

The *State/Year Constitutional Litigation Dataset* compiles political and litigation-related variables for every one of the 32 states of the Mexican federation in the period of this study 1995-2010. The elaboration of this dataset was based on information provided by the *Constitutional Review Judgements Dataset 1995-2011*, and was complemented with information from Mexico's National Geography and Statistics Institute (INEGI for its Spanish abbreviation), as well as with data from the Federal Electoral Institute's, CIDAC's dataset and Lujambio (2000) and state electoral institutions.

The following procedure was followed for the integration of the dataset:

- 1) it was created as a longitudinal format (panel) to register political and judicial information for every year for each state;
- 2) the information *Constitutional Review Judgements Dataset 1995-2011* was arranged to determine the count of cases filed by either emerging or demanding state and municipal level actors (cases involving only federal actors were excluded from the analysis);

The *State/Year Constitutional Litigation Dataset* consists of 512 observations, 16 for each of the 32 states composing Mexico's federation. The variables included in the dataset are:

*ID*

Description: consecutive number ordered according alphabetically (states) and chronologically (year).

Values: 1 to 512.

Source: own definition

### *State*

Description: name of the state.

Values: 1 to 32 in alphabetical order for every state composing Mexico's federation (Aguascalientes, Baja California, Baja California Sur, Campeche, Chiapas, Chihuahua, Coahuila, Colima, Distrito Federal, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, Mexico, Michoacan, Morelos, Nayarit, Nuevo Leon, Oaxaca, Puebla, Queretaro, Quintana Roo, San Luis Potosi, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatan and Zacatecas).

Source: Mexican states names.

### *Year*

Description: year.

Values: 1995 to 2010.

Source: years in the period of study.

### *Actions of unconstitutionality*

Description: count of actions of unconstitutionality filed by year in every given state.

Values: 0 to 62.

Source: *Constitutional Review Judgements Dataset 1995-2011*.

### *Constitutional controversies*

Description: count of constitutional controversies filed by year in every given state.

Values: 0 to 42.

Source: *Constitutional Review Judgements Dataset 1995-2011*.

### *Governor*

Description: political affiliation of the governor.

Values: "1" for "PRI", "2" for PAN, "3" for PRD, "4" for other.

Source: CIDAC's dataset and state electoral institutes.

### *Local Congress Affiliation*

Description: name of the party controlling the majority in state congress.

Values: "1" for "PRI", "2" for PAN, "3" for PRD, "4" for no single party majority

Source: CIDAC's dataset and state electoral institutes.

### *Local Effective Number of Parties*

Description: effective number of legislative parties in the state congress the year the case was submitted.

Values: 1.4 to 5.

Source: own calculation.

### *ENP deputies*

Description: effective number of legislative parties in the Chamber of Deputies the year the case was submitted.

Values: 2.28 to 3.56

Source: own calculation with data from the Chamber of Deputies historic compositions.

### *Population*

Description: population in the state for every year.

Values: 373,636 (Baja California 1995) to 15,031,728 to Mexico state (2010).

Source: INEGI.

### *Participaciones*

Description: Non-targeted resources transferred from the federal government to states.

Values: 285,680,000 pesos (Baja California 1995) to 53,802,437,100 pesos (Mexico state 2010), at constant values of 2003.

Source: INEGI.

## ***Mexico Supreme Court Justices Dataset 1917-2011***

The Mexico Supreme Court Justices Dataset 1917-2011 registers information of appointments and career paths of the 212 people appointed as justices to the Supreme Court in the period 1917-2011. For the elaboration of this three sources of information were employed: the biographical compilation published by the Supreme Court (SCJN, 2011b); the information regarding judicial appointments included in Fix Zamudio and Cossio Diaz (1996); and the data registered in Mexican Political Biographies 1935-2009 (Camp, 2011).

The variables included in the dataset are:

### *Name*

Description: name of the justice appointed to the Supreme Court.

Values: complete name of the person.

Source: SCJN 2011b, Fix Zamudio and Cossio Diaz (1996), Camp (2011).

### *State of origin*

Description: state where the justice was born.

Values: Values: 1 to 32 in alphabetical order for every state composing Mexico's federation (Aguascalientes, Baja California, Baja California Sur, Campeche, Chiapas, Chihuahua, Coahuila, Colima, Distrito Federal, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, Mexico, Michoacan, Morelos, Nayarit, Nuevo Leon, Oaxaca, Puebla, Queretaro, Quintana Roo, San Luis Potosi, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatan and Zacatecas).

Source: Mexican states names.

*Year of birth*

Description: year when the justice was born.

Values: 1855 to 1960.

Source: SCJN 2011b, Fix Zamudio and Cossio Diaz (1996), Camp (2011).

