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Judicial Independence: The Politics of the Supreme Court in Mexico

PILAR DOMINGO

Abstract. This article examines the role of the Supreme Court in the development of the Mexican political system. The judiciary provided an important source of regime legitimation, as it allowed for the consolidation of a state of legality and a claim to constitutional rule of law, at least in discourse. However, the judiciary was in effect politically subordinated to the logic of dominant party rule through both specific constitutional reforms since 1917 that weakened the possibility of judicial independence and a politics of institutional and political co-optation. The constitutional reform of 1994 has significantly altered the nature of the relationship between the executive and the Supreme Court.

Introduction

Judicial independence is at least a desirable, if not an essential, aspect of constitutional rule in the pursuit of rule of law and democratic accountability. Within presidential systems it is generally institutionalised through some form of separation of powers. The principle of judicial independence has been, at least nominally, affirmed in Mexican constitutionalism since the last half of the nineteenth century. However, the history of political development in Mexico to all appearances attests to a marked absence of judicial independence in the relationship between the executive and the judiciary. In the academic analysis of the Mexican political system, the judiciary has been noticeably disregarded, precisely because it was seen as politically unimportant. By contrast, the political elite itself has been far less dismissive of this branch of government, and at different times the power-holders have undertaken to pass a number of constitutional reforms which have affected the judiciary since the drafting of the 1917 Constitution. Recent scholarly research has engaged increasingly in political-institutional analysis, but an understudied area remains that of the justice system.[1]

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[1] Most work on the justice system has been carried out by jurists. See for instance, H. Fix-Zamudio, 'El ejecutivo federal y el poder judicial' in *El sistema presidencial mexicano: algunas reflexiones* (Mexico, 1988), pp. 269–365; H. Fix-Zamudio, 'La independencia judicial en el ordenamiento mexicano', in James Frank Smith (ed.), *Derecho constitucional comparado: México–Estados Unidos. Tomo I* (Mexico, 1990), pp. 379–98; H. Fix-Zamudio and J. R. Cossío Díaz, *El poder judicial en el ordenamiento*

The legitimising role of the judiciary was critical in the replication of the post-revolutionary political system, as it gave the regime legal authority, and effectively channelled policy through the courts. However, the judiciary in Mexico has fallen considerably short of the criteria for rule of law, independent judicial review and control of the legality and constitutionality of the acts of the power-holders. The Mexican Supreme Court has been traditionally characterised by its passive political role, and its subservience to the will of the executive, in a system which has concentrated most political power, both formal and *de facto*, in the hands of the presidency.

The economic turmoil of the 1980s, the recent process of transformation of the Mexican state, and the complex path towards political liberalisation of the last two decades have affected both the public view of justice institutions, and the political role of the judiciary. Democratisation and economic liberalisation are exerting pressures on the political regime in such areas as the effective protection of human rights, an end to impunity and corruption in public office, the realisation of voting rights, the strengthening of economic legal security and a reliable property rights regime. The political violence of the Salinas years (1988–1994) and the seemingly growing magnitude of corruption scandals, dramatically epitomised by the recent jailing and sentencing of Raúl Salinas – brother to the ex-president – signal the growing pressures on the Mexican state to deliver on rule of law. In recent years the deficiencies of the justice system have provided frequent headlines in a mass media more open and denunciatory than in the past. In this context, Ernesto Zedillo inaugurated his presidency in 1994 with a constitutional reform that promised to overhaul the justice system and strengthen rule of law in Mexico and involved major alterations to the judiciary.

This article will focus on the highest level of the justice system – the Supreme Court. The objective is to shed some light on the political role of the judiciary in a dominant party system. The relationship between the judiciary and the executive is mediated ultimately by the Supreme Court, as the final court of appeal in the federal judicial system. A more arm's length relationship would provide an important institutional block in the construction of regime legitimation for the post-revolutionary political

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mexicano (Mexico, 1996); C . Schwartz, 'Jueces en la penumbra: la independencia del poder judicial en los Estados Unidos y en México', in *Anuario Jurídico* (Mexico, 1977).

More recent studies which include greater consideration of social and political factors in their analysis of the courts or justice administration are Luis Rubio et al., *A la puerta de la ley: el estado de derecho en México* (Mexico, 1994). M. Taylor, 'Why no Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch', in *New Mexico Law Review*, vol. 27 (1997), pp. 142–66).

order. A politically passive institution, the judiciary nonetheless provides an important forum for conflict resolution and justice administration. This article argues that the limited political autonomy of the Supreme Court arises firstly from a long-term process of constitutional reform, and secondly, from the nature of dominant party rule which affected the career paths, ambitions and aspirations of the members of the high tribunal. The relationship between the Court and the executive has undergone important transformations since 1917. In particular, recent constitutional reforms, notably in 1994, and the current changes in the power structures of the Mexican political system will inevitably affect the nature of this relationship, and the political role of the judiciary.

The first section of the article briefly addresses the general issue of judicial independence. The article then examines the Mexican case, through a consideration of the different constitutional reforms that have altered the Supreme Court since 1917, and the various formal aspects which have acted as constraints on the independence of the judiciary vis á vis the executive. Here it is important to consider the nature of the Mexican political system, and the peculiarities of the form of constitutional rule that developed under dominant party rule in the post-revolutionary years. The third section examines the career paths and the political strategies of the members of the Supreme Court, and how these have been shaped by the nature of dominant party rule in Mexico's presidential system.[2] The informal dynamics of political loyalties that underpinned the stability of the Partido Revolucionario Institucional (PRI) regime, combined with the particular constitutional reforms to subordinate judicial independence to political expediency, contributing to the mutually supportive relationship that until recently had developed between the executive and the judiciary. The final section of the article draws together the principle political factors that have determined the role of the judiciary in the political system. Here the Supreme Court is discussed, first from a historical perspective; second, in terms of the political background that lead to the reform of 1994; and third through a brief assessment of the reform and its impact on the Court's place within a changing political system.

[2] The data used to assess career paths within the Supreme Court has been compiled from the impressive works by Fix-Zamudio and Cossío Díaz, *El poder judicial*; the political biographies in R. A. Camp, *Mexican Political Biographies: 1935–1993* (Austin, 1995); and the author's own research in the Supreme Court, predominantly in the *Informes Anuales de la Suprema Corte de la Nación.*

1. *Judicial Independence*

In a working democracy, the principal judicial functions are: firstly, guarding the principles of constitutionality and legality, and providing checks and balances against other branches of state; secondly, administering justice through the resolution of disputes and the protection of rights. The political role of the judicial branch is largely, but not exclusively, defined by the degree of autonomy and by the scope of review powers that judges are granted. Judicial independence is deemed necessary in order to achieve due process and impartiality in the tasks of adjudication and judicial review. But independence is a qualified matter: how much independence is considered due; and independence from whom?

Firstly, judges should be politically independent, so that they are not influenced in their rulings by external pressures and short-term political considerations. But political insulation is not enough. To ensure judicial impartiality the system needs to minimise the dangers of judges being swayed or bought by any of the parties involved in a legal dispute. Bribery is the most blatant violation of a judge's impartiality, but more subtle forms of influence can equally impair decisions, such as clientelism, or social and cultural bonds, and also subjective personal attitudes.[3] Finally, independence from democratic pressures is desirable, particularly as mass media and increasing public visibility of judicial practices place the judges in the public limelight in an unprecedented way.

While independence is a good thing, absolute autonomy of the judiciary runs counter to the principles of democracy. Judges need also to be held accountable, and to some extent must be subjected to political or democratic controls.[4] In the Mexican case, however, the problem is not one of judges being over-autonomous, but rather that they are all too exposed to the many types of influence which impede neutral and effective justice administration.

Judicial independence of the highest tribunal can be achieved institutionally by several means. First, appointments procedures determine the degree of political influence in the courts. However once appointed, a judge may cease to be politically accountable depending on the tenure system. Second, life tenure or long-serving periods are the accepted forms by which the appointed magistrate escapes subjection to pressures from the political body that elected him or her. Third, financial autonomy and

[3] See O. Fiss, 'The Right Degree of Independence', in I. Stotzky (ed.), *Transition to Democracy in Latin America: The Role of the Judiciary* (Boulder, 1993) pp. 55–72; P. W. Kahn. 'Independence and responsibility' in Stotzky (ed.), *Transition to Democracy*, pp. 73–88; and M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, 1981), for a discussion of judicial independence.

[4] O. Fiss, 'The Right Degree of Independence', in Stotzky (ed.), *Transition to Democracy*.

decent salaries will both reduce judicial dependence on the other branches of power, and minimise the dangers of corruption.

