

LAW, COURTS
and POLITICS

JUDICIAL POLITICS IN MEXICO

The Supreme Court and the
Transition to Democracy

Edited by **Andrea Castagnola** and **Saúl López Noriega**



LAW, COURTS AND POLITICS

Edited by Robert M. Howard, Georgia State University

In *Democracy in America*, Alexis de Tocqueville famously noted that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." The importance of courts in settling political questions in areas ranging from health care to immigration shows the continuing astuteness of de Tocqueville's observation. To understand how courts resolve these important questions, empirical analyses of law, courts and judges, and the politics and policy influence of law and courts have never been more salient or more essential.

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INTRODUCTION

Tom Ginsburg

Mexico’s process of democratic reform since the early 1990s has been remarkable in many ways, and the increasing prominence of law and courts is certainly one of the most important. In the transition from a dominant-party authoritarian regime to a vigorous democracy, it is perhaps not surprising that the Mexican Supreme Court has become a much more important actor. Starting with the judicial reform which had been implemented at the beginning of 1995, and accelerating after the 2000 election that led to the first change in power in several decades, the court has emerged as an important actor in the Mexican political scene.

There has been a set of important interdisciplinary studies accompanying these reforms, integrating legal and political analysis, by Mexican and other academics (see, e.g., Ríos-Figueroa 2007; Magaloni 2003, 2006; Sánchez et al. 2011; Inclán 2009). This work is among the most varied and interesting anywhere in the field of comparative judicial studies, and the present volume is no exception. Using a wide array of methodologies, the authors here help elucidate the evolving role of the court in Mexico’s democracy. The chapters deserve close scrutiny, not only by scholars of Mexico, but by others interested in understanding the role of courts and the dynamics of democratization. In this introduction, I briefly place the Mexican case in comparative perspective and then make some comments on the chapters that follow. Together, they make a major contribution to the literature on comparative judicial politics.

Let me begin by considering a paradigmatic democratic transition from authoritarian rule in recent decades. Such a transition, whether fast or slow, by

THE TRANSFORMATIONS OF THE ROLE OF THE MEXICAN SUPREME COURT

Andrea Pozas-Loyo and Julio Ríos-Figueroa

I Introduction

The objective of this chapter is to give a broad but systematic introduction to the roles the Mexican Supreme Court has played in almost one hundred years of functioning, from 1917 to 2013. We aim at presenting an account that incorporates the political and the legal perspectives on the work of the court, establishing a dialogue within the current literature on this high tribunal. We hope it will be of interest to both students and specialists, and that it will contribute to building bridges among scholars who study the Mexican Supreme Court from different fields of knowledge.

The last decade has seen an important increase in the number of studies devoted to analyzing different aspects of the Mexican Supreme Court.¹ In contrast to a not very distant past, these studies come from diverse disciplines in the social sciences and not almost exclusively from legal scholarship. For starters, there is now a series of richly descriptive empirical studies that unveil important issues and processes, such as how the justices are elected and how they decide cases (Elizondo and Magaloni 2010); how many and what type of cases the Supreme Court decides either in general (Bustillos 2009) or through specific instruments of constitutional review, such as the action of constitutionality (López Ayllón and Valladares 2009) and the constitutional controversy (Hernández 2011).² These studies have provided fundamental information on the Supreme Court and have called attention to the basic data we still lack on central issues.

There is also a series of political science studies aimed at explaining the behavior of the Supreme Court judges emphasizing the effects of different kinds of non-legal constraints on the justices' decisions. In this vein, for instance, it has been shown that Supreme Court judges began leveling the electoral playing field

soon after the 1994 reform (e.g. Finkel 2003), which divided government in 1997 and increased the likelihood of decisions against the Partido Revolucionario Institucional (PRI) (e.g. Ríos-Figueroa 2007), and in which party turnover in executive power in 2000 also increased the likelihood of decisions of unconstitutionality (e.g. Magaloni et al. 2011). It has also been shown that since 1995 the Supreme Court has actively sought the support of public opinion in order to build its power and authority (e.g. Staton 2004, 2010). One of the central lessons of this political science scholarship is that the Supreme Court is a strategic political actor that has concentrated its efforts on arbitrating political conflicts, downplaying its role as protector of fundamental rights (e.g. Ansolabehere 2010; Helmke and Ríos-Figueroa 2011; Magaloni et al. 2011).