*Year of appointment*

Description: year when the justice was born.

Values: 1917 to 2011.

Source: SCJN 2011b, Fix Zamudio and Cossio Diaz (1996), Camp (2011).

*Year of retirement*

Description: year when the justice left the Supreme Court.

Values: 1919-to 2009.

Source: SCJN 2011b, Fix Zamudio and Cossio Diaz (1996), Camp (2011).

*Year of death*

Description: year the justice died (23 missing values).

Values: 1919-to 2007.

Source: SCJN 2011b, Fix Zamudio and Cossio Diaz (1996), Camp (2011).

*Nominating President*

Description: the surname of the President that nominated the justice.

Values: "0" Congress (1917-1927), "1" Portes Gil, "2" Ortiz Rubio, "3" Cardenas, "4" Avila Camacho, "5" Aleman, "6" Ruiz Cortinez, "7" Lopez Mateos, "8" Diaz Ordaz, "9" Echeverria, "10" Lopez Portillo, "11" De la Madrid, "12" Salinas de Gortari, "13" Zedillo, "14" Fox Quesada, "15" Calderon.

Source: SCJN 2011b, Fix Zamudio and Cossio Diaz (1996), Camp (2011).

*Judicial career*

Description: previous judicial experience in either state or federal level bodies.

Values: "1" if the justice had judicial experience, "0" otherwise.

Source: SCJN 2011b, Fix Zamudio and Cossio Diaz (1996), Camp (2011).

*Political career*

Description: previous or posterior experience in either state or federal executive or legislative branches.

Values: "1" if the justice had or followed a political career either before or after the nomination, "0" otherwise.

Source: SCJN 2011b, Fix Zamudio and Cossio Diaz (1996), Camp (2011).

## ***State Expropriation Laws and Precedents Dataset 1917-2011***

The *State Expropriation Laws and Precedents Dataset 1917-2011* registers every law passed by the legislature in every state of the federation, as well as

every precedent established by the Supreme Court. The information included in this dataset has its origins in two sources: in the case of the legal disposition it is based on a revision of the state-level reforms as secondary sources; while the data regarding judicial precedents relies on the compilation elaborated by Herrera (2006).

For the integration of this data was employed the following procedure:

- 1) It was first designed in a structure using years as the units of observation (period 1917-2011);
- 2) It was then transformed in the compilation by Herrera (2006) in order to determine the count of *jurisprudencias* created by the Supreme Court per year in expropriation matters, distinguishing between those that mentioned the right to prior hearing from those which did not;
- 3) It was complemented with the data obtained from Herrera (2006) with information from *IUS*, in order to have complete information regarding the case law activity by the Supreme Court on expropriation matters;
- 4) In order to gather the information related to the evolution of expropriation law at state level it was constructed as a sub-dataset that registered data for every law on this subject enacted or reformed in the period of the study. The source of information employed in this step was the National and International Legal Compilation published by the Supreme Court on its website.
- 5) The information included in that sub-dataset was then transformed in order to determine the count of laws enacted and reformed per year, distinguishing between those that mentioned the right to prior hearing from those which did not.

The variables included in the dataset are:

*Year*

Description: year in the period of the study (1917-2011)

Values: 1917-2011

Source: Herrera (2006), *IUS*, and *National and International Law Compilation*.

*Expropriation jurisprudencias*

Description: count of jurisprudencias on expropriation matters for in every given year.

Values: 0 to 5.

Source: Herrera (2006) and *IUS*.

*Expropriation jurisprudencias mentioning the right to prior hearing*

Description: count of jurisprudencias on expropriation matters mentioning the right to prior hearing in every given year.

Values: 0 to 3.

Source: Herrera (2006) and *IUS*.

*Expropriation laws*

Description: count of state expropriation laws enacted or reformed in every given year.

Values: 0 to 5.

Source: *National and International Law Compilation*.

*Expropriation laws mentioning the right to prior hearing*

Description: count of state expropriation laws enacted or reformed in every given year.

Values: 0 to 3.

Source: *National and International Law Compilation*.