The legal system is embedded in a political environment that will also condition the degree of judicial independence. In a given political system the role that the judiciary plays is determined to a large extent by the political context within which it develops, and by the extent to which the political class and enveloping society wish judges to have a political role.[5]

Finally, the political role of the judiciary is also greatly affected by the scope of review powers that a high tribunal has in terms of controlling the constitutionality and legality of the acts of the other branches of government. An independent judiciary with limited review powers will remain a weak branch. Conversely, a politically subordinated Supreme Court may choose not to make full use of its constitutional powers.

2. *The Institutional Framework of the Mexican Supreme Court*

This section examines the constitutional development of the Supreme Court since 1917, with particular emphasis on those reforms which have altered its design, and have modified its relationship with the Mexican executive. The objective here is to examine how judicial independence has changed since 1917, and to what extent this is linked to very specific institutional aspects of the Court's structure, appointments procedures, tenure system and financial autonomy, and also to the nature of judicial review powers.

The Supreme Court is viewed as a branch which has traditionally been subordinated to the executive in a strongly presidentialist and essentially undemocratic regime. To speak of judicial independence in the Mexican context might seem misguided given that the power structures were certainly not driven by rule of law or constitutional precepts, once the revolutionary family had been consolidated. Nonetheless, constitutionalism was an essential component of the Mexican political system, and central to its legitimation. Constitutional forms have been unswervingly maintained, electoral calenders consistently respected and upheld, albeit through highly fraudulent and often violent practices, and the separation of powers, although essentially limited, have formed the institutional bulwark of the regime.

The importance of constitutional forms for the political power-holders in Mexico since 1917 is evident merely from the number of times that the Constitution has been amended (over 350 times).[6] Legal forms and a

[5] M. E. Frankel, 'Concerning the Role the Judiciary May Serve in the Proper Functioning of a Democracy', in Stotzky (ed.), *Transition to Democracy*, p. 28.

[6] S. E. Gutiérrez and R. Rives, *La Constitución mexicana al final del siglo XX* (Mexico, 1995), p. 155.

constitutional discourse were key components in the construction of the post-revolutionary regime. And within this, the judiciary was critical precisely in bestowing considerable legal authority on the political system. Although much neglected in the political analysis of post-revolutionary Mexico, the judiciary itself has been reformed numerous times, which speaks of the weight that the power holders gave to the legal aspects of the regime. In this sense, the Mexican political system is strongly underpinned by a *state of legality*, although not by rule of law proper. Evidently, the relationship between the Supreme Court and the executive has not remained unchanged since 1917. The different reforms to which it has been subjected have signified both restrictions and progress at different times in terms of judicial independence from the executive. And at times the Court has acted with more independence than others.[7]

The roots of the current judiciary date back to the nineteenth century and specifically to the 1857 Constitution, which gave the judicial branch a more prominent role than in the past and, to a large extent laid the basis for the modern role of the judiciary in Mexican society and politics. The constitutional and political legacy of the nineteenth century consists of three main features. First, the judicial branch underwent an important process of institutionalisation and administrative improvement, allowing for the advancement of a unified and increasingly centralised legal system.[8] Second, judicial review was consolidated around the *amparo* suit, a limited, but nonetheless initially effective form of individual rights protection.[9] Until 1994 this would be the principle mechanism of judicial review. Finally, despite some initial efforts in 1857 to increase the political role and independence of the judiciary, the principle of judicial abstention from electoral, and generally political, matters was well consolidated by the turn of the century,[10] and would remain so until the reforms of 1994. Thus, despite some notable advances, by the turn of the century the Court was still fairly subordinate to the executive, a trend that was reinforced during the rule of Porfirio Díaz.

[7] Cárdenas Gracia identifies four different stages in the executive-judiciary relationship since 1917: 1) between 1917–1928 of relative independence 2) between 1928–1944, of judiciary subordination to the executive, as the presidency was strengthened under Calles and Cárdenas; 3) between 1944–1986, of internal institutionalisation and administrative consolidation; also a period of stability and political compliance of the judiciary 4) 1986 to date, where judicial reforms have served to enhance judicial autonomy, J. F. Cárdenas Gracia, *Una Constitución para la democracia: propuestas para un Nuevo Orden Constitucional* (Mexico, 1996), p. 173.

[8] See Cárdenas Gracia, *Una Constitución*; and Fix-Zamudio, 'El ejecutivo federal'.

[9] The *juicio de amparo* was established in 1845, and made constitutional in 1857.

[10] Cárdenas Gracia, *Una Constitución*; and J. Moctezuma Barragán, *José María Iglesias y la justicia electoral* (Mexico, 1994).

The 1917 constituent assembly discussed role of the judiciary at length. In reaction to the judiciary's subordination to the executive during the *porfiriato*, some measures were taken to enhance judicial independence. Notably, the original 1917 appointments procedure and the tenure system allowed for considerable autonomy from the executive (later to be reformed to the detriment of the principle of judicial autonomy).

During the first years following the promulgation of the 1917 Constitution, the Supreme Court did adopt a fairly independent position with regard to the executive, and at times ruled directly against government interests. Conflict arose in the early years, in particular with regard to the legal interpretation of the new social elements of the Constitution.[11] But subsequent reforms in the 1920s and 1930s aimed directly at curbing the judiciary's scope for independent action effectively harnessed the judges to the revolutionary project consolidated under Cárdenas. Thereafter, a compliant Court was assured, and the judiciary undertook a more passive role in political matters. And where major disagreements arose between the Court and the executive it was mostly regarding more functional matters concerning the internal organisation and administration of the judiciary.[12]

The constitutional reform of 1994 marks a break with the past, and potentially represents a qualitative change in terms of judiciary-executive relations. However, if it proves to have inaugurated a new period in the judiciary's history, this will be as much a result of changing political circumstances. Examination of the formal-institutional history of the court suggests that the traditional self-restraint and passive role of the judiciary cannot be explained solely in terms of a limiting institutional framework. The judiciary's subordination to the executive was part of the more complex political and institutional process by which dominant party rule was secured. It is this broader political context which determined the judiciary's fate, as an examination of the institutional aspects reveals that there was scope for more independent action on the part of the judiciary.

[11] Fix-Zamudio, 'La indepedencia judicial'; Fix-Zamudio, 'El ejecutivo federal'; and Cárdenas Gracia, *Una Constitución*.

The Supreme Court was in particular resistant to endorsing the spirit of articles 27 and 123 of the 1917 Constitution, relating to the social rights of workers and peasants, and land reform – in part because of the absence of the corresponding legislation required to regulate the new socio-economic order.

[12] For the early history of the Supreme Court see J. L. Soberanes Fernández, 'Políticas públicas relativas al sistema judicial en México', unpublished article (Mexico, 1987); P. González Casanova, *La democracia en México* (Mexico, 1979); L. Cabrera, *El poder judicial federal mexicano y el constituyente de 1917* (Mexico, 1968); A. Carrillo Flores, *Estudios de derecho administrativo y constitucional* (Mexico, 1987); Fix-Zamudio, 'El ejecutivo federal'; and Fix-Zamudio, 'La independencia'.

(i) Appointments procedure and tenure in the Supreme Court

The original appointments and tenure system established in the 1917 Constitution allowed for considerable autonomy from the executive. The eleven members (later increased to 21) were elected by an absolute majority of the votes in Congress in secret ballot, from a list of candidates proposed by the local legislatures of the states. The absence of the executive in this appointments procedure is notable. In addition, Supreme Court members held life tenure appointments. It is important to stress that whilst the original mechanism ensured judicial autonomy from the executive, this was not the case with regard to the local caudillos, who effectively controlled the names of candidates put forward to Congress for Supreme Court appointments.[13]

The appointments procedure was the first aspect to be modified under Calles in 1928 It was replaced by a system of presidential appointment with Senate ratification. Although the reformed article allowed for the Senate to reject the presidential appointment, the consolidation of dominant party rule effectively signified that Supreme Court appointments were virtually in the hands of the executive. Here began the process of subordination of the Court to the executive. The 1928 reform was welcomed by the more progressive elements of the revolution as a way of controlling what at the time was seen as a reactionary judiciary, that served the interests of the regional caudillos and landlords, to the detriment of the revolutionary reforms.[14] The 1928 reform, moreover, involved replacing all of the Court members.[15]

The second major assault on the autonomy of the Court came with the constitutional reform of 1934 under President Cárdenas. The reform of article 94 replaced the original system of life tenure by one of fixed tenure of six years, coinciding with the presidential term. The years of the Cárdenas administration represented the height of the revolutionary process in terms of social reform and political stabilisation. The judicial

[13] S. G. Leon González, 'Decisiones Constituyentes, 1921–28', unpubl. degree thesis, UNAM, Mexico, 1990.

[14] Cámara de Diputados del Honorable Congreso de la Unión, Comité de Asuntos Editoriales, *Derechos del pueblo mexicano. México a través de sus constituciones*, tomo IX (Mexico, 1994).