In part as a response to the shortcomings of political science work on the Supreme Court, and in part because of the increasing importance of the court's jurisprudence for policies and politics, legal scholars have begun to produce systematic jurisprudential lines on specific topics. This novel work (in Mexico) has produced specialized jurisprudential knowledge in areas such as criminal due process rights (e.g. Magaloni Kerpel and Ibarra Olguín 2008); the taxing capacity of the state and the just imposition of fiscal burdens (e.g. Elizondo and Pérez de Acha 2006); federalism (e.g. Caballero 2010); separation of powers and political representation (e.g. Carbonell and Salazar Ugarte 2006; Ibarra Cárdenas 2014); the scope and limits of sexual and reproductive freedom (e.g. Madrazo and Vela 2011; Pou Giménez 2010); and freedom of speech (e.g. Cossío, Hernández, and Mejía 2014). In terms of judicial behavior, of the central lessons of these studies is that the court is building—quite slowly, and in disparate and not always consistent ways—its understanding of the basic rules of the political game, and of the effective protection of fundamental rights.³

In sum, scholarship on the Mexican Supreme Court has made considerable progress in the last two decades. However, while we now have social science and legal analyses on the court these two perspectives remain isolated; they don't talk to each other. Because the Supreme Court is a key legal and political actor, we believe that it is much more fruitful to analyze its work from these two perspectives simultaneously. Moreover, we believe that each of these perspectives tends to embrace a misleading assumption that needs to be abandoned to account for the evolution and the determinants of judicial behavior in Mexico.

On the one hand, while most social science studies on the Supreme Court focus on the last two decades it is important to recognize that the court has been a key actor in Mexico's political life for a long time, though its role has changed across time and across issues.⁴ Moreover, to understand the changing roles of the court it is crucial to analyze in detail its decisions on specific political problems, something that social science studies that focus on general patterns do not usually do in depth. On the other hand, contrary to what an important part of the legal scholarship implies, it is important to recognize that the decisions of the Supreme Court are often influenced by extra-legal factors and that these can be

systematically accounted for. Justices are motivated both by their constitutional and by their political constraints and incentives. Because they are neither the Montesquieuian “mouths of the law,” nor purely Machiavellian power seekers, we need a theoretical framework that enables an account that combines the political and legal perspectives.

In this chapter, we use a notion of “role” that enables an analysis of judicial behavior from these two perspectives simultaneously. In turn our empirical research has a diachronic structure and focuses on a single but highly relevant area of issue that we analyze in depth. We believe this structure, which is characteristic of jurisprudential lines (López Medina 2009), is particularly fruitful in showing the interaction of political and legal aspects of judicial behavior.

Specifically, we focus on the Supreme Court’s jurisprudence from 1917 to 2013 on military autonomy, defined as the “military’s decision making authority that ranges from education to intelligence gathering to human rights” (Pion-Bérin 1992: 84). We look at cases reaching court where some aspect of the military’s decision-making authority is challenged, and then zoom in on the subset of those cases that deal with the scope of military jurisdiction.⁵ This is a relatively small but privileged window from which to observe the dual legal/political nature of the Supreme Court because it captures the legal responses that the Supreme Court has given to a highly political question, as well as the ways in which the constitutional design of judicial institutions has affected the court’s jurisprudence. Moreover, the trajectory of the Supreme Court’s jurisprudence on military autonomy and the scope of military jurisdiction broadly also reflect its jurisprudence in other areas, such as rights protection and the arbitration of political conflicts. But, of course, a more specific analysis on particular issues will show variations in the timing, type, and direction of jurisprudential trajectories.

Our account is divided into three broad periods marked by important changes in the justices’ roles that lead to three different responses to the legal question regarding military autonomy and the scope of the military jurisdiction. The three periods are:

1. From 1917 to 1940: In this period the Supreme Court Justices’ role was largely that of *adjudicators*, therefore, their jurisprudence regarding military jurisdiction basically applied the quite restrictive scope established in Article 13 of the Mexican Constitution.
2. From 1941 to 1997: In this period the justices’ role was that of *regime supporters* and their jurisprudence regarding military jurisdiction gave prevalence to an expansive Code of Military Justice over the constitution overlooking the explicit content of Article 13, and in this way protecting the interests of the military and the regime elite.
3. From 1998 to 2013: In this period the justices’ role has had important transformations enabling them to function at times as *constitutional interpreters*. On military jurisdiction, this role has been played inconsistently but it is

possible to say that it became clearer with the jurisprudence produced from *ca.* 2009 onward.