# Output for statistical analyses

## Chapter 3

	con1 b/se	con2 b/se	con3 b/se	con4 b/se	acc1 b/se	acc2 b/se	acc3 b/se	acc4 b/se
PRI	-0.603 (0.34)	-0.613 (0.34)	-0.577 (0.35)	-0.597 (0.35)	0.226 (0.41)	-0.279 (0.39)	0.220 (0.42)	-0.415 (0.40)
PAN	-0.235 (0.36)	-0.295 (0.36)	-0.259 (0.36)	-0.310 (0.36)	0.609 (0.43)	0.079 (0.41)	0.578 (0.43)	0.018 (0.41)
PRD	-0.097 (0.39)	-0.206 (0.39)	-0.237 (0.39)	-0.284 (0.39)	0.918* (0.45)	0.120 (0.43)	0.874 (0.45)	0.226 (0.44)
Population (logged)	-0.643** (0.20)	-0.501* (0.20)	-0.585** (0.20)	-0.449* (0.20)	-0.907*** (0.18)	-0.361 (0.19)	-0.856*** (0.19)	-0.329 (0.19)
Particip. (logged)	0.968*** (0.18)	0.816*** (0.18)	0.918*** (0.18)	0.766*** (0.18)	0.870*** (0.16)	0.341* (0.17)	0.801*** (0.17)	0.270 (0.17)
Municip. (logged)	0.482*** (0.09)	0.464*** (0.09)	0.477*** (0.09)	0.462*** (0.09)	0.274** (0.09)	0.121 (0.09)	0.290*** (0.09)	0.158 (0.09)
FENP		0.535** (0.17)		0.508** (0.18)		1.904*** (0.20)		2.022*** (0.21)
LENP			2.212** (0.84)	2.256** (0.84)			2.688** (0.91)	2.311* (0.94)
LENP2			-0.331* (0.14)	-0.351* (0.14)			-0.435** (0.15)	-0.433** (0.16)
Constant	-13.230*** (2.28)	-13.420*** (2.24)	-16.348*** (2.50)	-16.352*** (2.48)	-7.430*** (2.22)	-8.485*** (2.35)	-10.597*** (2.53)	-10.733*** (2.61)
N	512.000	512.000	512.000	512.000	512.000	512.000	512.000	512.000
chi2	85.801	102.120	96.187	110.002	46.505	121.524	53.679	131.509
p	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000
r2_p								

\* p<0.05, \*\* p<0.01, \*\*\* p<0.001

## Chapter 4

### *Actions of unconstitutionality*

	accinv b/se	accjur b/se
<b>main</b>		
ENP (Deputies)	1.434*** (0.42)	-1.705** (0.57)
experienciad	0.946* (0.45)	0.410 (0.46)
1b.Defendant party	0.000 (.)	0.000 (.)
2.Defendant party	0.819*** (0.21)	-0.543* (0.26)
3.Defendant party	0.874* (0.36)	-0.199 (0.44)
4.Defendant party	-0.084 (0.41)	0.511 (0.45)
2b.Claimant level	0.000 (.)	0.000 (.)
3.Claimant level	-0.409 (0.26)	-0.214 (0.30)
sameparty	1.066* (0.49)	-3.214*** (0.77)
nofiscalorelectoral	-1.459*** (0.23)	1.110*** (0.28)
Overrule		1.151*** (0.24)
Constant	-11.949*** (2.93)	1.674 (2.69)
<b>lnalpha</b>		
Constant		1.738*** (0.12)
<hr/>		
N	662.000	662.000
chi2	154.267	82.657
p	0.000	0.000
r2_p	0.170	0.059

\* p<0.05, \*\* p<0.01, \*\*\* p<0.001

### *Constitutional controversies*

	coninv b/se	conjur b/se
<b>main</b>		
ENP (Deputies)	-1.120** (0.41)	-0.133 (0.40)
logpromedio	0.950* (0.40)	-0.550 (0.31)
1b.Defendant party	0.000 (.)	0.000 (.)
2.Defendant party	-0.433 (0.28)	-0.949*** (0.27)
3.Defendant party	-0.065 (0.31)	-0.179 (0.30)
4.Defendant party	0.319 (0.45)	-0.248 (0.45)
1b.Claimant level	0.000 (.)	0.000 (.)
2.Claimant level	0.584* (0.23)	0.796*** (0.22)
3.Claimant level	1.808*** (0.38)	1.595*** (0.39)
sameparty	0.816* (0.38)	0.886* (0.36)
nofiscalorelectoral	-0.128 (0.20)	0.335 (0.19)
Overrule		1.384*** (0.20)
o.nofiscalorelecto~l		0.000 (.)
Constant	-5.307* (2.53)	3.519 (1.81)
<hr/>		
<b>lnalpha</b>		
Constant		1.151*** (0.13)
<hr/>		
N	700.000	700.000
chi2	46.656	113.839
p	0.000	0.000
r2_p	0.062	0.075

\* p<0.05, \*\* p<0.01, \*\*\* p<0.001



## Appendix II. Interviews

The in-depth open-ended interviews for this thesis were conducted on three different fieldtrips, all of them in Mexico City, Mexico. The first one was undertaken between the 14<sup>th</sup> of April and the 2<sup>nd</sup> of May of 2008; the second between 29<sup>th</sup> of September and 17<sup>th</sup> of October also of 2008; and the third one between the 9<sup>th</sup> and the 20<sup>th</sup> of March of 2009. Additionally, one more interview was carried out on the 1<sup>st</sup> of March of 2010.