[15] Later reforms, in 1934 and in 1994, were also taken as opportunities to 'pack' the Court. In addition to this reform, a constitutional article was introduced in 1928 which allowed presidential removal of Court members for bad conduct subject to the approval of congress. Prior to this, the magistrates could only be removed from office through an impeachment process. This clause survived until 1982. Between 1928 and 1976, only three members of the Court were removed by this procedure, but the very existence of the clause conceivably established a significant deterrent against Court confrontation with the executive. J. Carpizo, *El presidencialismo mexicano* (Mexico, 1979), pp. 185–6.

reform of 1934 was clearly designed to further subjugate the judiciary, with the purpose of ensuring minimum judicial interference in a highly complex political moment.[16] Again, as with the reform of 1928, taking steps to subordinate what was seen as a conservative and reactionary institution was hailed as a progressive and desirable measure at the time, and one which would protect the social reforms.[17]

Although life tenure was restored under Avila Camacho in 1944, the tone of executive-judicial relations had been set, and was to remain essentially unchanged until 1994. Reincorporating life tenure did not significantly alter judicial activism or the Court's political autonomy. By this time a compliant court had been consolidated, which was part of the process of institution-building for the stabilisation of the post-revolutionary regime. The reform of 1994 changed life tenure to a staggered fifteen year fixed term, on the argument that fifteen years is sufficient to protect judicial independence from incumbent presidents, and has the advantage of allowing for healthy renewal of the maximum tribunal.

In terms of the tenure system and the appointments procedure, between 1928 and 1994 (except for the period 1934–44) the Mexican system is not dissimilar to systems in other presidential democracies. That is, the political nature of the appointment is not in itself necessarily a problem, and in theory incorporates a desirable element of judicial accountability to the other branches of power. However, dominant party rule in Mexico under a heavily centralised presidential system has in effect ensured virtually unchecked presidential appointments to the Supreme Court. The legal community has played a minimal role in the supervision of court appointments, and no formal consultation takes place with the professional law associations.[18] This is also the result of a judicial structure which has not fostered meritocratic promotion mechanisms. In addition, the media was restricted until recently, and prior to 1994 public scrutiny and media coverage of Supreme Court appointments was minimal. Thus, Supreme Court appointments in the past have lacked any real broader public debate or consideration.

Throughout the judicial system, appointments requirements are lax and minimal. In the 1917 text, article 95, the requirements to be a member of the Supreme Court included being a Mexican citizen, not below the age of thirty five, having a degree in law, and being a *bona fide* citizen, with no criminal record or public scandal, and having lived in the country for the

[16] Fix-Zamudio, 'La independencia judicial', p. 385.

[17] Cámara de Diputados, *Derechos del pueblo mexicano*, Tomo IX.

[18] E. Arteaga Nava, 'La independencia judicial en el ordenamiento mexicano', in J. F. Frank (ed.), *Derecho constitucional comparado: México Estados Unidos. Tomo I* (Mexico, 1990), pp. 72–99, on p. 404.

previous five years. This was reformed in 1934, by which the only requirements were to be between the ages of thirty five and sixty five, and to have possessed a law degree for at least five years. The 1994 reform significantly alters this. Now candidates must be law graduates with ten years experience, preferably with experience in the judicial system, and *cannot have held a political position (as secretary of state, head of administrative department, attorney general, member of Congress of either chamber, governor or head of the Federal District) for at least a year before the appointment.* The latter is directed at curbing the political as opposed to the judicial criteria for appointments. The pyramidal structure of the judiciary bred top-bottom clientelist relations, and high levels of professional competence were not particularly fostered. The 1994 constitutional reforms has established a Judicial Council, *Consejo de Judicatura*, which has as its principal task to relieve the Supreme Court of its administrative burdens, notably, appointments to the lower courts and the administration of the judicial budget, to establish more rigid criteria of merit and performance in office, and set up disciplinary mechanisms to control corruption.[19]

The reform of 1994 considerably limits the executive control of Supreme Court appointments. The current article 96 establishes a system by which the Senate elects each member of the Court from a list of candidates provided by the executive, on a two thirds majority vote. As party pluralism in Mexico increases, in principle this reform incorporates a stronger mechanism of Senate control over presidential appointments which in the long run will weaken the bond between the judiciary and the executive. In the future, appointments to the Supreme Court will inevitably involve inter-party negotiations. However, the immediate impact of the reform was sadly diluted by the manner in which the current members were appointed. After 'dismissing' the previous members of the Supreme Court, albeit with generous compensation, the new members were elected from a list presented by Zedillo to the Senate. However, the PRI senators voted with marked ballot papers, thus effectively resulting in a packed court again.

The 1994 reforms significantly increase the possibilities for a more politically independent judiciary, both by limiting the presence of the

[19] It is notable that the commission of the Council in charge of internal disciplinary action after 27 months of investigations into over 70 cases of judicial misconduct, only 10 members of the judiciary were removed from office, 9 suspended, and 5 disqualified. These optimistic figures have prompted distrust regarding the thoroughness and sincerity with which disciplinary investigations are being undertaken by the Council. *Proceso*, 22 June 1997.

See Cossío Díaz, *Jurisdicción federal y carrera judicial en México* (Mexico, 1996); and H. Fix-Zamudio and H. Fix-Fierro, *El consejo de la judicatura* (Mexico, 1996) for a discussion of the Council.

executive in the appointments procedure, and by reducing the political character of the appointments. The long-term effects of the reform remain to be seen, as the current court was still elected under an overwhelming PRI majority in the Senate, a situation that is bound to change following the electoral reform of 1996. Potentially, though, the reform is far-reaching, and all the more so in a context of increased electoral competition and party pluralism in Congress.

(*ii*) *Financial autonomy*

An additional factor which affects both the level of judicial independence, and the career paths of the members of the Supreme Court is the question of financial autonomy. Before 1994 the only financial guarantee provided for in the Constitution was that the salaries of the Supreme Court members and of the judges in the lower courts could not be reduced during their time in office, (which does not say much in times of inflation). Prior to 1976 the administration of the judicial budget had to be approved by the Secretary of Planning and Expenditure (*Secretaría de Programación y Presupuesto*). A budget law of 1976 established that the judiciary no longer required executive approval for the administration of the judicial budget. This measure was incorporated into the Constitution in 1994.

The budget allocated to the federal judiciary is relatively low, remaining well below 0.5 per cent of the national budget after the 1950s.[20] There is little information available on the management and allocation of the judicial budget. The general impression is that prior to the 1980s, salaries were low. Even at the level of the Supreme Court this not only makes judges more vulnerable to bribery and corruption, weakening judicial independence, but it also makes the membership of the Supreme Court not particularly attractive. The number of Court justices that have left a life tenure position for other walks of political life attests to this, (see Tables 2 and 3 in the next section). In 1982 it appears that the salaries were raised significantly.[21] Currently Supreme Court members' salaries are officially set at the same level as those of under-secretary of state, and the members of the IFE – Federal Electoral Institute – which in 1998 stood at 75 thousand pesos a month.[22] This does not take into account discretionary bonus packages, which in the case of IFE members have been calculated as amounting to a total of 114 thousand pesos per month.[23] It appears that Supreme Court members also benefit from similar

[20] Cossío Díaz, *Jurisdicción federal*, pp. 54–60.

[21] C. Welna, 'Reform of Justice and the Proliferation of Human Rights Non-Governmental Organisations in Mexico (1977–1994)', paper presented at Law and Society Association, Glasgow, July 10–13, 1996; and Soberanes, 'Políticas públicas'.

[22] Approximately US$7,550 per month calculated at the exchange rate in November 1998.

[23] *El Financiero*, 26 Nov. 1998.

discretionary bonus packages paid by the executive, the legality of which is highly questionable.[24] Nonetheless, good constitutional lawyers stand to earn considerably more in private practice.[25] The judicial budget, however, has increased notably since the years of the López Portillo presidency (1976–1982) and throughout the 1980s and 1990s.[26] This would suggest that in financial terms, the position of justice of the Court has become more attractive since the 1980s.

(*iii*) *Judicial Review in Mexico*

In addition to the institutional aspects of appointments, tenure and financial autonomy, the political role of a judiciary is also defined by the nature and scope of judicial review powers. The Mexican system of review is based on the *amparo* suit, designed for the protection of individual rights, but which came to constitute the principal procedure for judicial control of the constitutionality of acts of authority and legislation.[27] The complexities of the *amparo* suit will not be discussed here, but a mention of how it operates is important to understand the role that the Supreme Court could be expected to have within the political system.