Section II of the chapter is sub-divided into five parts. In the first, we briefly discuss different notions of “roles” and clarify the one we use here.⁶ We also give a broad introduction to the military–civil relations in Mexico and to the issue of military autonomy and military jurisdiction in particular over the long period analyzed in this chapter. The second, third, and fourth parts deal with each one of the three periods we have just described. In particular in each part, we first present the roles of the Supreme Court Justices in that period in order to then discuss its jurisprudence on the scope of the military jurisdiction. Section III briefly concludes.

II Roles and military jurisdiction

II.1 “Role”: A definition

“Judicial roles” has been used in legal and social science studies on courts in different ways. Broadly speaking, we can identify two different conceptualizations of “judicial role.” The first one, mainly used in social science studies, refers to the court’s function or task in a particular political system or in a particular time such as a democratic transition (see Ginsburg 2012; Kapiszewski et al. 2013). Under this notion the collective agent who plays the “role” is the court. This notion is helpful to describe how the court, as an institutional agent, interacts with other institutional agents such as the executive and the legislative powers, or with other political actors such as the authoritarian and democratic forces, in a critical juncture. This notion is therefore often used as the dependent variable in studies that aim to explain why a given court played such and such a function in a certain period. While very helpful, this conceptualization is often loosely used, and not always explicitly and clearly defined.

The second notion of judicial role refers to the self-conception of individual judges’ own task, i.e. the beliefs judges have over their function. This notion is often used as an independent variable to give account of judicial decisions (e.g. Hilbink 2007). This notion can of course also be used as a dependent variable in historical studies that ask: “Why do judges conceive their function the way they do?”, or simply “How do specific justices conceive of their own task?” (Pozas-Loyo 2012b). This notion is also helpful, but it faces the challenge of capturing in a systematic way the often elusive judges’ self-conceptions.

The conceptualization of “role” we use here shares the usefulness of the other two notions, while it evades the problems we have mentioned. In particular, it has an explicit and analytically clear definition the former lacks. And, unlike the latter, the full description of roles is provided by norms (legal and political) that are known in the political context analyzed (for more details on this notion see

Pozas-Loyo, 2012a).⁷ In a nutshell, a role is an abstract description of an agent's or an object's expected function (Zambonelli et al. 2003; see Masolo et al. 2004) due to its position in a set of relations (see Davis and Barret 2002 and Pozas-Loyo 2012a). Examples of roles in this sense are: professor, wife, and president.

Political and constitutional roles are part of a subtype of roles called "statuses." A status is a role that carries powers, prohibitions, rights, requirements, and permissions (Knoke and Kuklinski 1982: 19). Hence, the complete description of an individual's political or constitutional role is the set of powers, prohibitions, rights, requirements, and permissions the specific role has in that political or constitutional system (Searle 2010: 102). For instance, the *constitutional role* of the Supreme Court Justice in Mexico can be fully described by listing all the powers, prohibitions, rights, requirements, and permissions the Mexican Constitution grants to justices. In this way we address the concerns regarding the fuzziness of the first notion of role and the elusiveness of the second.

In order to clarify our narrative we divide the Supreme Court Justices' roles into two parts: the constitutional role on the one hand, and the political role on the other. This analytic separation makes sense since the set of powers, prohibitions, rights, requirements, and permissions contained in the constitutional and the political norms can oppose or reinforce each other, and therefore separating them would enable us to account for the *de jure/de facto* interaction and its consequences for constitutional efficacy (see Pozas-Loyo 2012b).⁸

We can now provide clear definitions of constitutional and political roles:

1. A constitutional role is a status function whose complete description can be obtained in a written constitution. In the instance that concerns us here, it is the complete set of powers, prohibitions, rights, requirements, and permissions that the Mexican Constitution grants to the Supreme Court Justices.
2. A political role is the status function whose complete description can be obtained from the unwritten norms of the political system. So the powers, prohibitions, rights, requirements, and permissions present in the norms of the Mexican political system provide the full description of Supreme Court Justices' political role.

The usefulness of these definitions is that they provide the theoretical justification for focusing on the constitutional and political powers, prohibitions, rights, requirements, and permissions to give account of the roles the Supreme Court had in the three periods we identify.