The objective of the interviews was to gather information regarding the Supreme Court of Justice and the effects of its resolution in order to provide a more accurate analysis of its performance in policy-making terms. Accordingly, this research sought to interview all of the eleven justices to the Supreme Court or high-ranked officers within their corresponding staffs. As the reader will notice, interviews were conducted with at least one person from the staff of eight out of the eleven justices composing the Supreme Court. Additionally, former justices and high-ranked judicial officers were interviewed during the three fieldtrips.

In order to avoid bias in the elite-interviewing sample this research also aimed to undertake interviews with key actors outside of the Federal Judiciary. For this reason, interviews with members and high-ranked officers in the Federal Congress were made, along with some others to political party leaders and strategic decision-makers in the Attorney General's Office.

The next table provides a full list of the interviewees with the date when the corresponding interview was conducted. For confidentiality issues, in all cases the name of the person is omitted but not their position at the moment of the interview.

Table A.1. List of Interviewees

Interviewee	Position	Date
Interviewee 01	Law Clerk to Justice Juan N. Silva Meza	05/10/2008
Interviewee 02	Law Clerk in the Second Chamber of the Supreme Court of Justice	06/10/2008
Interviewee 03	Mexican Lawyer. Legal Associate to the World Bank's Law and Development Program.	05/05/2008
Interviewee 04	President to the Social Democratic Party	13/10/2008
Interviewee 05	Legal Counsellor to Mexico City's Head of Government	04/10/2008
Interviewee 06	Former Justice to the Supreme Court of Justice (1995-2003)	16/03/2009
Interviewee 07	Director of the Official Bulletin of the Chamber of Deputies ( <i>Gaceta Parlamentaria</i> )	17/03/2009
Interviewee 08	Justice to the Supreme Court of Justice	25/04/2008
Interviewee 09	Law Clerk to Justice Olga Sanchez Cordero de Garcia Villegas	02/10/2008
Interviewee 10	Former Director of the Unit of Constitutional Controversies and Actions of Unconstitutionality	08/10/2008
Interviewee 11	Former Justice to the Supreme Court of Justice (1995-2006)	08/10/2008
Interviewee 12	Assistant to the Head of the Administrative Office of the Supreme Court of Justice	03/10/2008
Interviewee 13	Director of Legal Affairs at the Chamber of Deputies	17/03/2009
Interviewee 14	Senator (2006-2012)	20/03/2009
Interviewee 15	Deputy. Leader of the PRD in the Chamber of Deputies (2006-2009)	17/03/2009
Interviewee 16	Law Clerk to Justice Jesus Gudiño Pelayo	06/10/2008
Interviewee 17	Feminist. Founder of the Information Group on Reproductive Choice (GIRE).	30/09/2008
Interviewee 18	Law Clerk to Justice Jose Ramon Cossio	04/10/2008

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Interviewee 19	Law Clerk to Justice Juan N. Silva Meza	07/10/2008
Interviewee 20	Professor of Law. Litigant in constitutional matters in the Supreme Court of Justice.	24/04/2008
Interviewee 21	Judicial officer. Deputy Director at the Legal Planning Office of the Supreme Court of Justice	25/04/2008
Interviewee 22	Law Clerk to Justice Jose Ramon Cossio	07/10/2008
Interviewee 23	Director of Constitutional Affairs at the Attorney General's Office	15/04/2008
Interviewee 24	Mexican politician. Former Secretary of the Interior (1994-1995)	18/03/2009
Interviewee 25	Former Director of the Unit of Constitutional Controversies and Actions of Unconstitutionality	10/10/2008
Interviewee 26	Judicial officer at the Judicial Statistics Office of the Supreme Court of Justice	13/03/2008
Interviewee 27	Law Clerk to Justice Jose Ramon Cossio	04/10/2008
Interviewee 28	Law Clerk to Justice Jose Ramon Cossio	13/03/2009
Interviewee 29	Law Clerk to Justice Jose Ramon Cossio	06/10/2008
Interviewee 30	Former Justice to the Supreme Court of Justice (1985-1994)	01/03/2010
Interviewee 31	Law Clerk to Justice Margarita Luna Ramos	09/10/2008
Interviewee 32	Law Clerk to Justice Genaro Gongora Pimentel	09/10/2008
Interviewee 33	Deputy (2006-2009).	17/03/2009
Interviewee 34	Law Clerk to Justice Fernando Franco	09/10/2008
Interviewee 35	Law Clerk to Justice Sergio Salvador Aguirre Anguiano	05/10/2008

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