Essentially, prior to 1994 the *amparo* suit was the main mechanism available to contest the legality or constitutionality of a law, resolution, act or judicial decision.[28] A principal feature is that in *amparo* suits, the Court's ruling does not have *erga omnes* effect, that is, it does not lead to the abrogation of the law or act in question, but only protects the affected plaintiff. Only when the Court makes the same ruling for five consecutive cases is jurisprudence established, whereby lower courts must apply the same conclusion to all similar future cases. The process for the *amparo* suit has changed several times since 1917, but the essence of this judicial review mechanism has remained basically the same.

[24] The Constitution clearly states that members of the Supreme Court can only earn a salary which is officially stipulated in the federal budget. The constitutionalist, Arteaga Nava, in an interview suggested that by accepting the bonus payments, Supreme Court members are indebted to the executive, undermining their political autonomy. (Author's interview with Arteaga Nava, September 1999.)

[25] Author's interview with Arteaga Nava.

[26] Welna, 'Reform of Justice'; CIDAC, *A la puerta*, p. 80; Soberanes, 'Políticas Públicas', pp. 62–63; and Cossío Díaz, *Jurisdicción Federal*, p. 56.

[27] See the following for a discussion of the *amparo* suit: Fix-Zamudio, 'El ejecutivo Federal'; Fix Zamudio, and Cossío Díaz, *El poder judicial*; Taylor, 'Why no Rule of Law'; Schwartz, 'Jueces en la Penumbra'; R. E. Biles, 'The Position of the Judiciary in the Political Systems of Argentina and Mexico', in *Lawyer of the Americas*, vol. 8 (1976), pp. 237–318.

[28] A constitutional reform of 1987 enhanced the character of constitutional tribunal of the Supreme Court by limiting the type of *amparo* suits that could be heard at this level to cases dealing with the unconstitutionality of laws.

Although apparently limited, this form of constitutional review has been considered by Mexican jurists (and social scientists) as having had considerable success in protecting individual rights against unconstitutional resolutions, rulings or laws. Statistics up until the 1970s attest to the relative effectiveness of rights protection afforded by the *amparo* suit.[29] These findings point to a far from negligible degree of judicial independence in *amparo* suits, at least on matters that were politically unimportant. Arguably, it was precisely the limited nature of the *amparo* suit in terms of revoking legislation under an essentially authoritarian regime which rendered it a relatively effective recourse for rights protection. It at least provided for some form of rights protection in the day to day administration of justice.

However, increasingly there is growing discontent among the legal community regarding the limitations that the *amparo* suit presents as an effective tool of rights protection and judicial review.[30] On the one hand, there is discontent with the limited impact of the judicial review powers of the Court. The lack of *erga omnes* effect is increasingly viewed as undemocratic, undermining the notion of equality before the law. Moreover, the overwhelming increase in caseloads has inevitably diminished effectiveness of the *amparo* suit in terms of rights protection. In 1992, as many as 77 per cent of *amparo* cases were dismissed for reasons of improper procedure, and only 11 per cent of court rulings favoured the plaintiff.[31]

While the *amparo* suit had some effect in non-political cases, rarely did the Supreme Court after the 1930s undertake to challenge the executive where critical political or financial interests were at stake.[32] What has prevailed within the high tribunal is an inclination to maintain a low political profile and avoid open conflict with the executive, in the name of political stability. *Amparo* suits of an overtly political nature were

[29] See Carpizo, 'El presidencialismo', and Biles, 'The Position of the Judiciary'; González Casanova, *La democracia*, and Schwartz, 'Jueces en la penumbra'. The latter two present statistical analyses of the effectiveness of the *amparo* suit.

[30] Cárdenas Gracia, *Una Constitución*; C. Reséndiz Núñez 'Cumple el Juicio de Amparo con sus objetivos?' presented at the Comisión de Derecho Constitucional y Amparo de la Barra Mexicana de Abogados, Mexico, November 1996; CIDAC, *A la puerta de la ley*; and Taylor, 'Why No Rule of Law?', pp. 154–6.

[31] CIDAC, *A la puerta de la ley*, p. 65. 'Improper procedure' offers an escape valve to a court system which has become increasingly overloaded and incapable of dealing with its case-load. Workloads have increased from 495 cases per judge in 1940 to 1686 per judge in 1990, CIDAC, *A la puerta de la ley*, p. 76.

[32] Traditionally, the non-political role of the Court was justified from two perspectives. The first reflected the arguments of Vallarta, member of the Supreme Court in the 19th century, who argued against the dangers of a judicial dictatorship. The second notion was that judges were not to be 'contaminated' by political matters. See González Avelar, *La Suprema Corte*.

frequently declared inadmissible.[33] The Supreme Court has not always been able to avoid political issues, but on the whole has tended not to rule against the executive in politically or economically sensitive matters. In 1968, the Court was quick to dismiss *amparo* suits to protect the students and protestors against arbitrary imprisonment, on the premise that their acts constituted possible cause of 'social dissolution' (contemplated in the Federal District penal code until 1970) and so could not be protected by the courts.[34] The Court was quick to support the executive in 1982 when *amparo* suits were put forward by the business community questioning the constitutionality of the nationalisation of the banks.[35] Since the 1930s, the judiciary has clearly adopted a passive political role, and confrontation with the executive has been avoided as the Court has sought to distance itself from politically sensitive issues.[36]

Although its review powers were limited, and despite the process of institutional encroachment on the judicial branch in the 1920s and 1930s described above, there is also a pattern of self-constraint and political 'shyness' which is not warranted by the constitutional framework alone. The attitudes that developed within the judicial branch were in line with the nature of the dominant party regime, where institutional loyalty to government interests prevailed. Once judicial compliance with the regime had been consolidated in the 1930s, this loyalty to the system followed naturally, and was replicated for decades. The judiciary responded to the wishes of the executive as expressed through a number of informal pressures and incentives, ranging from political loyalties to informal financial and political rewards, and, as will be seen below, career incentives which went beyond remaining in the Supreme Court despite the stability of life tenure. As the judiciary became subordinated to the

[33] González Avelar *La Suprema Corte* points to a handful of *amparo* suits of a political nature where the Court ruled in favour of the plaintiff. However, these were the exception, and on the whole what has prevailed is the priority of maintaining political stability. An example that illustrates the attitude of the Supreme Court as it ruled in favour of the plaintiff as early as 1933 was expressed by a member of the Court:

> 'We have ruled in favour of the plaintiff only because the country is at peace: if the circumstances were different, nothing would stop us from declaring that the dismissal of a military man is a political act that cannot be protected by the *amparo* suit'. Quoted in A. Carrillo Flores, *Estudios de derecho administrativo*, p. 277 (author's translation).

[34] Schwartz, 'Jueces en la Penumbra', pp. 208–9.

[35] C. Elizondo, 'Property Rights in Mexico: Government and Business after the 1982 Bank Nationalization', unpubl. D.Phil thesis, University of Oxford, 1986.

[36] J. Verner, 'The Independence of the Supreme Courts in Latin America: A Review of the Literature', in *Journal of Latin American Studies*, vol. 16 (1984), pp. 484–5, describes the Mexican Supreme Court as 'stable'; as long as it did not concern itself with questions of partisan politics or fundamental public policy it was generally and routinely respected.

executive, unsurprisingly the interests of the members of the judicial hierarchy tended to coincide with broader regime interests – notably, regime stability. So, perhaps it was essentially a case of inter-branch collusion, or convergence of interests between the executive and the judiciary. Arteaga Nava characterises the justices of the Supreme Court in the following terms:

> While judges, especially in other countries, have the reputation of being conservative, the truth is that in Mexico, except on rare occasion, we cannot say the same. It does not follow from this that they are liberal or revolutionary; rather that the highest magistrates are simply colourless, and follow the ideas of the highest members of the ruling group of the moment, especially those of the president of the republic, be they revolutionary, conservative, or whatever else is in fashion... (Author's translation).[37]

The 1994 reforms have introduced potentially far-reaching innovations regarding the scope of judicial review and constitutional control powers of the Court. Now the Supreme Court can rule under certain conditions on the constitutionality of laws or acts of authority with the effect of abrogating the law (or section of the law) or act in question, that is with *erga omnes* effect. The new review powers of the court include, first, the capacity to rule on conflicts which arise from legal controversies that are essentially between federal government and local states, between state governments and municipalities, between different state governments, and between different municipalities (these Court rulings did exist in a more limited form before the reforms of 1994). Secondly, the Supreme Court can rule on cases of unconstitutionality brought up by 33 per cent of either chamber of the national Congress against federal or Federal District laws or resolutions, and 33 per cent of local legislatures against their own state laws or resolutions.[38]

The first of these new powers effectively grants the Supreme Court the ability to decide on matters of federal inter-state relations. As federalist pressures on central government increase this will become a controversial area of adjudication. The second innovation allows for opposition parties

[37] E. Arteaga Nava, *Derecho constitucional* (Mexico, 1995), p. 489.