II.II Civil-military relations and military jurisdiction in Mexico

Democratic civilian governments and their armed forces clash over how to subject the military to the democratic rule of law without jeopardizing its *esprit de corps* and its efficacy (cf. Agüero 1995; Barany 2012; Serra 2010). In other words,

the construction of a "democratic army," an army that unconditionally supports democratic governance, involves striking a delicate balance between ensuring the loyalty of the military to the popularly elected politicians while simultaneously granting to the military sufficient autonomy and strength to successfully discharge its functions and execute its missions (Barany 2012). Conflict between civilian governments and the armed forces is thus inherent to democracy. Of course, these conflicts are more acute and more regular in countries undergoing regime transition and also where the armed forces are called upon to perform activities related to internal security, such as fighting against terrorism, drug trafficking, organized crime, and sometimes even regular street policing. As former Spanish Defense Minister puts it "striking a balance between controlling the military and maintaining discipline on the one hand, and inspiring motivation and necessary collaboration in order to construct and apply a new framework of relationships on the other, is one of the most difficult challenges in a period of consolidation of democracy" (Serra 2010: 153).

In the inherently tense relations between civilian governments and their military forces there can be a series of difficult outcomes. One extreme outcome is, to be sure, a military coup and the establishment of a military government. Another extreme outcome is a stable and workable military subordination to the civilian government. In between these two extremes, which in a pure form are rarely found, is where the tensions between these two actors need to be sorted out in a pacific way. In democracies, the peaceful solution of tensions is not enough and those solutions should also be compatible with certain principles, values, and laws. This is important because whereas a tense civil-military regime may not necessarily produce a coup or military intervention, they do have the potential to hollow out democracies. It is in this middle ground where the existence of institutions such as the Supreme Court can be helpful, or not, in accommodating the interests of both the military and the civilian government.

In the particular case of Mexico, within the time frame of this chapter the desire to build a working democracy as well as tense civil-military relations has been present since the revolution. The long period from 1917 to 2013 has witnessed interesting differences in regime types: a competitive but highly unstable democracy (from approximately 1917 to 1940), a hegemonic party authoritarian regime (from approximately 1941 to 1997), and a more stable democracy (from 1997 to date). To be sure, different ways to accommodate civil-military relations are intertwined with these three regime types. Interestingly, the roles of the Supreme Court, and in particular its jurisprudence on military autonomy and the scope of the military jurisdiction, also vary accordingly.

The military jurisdiction, *fuero militar* in Spanish, has traditionally been justified on the grounds that members of the armed forces require a separate body of law, prosecutors, and courts that take into account the specifics of their job in order to give institutional stability and legal security to its members. Even though this justification has merit, in places with a history of military interventions, military

participation in public security within national borders, and executive dominance, military jurisdiction gave way to impunity and arbitrariness. In particular, a broad military jurisdiction became a blank check for members of the armed forces who had committed crimes that had nothing to do with their specialized mission, as well as a vehicle for repressing political opponents. In such places, members of the armed forces and executives got used to a very wide scope of military jurisdiction and usually resisted attempts to reduce it, judicially or otherwise. Mexico is not an exception.

What happened in Mexico when cases that challenged a decision made within the armed forces reached the Supreme Court? Figure 1.1 shows the so-called jurisprudential thesis (*tesis de jurisprudencia*)⁹ by the Supreme Court (1917–2013) on military autonomy.¹⁰ The constitutional organ can reject or amend a previous decision made by a military authority, which we code as “limiting autonomy,” or rather uphold it, which we consider as “respecting autonomy.” The most interesting finding in Figure 1.1 is that whereas during the limited democratic period of 1917–1940 there are more decisions restricting military autonomy, the opposite is true during the hegemonic party period (1941–1997). Figure 1.2 shows a similar pattern regarding so-called “conflicts of jurisdiction”: whenever the