[38] See E. Arteaga Nava, 'Las nuevas facultades de la Suprema Corte de la Nación, in M. Melgar Adalid (ed.), *Reformas al poder judicial*, (Mexico, 1995). See also Taylor 'Why no Rule of Law', pp. 162–3, who highlights the major weaknesses of this new power of judicial review. The time limit within which congress can challenge the constitutionality of a law – 30 days – may not be sufficient for a constitutional flaw in the legislation to become evident. Secondly, limiting the power to raise a constitutional challenge to Congress or the Attorney General undermines the notion of universal access to justice – the *amparo* suit remains the channel for rights protection for the public – and inevitably politicises a juridical-constitutional procedure. The decision to challenge the constitutionality of a law will be based on political calculations rather than a concern with constitutional principles.

to question the constitutionality of government legislation with considerable ease. Although the reform is perhaps still too recent for a full assessment of its impact on the political possibilities of the Supreme Court, several suits of unconstitutionality have already been presented to the high tribunal. With this new faculty, the Court has sprung to the public limelight through various politically sensitive rulings (discussed below).

Finally, a later reform in 1996 greatly enhanced the political profile of the Supreme Court by extending its review powers to some electoral matters. The 1996 constitutional reform was the result of a complex process of negotiation with parties of the opposition, and was part of a package of electoral reforms that included, among other things, the establishment of a strengthened Federal Electoral Institute (IFE) – a collegial citizen counsellor body in charge of the management of electoral processes.[39] The Supreme Court can now rule on the constitutionality of electoral laws at a federal and state level. All other electoral disputes (such as the constitutionality of electoral acts and decisions, or the protection of voting rights) are decided by the Federal Electoral Tribunal, and cannot be repealed by the Supreme Court.[40] The 1996 reform has significantly raised the political profile of the Supreme Court.

Potentially, the judiciary may now come to occupy a position of considerable political influence, and will have to enter into the calculations of all the political parties. How the Court will use these new attributes remains to be seen. Since the reform of 1994 there does appear to be a more visible role of the Supreme Court in political affairs, although not necessarily a more respected one. Increased Court activism is not equivalent yet to greater political autonomy. Moreover, greater presence of the Court in the political arena by no means necessarily translates into a better quality of justice administration. The reforms of 1994 may have major political implications in the future, as competitive party politics inches its way into the political system.

In summary, the most important constitutional reforms which defined the place of the Supreme Court within the political system had been passed by 1944. Later reforms until 1994 essentially involved important administrative and organisational changes, but did not in any fundamental

[39] See T. A. Eisenstadt, 'Off the Streets and into the Courtrooms: Resolving Post-electoral conflicts in Mexico', in A. Schedler, L. Diamond, and M. F. Plattner (eds.), *The Self-Restraining State* (Boulder, 1999), pp. 83–104.

[40] Although the Federal Electoral Tribunal falls within the judicial branch since the reform of 1996, its decisions are not subject to judicial review by the Supreme Court. However, the boundaries between the two bodies are not always clear, and the last few years have seen a process of tentative accommodation to their new powers by both institutions. *El Financiero*, 24 April, 1997.

way alter either the scope of constitutional review powers, or the degree of political independence.[41] It is of interest that many of the constitutional reforms after 1944 were the product of proposals drawn up by the Supreme Court itself . There was the sense that in exchange for political loyalty, the judiciary was granted considerable leeway regarding its own internal affairs. The 1994 reform, which lead to the dismissal of all but one members of the Supreme Court, was not the product of an internal consultation process within the judiciary – nor was it widely politically debated.[42]

3. *Career Paths of the Supreme Court Justices*

The institutional context tells us much about the structure of incentives and opportunities which are built into the judicial system, and how this shapes the degree of judicial independence. A closer look at the career paths of the members of the Supreme Court will give a more accurate picture of the relationship between the judiciary and the executive. Although the available data is incomplete, and in some parts is inconsistent, nevertheless, some patterns of behaviour and career choices can be discerned which give an indication of the incentive and opportunity structures which characterised the office of Supreme Court justice.

Career paths reflect certain patterns of ambition which characterise specific offices. Ambition is shaped both by personal preferences, and by the structure of opportunities which are built into the office in question.[43] The structure of opportunities is determined by the institutional (and constitutional) framework, prevailing patterns of career advancement and promotion possibilities, and also by the political environment in which the office in question is inserted. Given the function and nature of the Supreme Court in Mexico, the career ambitions that ought to characterise the office-holders are of a *static* type. In principle, life tenure implies that there should be a very low turnover rate of the office, and it should

[41] Constitutional reforms which affected the Supreme Court, either organisationally or administratively, were passed in 1946, 1951, 1962, 1967, 1974, 1975, 1977, 1979, 1982, 1987. See Fix-Zamudio and Cossío, *El poder judicial* for a detailed discussion of the reforms.

[42] *Proceso*, 19 Dec., 1994; 26 Dec., 1994; and 3 Jan., 1995. The law was passed within less than a month of its initial announcement in Congress with very little public debate, which perhaps had much to do with its unfortunate timing, as it was announced on the eve of the December 1994 financial crisis.

[43] In his study of political parties, Schlesinger distinguishes between the three types of ambition: *discrete*, by which the office holder seeks a particular position for a specified term, and then chooses to withdraw from public office; *static*, in which the office holder seeks to make a long-term career out of a particular type of office, and *progressive*, when he or she views the office in question as a transitory one to a more valued or desirable office. See J. A. Schlesinger, *Political Parties and the Winning of Office* (Ann Arbor, 1991).

Table 1. *Positions held by members of the Supreme Court prior to their appointment between 1933–1995*

	%
Percentage of members of the Supreme Court who occupied a position in the judiciary prior to appointment.	29
Percentage of members of the Supreme Court who occupied a political position prior to appointment.[1]	47
Percentage of members of the Supreme Court for whom there is no information, or data is contradictory.	24

[1] This includes positions in the attorney general's office which depends on the Executive.

Source: Author's own compilation from *Informes Anuales de la Suprema Corte de Justicia de la Nación*, R. Camp, *Mexican Political Biographies*: 1935–1993 (Austin, 1995); and H. Fix-Zamudio and J. R. Cossío Díaz, *El poder judicial en el ordenamiento mexicano* (Mexico, 1996).

encourage career aspirations to be directed to remaining in office. Once a justice is appointed, there should be no reason why he or she should wish to leave office, so that his or her loyalties are to the job – and not subject to external pressures. What we find instead is a position that is politicised by the nature of the political environment in which it is embedded. An examination of the career paths of Supreme Court members reveals a less than ideal commitment to the office.

In the first instance, between 1940–1994, 47 per cent of Court appointees proceeded from previous political positions, as opposed to 29 per cent who came from positions within the judicial hierarchy (see Table 1).[44] The fact that appointment requirements were lax signified that members were not necessarily selected for their professional or judicial merits, but for reason of political affinity, loyalty and friendship, or as a political rewards. This combined with the absence of public control mechanisms (such as a critical media), or the involvement of professional bodies (such as lawyer associations) to heighten the political nature of appointments to the Court. This does not in itself preclude the possibility that once in office justices remain under political influence. In theory, life tenure should secure political independence, as career ambitions should be directed to remaining in office for life or until retirement.

Instead, the history of the Court shows a relatively high turnover and desertion rate. At least 26 per cent of Supreme Court members did not

[44] Over 67% of judges between 1935–1991 had some prior university teaching experience. But this is perhaps related to the importance of centres of education in the formation of political cliques or 'camarillas'. See R. A. Camp, *Political Recruitment across Two Centuries: Mexico, 1884–1991* (Austin, 1995), p. 232.

Table 2. *Positions held by members of the Supreme Court after they leave office between 1940 and 1994*

	%
Percentage of members of the Supreme Court who leave their position for a political post.	20
Percentage of members of the Supreme Court who leave their position for another post in the judiciary.	2
Total percentage of members of the Supreme Court who *do not* fulfil life tenure.[1]	26
Percentage of members of the Supreme Court for whom there is no data, or the information is contradictory.[2]	74

[1] This includes members for whom their date of death is several years after their departure from office.

[2] These percentages will not give an accurate picture of the percentage of members who fulfil life tenure in the court. Although it can be assumed that many of those ministers for whom there is incomplete information will have remained in office, some will have left.

Source: Author's own compilation from *Informes Anuales de la Suprema Corte de Justicia de la Nación*, R. Camp, *Mexican Political Biographies: 1935–1993* (Austin, 1995); and H. Fix-Zamudio and J. R. Cossío Díaz, *El poder judicial en el ordenamiento mexicano* (Mexico, 1996).

complete life tenure (see Table 2). It is likely that in reality this percentage is higher: of those for whom there is available information that left office before time, at least 20 per cent went on to a political post either immediately after or some time later.[45] For a position that offers life tenure, these figures, (which at most under-represent the rate of desertion of office) are alarmingly high, indicating that the position of member of the Supreme Court was not a particularly valued one. They also suggest that a common aspiration was to leave office for a better political position. If this is so, it cannot be expected that the Court could rule independently on cases that affected the interests of the executive in the hope of future political rewards.

Thus, in a dominant party system, the sense of political mobility to other positions was not an unreasonable calculation on behalf of Court members. Firstly, membership of the high tribunal was not necessarily seen as the culmination of a legal career, but in some cases was one more stepping stone in a political career which aspired to reach higher, or more lucrative levels of public office.[46] It is particularly notable that outgoing justices would choose to take their place in such short-term positions as

[45] Of the remaining 74%, it is impossible to tell from the available date whether all of these actually fulfilled life tenure or not.

[46] Arteaga Nava describes the office of minister of the Supreme Court as a third level position within the public sector, along with under-secretaries of state, members of the lower house of congress and some governorships. Arteaga Nava, 'La independencia judicial', p. 406.

Table 3. *Position occupied by outgoing justices of the Supreme Court*

First position held after leaving the Supreme Court	Number of Members of the Supreme Court
Secretary of State (Federal level)	2
Under-secretary, or director of public agency	4
Governor	7
Member of the Chamber of Deputies	3
Member of the Senate	6
Secretary of state government (state level)	2
Presidential advisor	1
Attorney General	2
Special Prosecutor	1
Ambassador	1
Lower position in the judiciary	2
Other	2

Source: Author's compilation from R. Camp, *Mexican Political Biographies*: 1935–1993, (Austin, 1995); and H. Fix-Zamudio and J. R. Cossío Díaz, *El poder judicial en el ordenamiento mexicano* (Mexico, 1996).

members of Congress, in preference to remaining in the Court. (See Table 3). Dominant party rule provided the opportunities for mobility. Secondly, the position of member of the Supreme Court was not particularly prestigious, nor, until the late 1970s, particularly well paid, making security in office in itself not necessarily attractive, especially where more lucrative opportunities elsewhere were available.

Career paths of Supreme Court members have not remained unchanged, however. First, greater financial autonomy and better salaries since the end of the 1970s have made the position more attractive. Secondly, as the literature on political elites in Mexico reveals, the old style of UNAM (Universidad Nacional Autónoma de México) trained lawyers have been somewhat displaced in high public office by economists and technocrats trained abroad since the early 1980s, making aspirations to political mobility perhaps less feasible.[47] This is also related to the fact that from the mid 1970s onwards Supreme Court members were increasingly appointed from within the judicial hierarchy, making political ambitions beyond this office less likely.[48] Thirdly, in a changing political

[47] See R. A. Camp, *Politics in Mexico: The Decline of Authoritarianism* (Oxford, 1999), pp. 120–7; R. A. Camp, 'Camarillas in Mexican Politics: The case of the Salinas Cabinet', in *Mexican Studies*, vol. 6, no. 1 (1990), pp. 85–107; and M. A. Centeno and S. Maxfield, 'The Marriage of Finance and Order: Changes in the Mexican Political Elite', in *Journal of Latin American Studies*, vol. 24 (1992), pp. 57–85.

71% of Supreme Court members between 1935 and 1991 were trained in the UNAM. See Camp, *Political Recruitment*, p. 228.

[48] Author's own calculations from data compiled in Camp, *Mexican Political Biographies*, Fix-Zamudio and Cossío Díaz, *El poder judicial*, and author's own research in *Informes Anuales de la Supreme Corte de la Nación*.

environment where dominant party rule is no longer certain, security of tenure becomes more attractive, (although since 1994 tenure is only for fifteen years). The PRI can no longer offer promises of future rewards, or guarantee future promotion in exchange for political loyalties as in the past. Finally, the reform of 1994 very specifically addresses the problem as now Supreme Court members cannot have held a political position for at least a year before the appointment or for two years after. Thus, the old incentive and opportunity structures are being considerably transformed, as a result of both constitutional reforms and broader regime changes, increasing the chances for future political independence of the Court.

From the executive's viewpoint, providing career incentives beyond the Supreme Court was a way both of subordinating the judiciary to executive influence, and of including the judiciary within the sphere of state patronage and clientelist relations which have characterised the Mexican political system. Relatively high desertion rates within the Supreme Court meant that the executive could effectively 'pack' the Court to some extent. In effect, since 1944, each Mexican President appointed an average of 54 per cent of the Court during his time in office.[49]

The career paths of the justices of the Supreme Court reveal that despite some institutional aspects which in principle might have protected judicial autonomy from political pressures, the broader political context of dominant party rule and the limited attractions of the office weakened the possibilities of independent adjudication. Following the 1994 reforms, and in the context of broader political transformations the relationship between executive and judiciary will inevitably change.

4. *The Supreme Court in the Mexican Political System*

The judiciary was a critical institution in the construction of the post-revolutionary regime, and was perceived as such by the power-holders, as is evident from the numerous judicial reforms between 1917 and 1994. These reflected calculated strategies to bind the judiciary to the executive, and limit the principle of separation of powers. That the Supreme Court, and by extension the judiciary, was politically subordinated is in itself unsurprising, yet it constitutes an important yet dramatically understudied explanatory factor in understanding the remarkable longevity of the Mexican regime.

[49] Calculated from Fix-Zamudio and Cossío Díaz, *El poder judicial*. This contrasts with the United States where the average rate of appointment per president is 33% of the Court, thus rarely holding a majority Court, especially since Senate concurrence is no formality. Calculated from H. J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York, 1992), pp. 51–2.

(i) The Supreme Court and Dominant Party Rule

For the reasons discussed above, dominant party rule secured the complicity of the judicial branch in the construction and consolidation of the Mexican political system under the hegemonic rule of the PRI. The judiciary has played a crucial role in the legitimisation of the Mexican political system. Firstly, it bestowed constitutional and legal legitimacy on the regime – not so easily achieved by the military experiences of Latin America, if at all. The consistent respect for the constitutional rituals of periodic elections, an elected congress, a non-renewable presidency, and so forth, have rendered the discourse of rule of law possible (although not plausible), and proved highly instrumental for decades of political stability.

Secondly, the judiciary undeniably fulfilled the function of administration of justice, as is evident from the sheer volume of judicial proceedings, and the ever increasing case load.[50] Despite the prevailing image of lack of impartiality and corruption as characteristics identified with the administration of justice in Mexico, a functioning and unified court system operates, and there is in place a well established and sophisticated legal tradition. Moreover, in some areas of litigation more so than in others, justice administration was in fact fairly effective.[51] A politically shy judiciary, nonetheless provided a far from negligible forum for the resolution of legal disputes. This served an important legitimating function in state and society relations, not least as political developments in the post-Revolution were closely complemented by carefully drafted legislation – notably regarding agrarian reform matters and labour

[50] It must be stressed that many of the problems of the courts stem from the increasing pressures of litigation and case-loads in a modernising society. See, for a discussion of the magnitude of administrative problems of the courts CIDAC, *A la puerta de la ley*.

[51] Schwartz concluded in his study of the judiciary in the 1970s that the courts were reasonably effective in *amparo* suits that dealt with some taxation issues, cases brought before the administrative chamber with regard to administrative acts and resolutions, and cases concerning decisions taken in the military courts. Schwartz also suggests that even in some matters of protection of private property against expropriation related to agrarian reform, the Court has acted to limit the power of the executive, within the legal rubric permitted. Less encouraging were the areas of penal justice, particularly where political decisions were concerned, and rights protection. Schwartz, 'Jueces en la penumbra', pp. 181–93.

González Casanova concluded in his study which ranged from 1917–1960, out of 3700 *amparo* suits which specifically name the executive as the authority in question 34% were conceded to the plaintiff. However, the majority of plaintiffs came from a business or land-owning background, or represented foreign capital interests. Nonetheless, the courts fulfilled a crucial social function of channelling conflict, contributing to the social and political stability of the regime. González Casanova, *La democracia*, pp. 33–7.

legislation – which court rulings have, on the whole, upheld since the late 1930s.

This institutional design in the context of dominant party rule allowed for a comfortable and mutually supportive relationship between the judiciary and the political system. However, the political 'shyness' of the Supreme Court, to some extent self-imposed, corresponds to factors which go well beyond the formal constitutional provisions. Although, as discussed above, these in themselves carried inhibitory elements regarding judicial independence, of greater importance were the dynamics of the political process itself as power was concentrated in the hands of the presidency. The limited and self-limiting role of the judiciary was further complemented by the fact that many Supreme Court members were actually PRI members, or before or after their period in office held other public or state positions, some of these of a very notable political character. Thus the interests of the judicial hierarchy coincided effortlessly and unsurprisingly with broader regime interests, namely regime stability. The judiciary was both the product of the post-revolutionary political arrangement, and a support mechanism adjusted to its internal logic.

Thus, the judiciary was one more building block within the corporatist state structure that was consolidated under the Cárdenas presidency in the 1930s. It is unsurprising that the judiciary came to share the recurrent characteristic of networks of clientelism and state patronage.[52] The Mexican political system could not be said to have been underpinned by the rule of law proper, but a system of legality was in place. Although there was no even application of the law, by no means was the Mexican state lawless, and a modern system of law operated, channelled through the court system, and also through the parallel system of special tribunals or administrative courts.[53]

[52] Knight discusses the marriage of a culture of graft and clientelism with high idealism that has characterised Mexican politics since the 19th century. Under the revolutionary state, a system of patronage and repression developed based on coercive and allocative corruption. Where possible it was bound within a legal framework; where necessary, the law was disregarded. Clientelism and patronage was the basis for self-enrichment, but also for political purposes. See A. Knight, 'Corruption in Twentieth Century Mexico', in W. Little and E. Posada-Carbó (eds.), *Political Corruption in Europe and Latin America* (London, 1996), pp. 219–36. See also S. Morris, *Corruption and Politics in Contemporary Mexico* (Tuscaloosa, 1991).

[53] See M. González Oropeza, 'The Administration of Justice and the Rule of Law in Mexico', in M. Serrano and V. Bulmer-Thomas (eds.), *Rebuilding the State: Mexico after Salinas* (London, 1996), pp. 59–79, for a discussion of these parallel tribunals.

These tribunals (which include such bodies as the boards of conciliation and arbitration) are understudied in terms of their political and social relevance. Many were established in the early decades of the construction of the revolutionary state, and in some instances reflected the distrust that certain social sectors felt towards the formal judicial system.

(ii) Political Background to the 1994 Constitutional Reform

The constitutional reform of 1994 which was the first legislative measure announced by Ernesto Zedillo upon assuming presidential office in December, can be understood from a number of perspectives. The reform would bring about substantive alterations to the judicial branch in terms of its judicial review powers, and the future political autonomy of the Supreme Court. It seemed, therefore, to represent a sincere governmental initiative aimed at confronting the problems of law and order and justice administration, all the more so as it was accompanied by Zedillo's prior decision to appoint a member of the opposition to the position of Attorney General (*Procurador General de la República*) – Antonio Lozano Gracia from the Partido de Acción Nacional (PAN). On the other hand, it is possible that the reform was yet another typical anti-corruption drive similar to those that had characterised the early years of the de la Madrid and Salinas administration.[54] Thus, it could be construed as a further example of the resilience and adaptability of an essentially authoritarian regime, which despite the gradual changes of the last two decades, has moved slowly towards democratic rule or substantive political liberalisation. However, the very fact that such a reform was undertaken signals deeper changes in political and public concerns.

By the 1990s, several general factors have combined which appear to be forcing a redefinition of the role of the judiciary in the political system. Firstly, the rules of the game of the *ancien regime* are giving way to a process of political liberalisation which is causing an important, if still highly uncertain, redefinition of the procedures and institutions. The electoral losses of the PRI will undermine the institutional bonds that underpinned dominant party rule as the party can no longer guarantee political rewards in exchange for judicial compliance. As the basis for the executive-judiciary relationship of the past is eroded, the judiciary may seek to revamp its image to fit the new political exigencies of multi-party rule where there is a more forceful political discourse of the need for strengthened rule of law and separation of powers.

Secondly, and linked to the above, the prospect of democracy brings with it the notion of effective rights protection, and a political discourse which calls upon the judiciary to deliver justice. This is further prompted by an international community that sets increasingly high standards regarding justice administration: human rights agencies urge improved

[54] de la Madrid jailed high-ranking officials such as the chief of Mexico City police, Durazo, and Jesus Diaz Serrano of PEMEX upon taking the presidential seat. Salinas arrested corrupt union leader, most notably, 'la Quina' of the petroleum workers union. See S. Morris, *Political Reformism in Mexico: An Overview of Contemporary Mexican Politics* (Boulder, 1995).

rights protection and denounce persistent human rights violations; and an international financial community demands better conditions of legal security and judicial reliability for investment purposes.

Thirdly, changing social and economic conditions within Mexico are creating pressing societal demands on the judiciary for due process and more effective rights protection. To some extent this is an inevitable result of modernisation, and the exigencies of urban life. The fragmentation of the revolutionary social pact since the late 1960s, and the redefinition of the state after 1982 as old corporatist channels of social inclusion (however arbitrary and corrupt these were) are eroded, heightens the sense of exclusion felt by growing numbers of the Mexican population. In this context, individual rights, and their protection, acquire a new value in society.[55] An additional factor is the presence of a more open media since the 1980s which draws attention to issues that were more effectively covered up in the past. Moreover, public concerns with rule of law and justice are also closely linked to issues of law and order, impunity and corruption. This combines with the advances towards democracy, which, at least at the level of discourse, raises expectations as to what the justice system should deliver. Finally, on the economic front, the liberal economic model has to some extent prompted a greater demand by the business sector for a judicial framework that guarantees the legal security of property rights.

These broad long-term factors have interacted with more specific political events and economic policies in the 1980s and early 1990s. This led to a presidential campaign in 1994 where the issues of rule of law and rights, judicial reform, and corruption rose high on the agenda of all three political parties, although expressed in vague terms.[56]

Firstly, the economic context of liberalisation and privatisation, and the signing of the North American Free Trade Agreement (NAFTA), provided a propitious climate for judicial reform. However, it does not appear to be the case that the 1994 reform was directly related to NAFTA pressures for improved legal security. It was perhaps the continuation of a series of legislative and constitutional reforms put in place by Salinas which aimed to secure the success of the liberal economic model.[57] But we

[55] It is important to stress that while there is a general demand for rule of law and justice, the heterogeneity of Mexican society in terms of the formidable socio-economic disparities as well as cultural diversity means that there is no homogenous notion of rights issues and demands.

[56] See J. I. Dominguez and J. A. McCann, *Democratizing Mexico: Public Opinion and Electoral Choices* (Baltimore, 1996), pp. 184–91, for a discussion of the 1994 electoral campaign.

[57] See J. A. Vargas, 'Mexico's Legal Revolution: An Appraisal of its Recent Constitutional Changes, 1988–1995', in *Georgia Journal of International and Comparative Law*, vol. 25 (1996), pp. 497–559, emphasises the enormous amount of legislative and constitutional change that began in 1988 and has continued under Zedillo. The author

must not overstate the importance of NAFTA by late 1994, nor its direct influence on Zedillo's electoral campaign. The treaty had already been signed, and Salinas had already made the necessary concessions to the U.S.[58] Rights issues had been conveniently left out of the treaty, and Salinas' only concession to international pressure was the creation in 1991 of the Comisión Nacional de Derechos Humanos (CNDH) in a bid to convince the world of Mexico's democratising efforts.

Secondly, and perhaps more importantly, was the extent of the political crisis that Mexico, and the PRI were experiencing since the Chiapas uprising in January of 1994. The Ejercito Zapatista de Liberación Nacional (EZLN) provided a timely reminder, as NAFTA came into effect, that Mexico had not yet reached the state of modernity claimed by Salinas. The political violence of 1994 escalated with the assassination of the PRI presidential candidate in March, Luis Donaldo Colossio, and of Jose Francisco Ruiz Massieu in September, recently appointed as the majority leader in Congress. The gross mishandling of the assassination investigations (which would continue into the Zedillo administration), and the enormity of the corruption scandals related to the two events severely undermined any notion of the existence of rule of law. To this was added continued national and international denunciations of human rights violations under Salinas which highlighted the existence of widespread political repression. The Partido de la Revolución Democrática (PRD) alone had documented almost 300 cases of politically-motivated homicides.[59]

The combination of these more conjunctural factors and long-term trends provided the political conditions for the constitutional reform that was to inaugurate the Zedillo presidency. The judicial reform of 1994 was perhaps designed to set the tone for a presidency that intended to take law and order, corruption and impunity seriously. However, its political

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views the 1994 reform as part of a continuum of profound changes in the economic and state structures.

[58] J. A. Erfani, *The Paradox of the Mexican State: Rereading Sovereignty from Independence to NAFTA* (Boulder, 1995), argues that the NAFTA had secured sufficient legal guarantees for the US. NAFTA effectively undermines national sovereignty by overriding constitutional principles regarding certain aspects of economic and trade transactions. Legally, this creates uncertainties for the future which are currently a matter of legal dispute in the courts. The first NAFTA related case brought before the Supreme Court is an *amparo* suit against a resolution taken by a binational arbitration panel which has yet to be decided. At stake is whether decisions taken by NAFTA arbitration panels are subject to judicial review by the Mexican courts. If so, the implications for the conflict resolution mechanisms set up by the treaty are quite significant. Interestingly, the plaintiffs are two US firms, US-X and Inland, who have resorted to the Mexican courts. *El Financiero* 27 Oct., 1998.

[59] A. Redding, *Democracy and Human Rights in Mexico*, World Policy Institute, May, 1995.

impact was immediately overshadowed by the devastating financial debacle of December 1994 which brought the Salinas economic model crashing down.

(iii) The Supreme Court since 1994

Judicial reforms, by their nature, require a long time span in order for their full impact to be filtered through. Thus, at this stage any assessment of the 1994 reform can only be tentative at best. Moreover, changes within the Supreme Court with regard to its political role will be the result of the complex interaction between the specific constitutional reforms, and the broader social, economic and political pressures discussed above. The individuals within the Supreme Court will be reacting not only to changed formal structures, but also to a rapidly changing and unpredictable political environment.

The new members of the Supreme Court were voted into office on the 26 January 1995. Five years later, the high tribunal seemed to have acquired a public presence and political activism which is in stark contrast to the politically 'shy' Court of the past.[60] But this greater public prominence in the political arena by no means amounts in itself to all the other characteristics which ideally complement liberal judicial politics (independence, impartiality, transparency, equitable access to justice and so forth) in the task of adjudication.

How effective have the new judicial review powers been? By the beginning of 1999 twenty nine challenges to the constitutionality of laws had been presented to the Supreme Court. Over one hundred constitutional controversies (between different public agencies) have been presented to the Supreme Court.[61] In assessing the impact of the reforms, it is important to stress that the degree of independence of the Court is difficult to measure on the merit of the direction of its rulings. It does not follow, for instance, that a ruling which coincides with the interests of the executive by definition lacks impartiality or independence. Perhaps at this stage all that we can judge is whether the Supreme Court is casting aside its traditional political passiveness, and assuming a more prominent role in Mexican politics. It would seem that the nature of the new judicial review powers inevitably draws the Supreme Court into ruling on political matters.

With regard to the new review powers, many of the constitutional challenges put forward by opposition parties in Congress deal with electoral matters. Before the 1996 reform, which extended judicial review

[60] *El Financiero*, 14, Dec., 1998.

[61] Suprema Corte Nacional de Justicia, *Facultades Exclusivas de la Suprema Corte de Justicia de la Nación*, CD-ROM (Mexico, 1999).

to electoral matters, the Supreme Court had dismissed a constitutional challenge raised by the opposition parties in Mexico City against a Federal District electoral code on the grounds that it could not rule on electoral issues.[62] Since 1996, constitutional challenges regarding electoral legislation have lost their novelty. The first important victory for the opposition came in 1997 when the PRD won its case against the electoral code of Oaxaca.[63] In 1998 in a case presented by the PRD, the Supreme Court ruled against the electoral code of Quintana Roo on the basis that it did not uphold the constitutional principle of proportional representation.[64] Electoral issues are of crucial importance for opposition parties, and the Supreme Court has become a powerful tool as political liberalisation advances.

Court rulings have involved other matters including constitutional challenges to certain tax laws, questions of union membership, and public security legislation, amongst other things. The Court has adopted controversial positions and made rulings which have captured the public attention in an unprecedented manner, not only with regard to its new review powers, but also in *amparo* suits. In May 1996, the Court ruled against the corporatist tradition of the state by declaring that compulsory membership to one union, as established by the law for public employees of the state, was unconstitutional. The new justices have also ruled that compulsory affiliation to chambers of commerce and industry is unconstitutional. More recently the Court's highly controversial ruling on the issue of compound interest charged by the banks was clearly favoured by the executive, as well as the banking community.[65] Of interest was the Supreme Court's role in the investigation of the massacre of 17 peasants in Aguas Blancas, Guerrero, in 1995. Here, the justices carried out a procedurally clumsy, but politically significant, investigation which lead to a vague but much publicised report condemning the massacre and urging for the criminal prosecution of the culprits. The Court has also been requested to investigate the massacre which took place in Acteal, Chiapas, in 1997.[66] The results in terms of ensuring that justice is done have been minimal, however.

The expansion of review powers appears to have emboldened the Supreme Court to take on a more public role, and to deal more openly with controversial issues than in the past. On the whole, it would seem that in rulings which deal with economic matters, the judiciary has broadly embraced the imperatives of market economics. However, there is no clear pattern in their rulings which suggests either a greater step towards independence from the executive, or continued political

[62] *El Financiero*, 20 Oct., 1995.
[63] *El Financiero*, 12 Dec., 1998.
[64] *Ibid.*
[65] *Proceso*, 11 Oct., 1998.
[66] *El Financiero*, 24 Jan., 1998.

subordination. A Court which is more politically active and publicly engaged than in the past does not imply a better, more impartial and equitable administration of justice. The problem of independence from litigating parties is far from resolved, as cases of judicial corruption abound. The alarming persistence of human rights violations, high levels of inefficiency in the administration of justice, overburdened courts, and the continuing crises of corruption scandals and political violence undermine the notion that rule of law is advancing in Mexico. Moreover, these factors are the consequence of deep-rooted structural problems which require more fundamental reforms at all levels of the justice apparatus, and the political system.

As political liberalisation of sorts advances, it appears that what had existed to some extent almost as a mutually supportive relationship on matters of justice administration between the executive and the judiciary may be coming to an end. The institutional complicity which had underpinned the *ancien regime* is being undermined, as the different institutions adapt to rapidly changing and unpredictable political conditions and societal demands which inevitably will produce institutional tensions and inter-branch friction. Within this process it may well be the case that we are witnessing a process of self-assertion on the part of the judiciary, although not necessarily a qualitative shift in the direction of improved justice administration.

Conclusion

Judicial independence is to a large extent a function of the institutional design of separation of powers within a constitutional order, and the scope of review capacity that is constitutionally granted to the judicial function. This article has examined the development of the institutional aspects which have contributed to forging the nature of the relationship between the executive and the judiciary.

Institutional design is not sufficient to explain the role that the Supreme Court has played within the political system since the 1940s. What has marked the degree of judicial independence, or lack of it, is the political environment in which the judiciary was embedded. The nature of the Mexican political system, characterised by dominant party rule, where the power structures are heavily concentrated around the presidential office signified that the judicial system was subsumed within the system of state patronage, becoming one more instance of employment possibilities for the politically loyal.

The effect of this has been to undermine the notion of a judiciary independent from political pressures. Given the undemocratic nature of

the Mexican regime, this in itself is not surprising. Of interest is how, within an institutional framework which at a first glance does not appear particularly authoritarian in terms of the formal appointments procedure and tenure system regarding the Supreme Court, the presidential office in Mexico was able to subsume the judicial function to its political interests. The process by which the judiciary was historically subordinated to the executive was achieved without upsetting the constitutional order. What developed was a confluence of institutional interests between the executive and the judiciary. This has contributed to the image of regime stability, and with regard to the judiciary, to stability in office. And the judiciary has been a fundamental legitimating block within the institutional order that underpins the Mexican regime.

With the recent reforms, and given the changing political environment in which they are being undertaken, it may be that the nature of the relationship between the executive and the judiciary will change towards greater judicial autonomy. This will depend not only on the modifications to the institutional design, but perhaps more importantly on the direction taken by the political system in its entirety. Political liberalisation in Mexico has been a tortuous process and has advanced on a stop and go path with mixed results, and a still highly uncertain future.[67] The advances are undeniable, especially in electoral matters as opposition parties have inched their way into elected office at various levels. At the same time there are sufficient authoritarian elements within the regime that Mexico has continued to fall short of the full desiderata of democracy. Over time, unless the reform of the judiciary is accompanied by broader transformations in the political system, greater judicial independence may not mean very much in itself. On the other hand, the constitutional reforms of 1994 and 1996 may become additional institutional pieces which contribute in an important way to the complex puzzle of regime transformation that is taking place. However, in the best of circumstances, judicial systems tend to be resistant to change. The experience of judicial reform in other Latin American countries show judiciaries to have such in-built levels of institutional inertia that the fruits of reform, where effective, are frustratingly slow.

At one level rule of law depends on the accommodation of the political actors to rules (normally constitutional) of the power game, which become unquestionably binding for all, which structure the competition for power, and place effective limits and control mechanisms on the

[67] See L. Whitehead, 'The Peculiarities of "Transition" *a la Mexicana*', in N. Harvey and M. Serrano (eds.), *Party Politics in 'an Uncommon Democracy': Political Parties and Elections in Mexico* (London, 1994), pp. 109–30, for an insightful discussion of the complexities of democratisation in Mexico.

exercise of power. At another level, it refers to the impartial and predictable protection of rights and enforcement of rules which order the relationship between state and society. Despite changes in executive-judiciary relations as yet, neither of these two aspects of rule of law is fully in place yet in Mexico by modern liberal democratic standards.