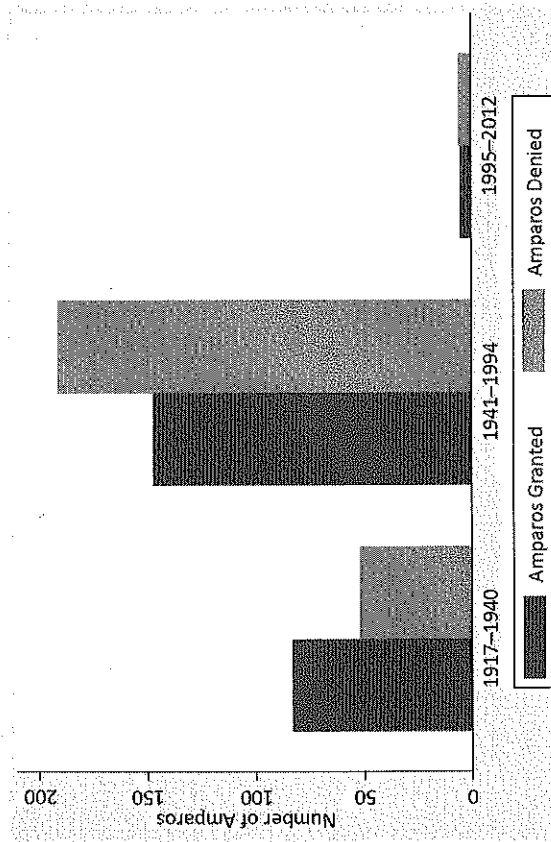


FIGURE 1.1 SCJN decisions on military autonomy, 1917–2012

Notes: The Supreme Court of Justice of the Nation (SCJN) can reject or amend a previous decision made by a military authority, which is coded as “limiting autonomy,” or rather uphold it, which is coded as “respecting autonomy.” The figure shows raw numbers. The percentage of “amparos granted”/“amparos denied” in the first, second, and third periods (respectively) are: 62 percent/38 percent; 43 percent/57 percent; and 48 percent/52 percent.

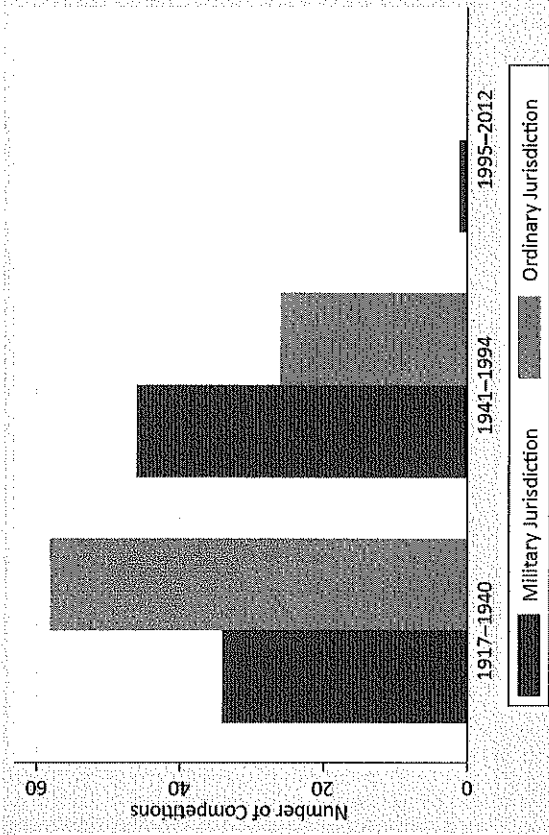


FIGURE 1.2 SCJN decisions on conflict of jurisdiction

Notes: The Supreme Court decides whether a given case should be sent to the military or to ordinary jurisdiction when such jurisdiction is contested. The total number of so-called *competencias* is 159. The figure shows raw numbers; the percentage of cases sent to military jurisdiction in period 1 is 37 percent, period 2 is 64 percent, period 3 is 100 percent; the corresponding percentages sent to civil jurisdiction are 63 percent, 36 percent, and 0 percent.

military jurisdiction was challenged as the appropriate forum for investigation and trial, the Supreme Court sent more cases to the ordinary jurisdiction in the first period, and more to the military jurisdiction in the hegemonic party period. In other words, in general Supreme Court’s decisions follow the political context under which they were made.

Figure 1.3 shows the general trajectory of the Supreme Court’s jurisprudence: from 1920 to roughly 1940, the court more often than not held a narrow scope of military jurisdiction but it progressively expanded its interpretation of Article 13 (see below); from around 1940 to roughly 2005, the court established a wider scope of military jurisdiction; and from 2005 to 2012, although there are relatively few *tesis*, apparently the court is moving toward narrowing the scope of military jurisdiction. Note the period from 1930 to 1960 when there were widely different interpretations of the proper scope of military jurisdiction which are reflected in inconsistent jurisprudence. Figure 1.3 also includes the constitutional response to the question on military jurisdiction that is the horizontal line situated at “AASF for military crimes.” Article 13 of the Mexican Constitution of 1917 establishes and delimits military jurisdiction. It clearly states that:

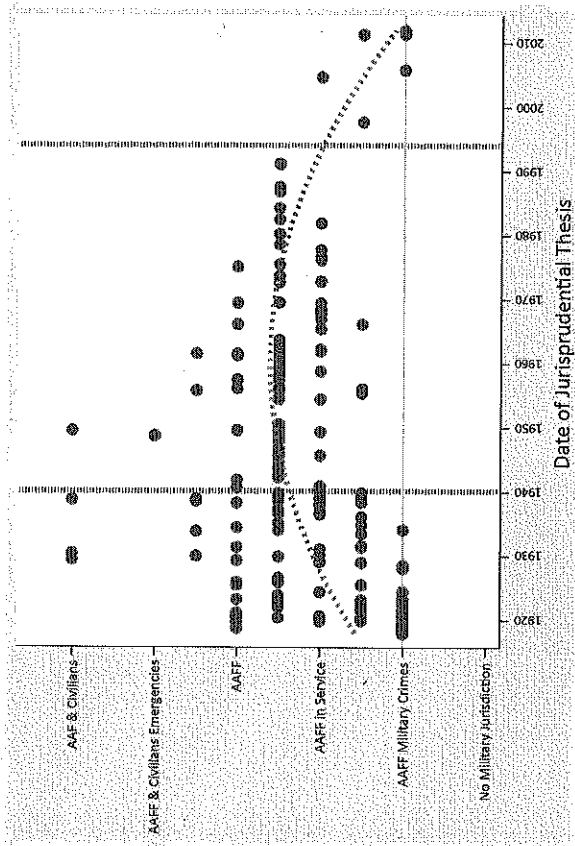


FIGURE 1.3 Scope of military jurisdiction, 1917–2012

Notes: Decisions by the Supreme Court on “Who can be judged in military courts, and under what circumstances?” For a better display, the vertical axis shows only even numbers. The red line displays a locally weighted regression on the data (lowest in STATA). The dotted blue line represents the answer to the question on the scope of military jurisdiction by the constitution of 1917.

The military jurisdiction will deal with military crimes and offenses to the military discipline. The military tribunals never, and for no reason, will extend their jurisdiction to persons that do not belong to the armed forces. When a civilian is involved in a military crime or an offense to the military discipline, the case will be decided in the correspondent ordinary court (emphasis added).

It is apparent that the scope of military jurisdiction is defined very narrowly in the constitution. During the debates of the constituent assembly in 1916 some deputies even proposed to eliminate military jurisdiction altogether (González Oropeza 2006: 190). Article 13 is exactly the same today as it was in 1917, which makes it one of the few relevant articles that have not been changed in the more than five hundred amendments that the 1917 constitution has undergone. While Article 13 is quite clear and has remained constant, the Supreme Court’s jurisprudence on the scope of military jurisdiction has fluctuated in important ways. This is one of the reasons why this issue is particularly fruitful for pinning down the extra-legal determinants of the Supreme Court’s jurisprudential changes. In the remainder of the chapter, we present a diachronic analysis of the legal development of the scope of military jurisdiction, divided into three periods.

III Supreme Court justices as adjudicators: 1917–1940

III.1 Political context and civil–military relations

After years of armed conflict which started toward the end of 1910, the Constitutional Congress that convened in Querétaro produced the constitution that since February 5, 1917 is Mexico’s fundamental law. Even though the enactment of the constitution signals the victory of one of the three main revolutionary factions, sealed with the appointment of Venustiano Carranza as president under the new rules of the game, the political scene until 1920 was marked by the successive elimination of the revolutionary leaders—Zapata, Villa, and Carranza himself who was assassinated in May of that year. The administrations of Generals Álvaro Obregón (December 1, 1920 to December 1, 1924), and Plutarco Elías Calles (1924–1928) are the ones that introduced relatively more regular politics after the so-called “armed phase” of the Mexican Revolution.

During the 1920s, however, the multiplicity of political forces continuously threatened to derail the already precarious post-revolutionary regime (Rath 2013: Ch. 1). In this context, the main threat to Obregón’s administration came from within his own group, with General De La Huerta’s rebellion which was successfully repressed in 1923. This paved the way in 1924 for the election of Obregón’s favorite, General Plutarco Elías Calles, who presided over a period when other rebellions were crushed, and when the constitution was amended to allow for the re-election in 1928 of Obregón. Obregón won the election but was assassinated before assuming office.

To channel the diversity of political forces, and in the shadow of the assassination of the president elect, General Calles pushed for the creation of an umbrella political organization under the name of National Revolutionary Party (PNR, Partido Nacional Revolucionario, 1929) which would become the main vehicle for politics and governance for the following seventy years (see Garrido 2005). For a few years, Calles successfully led the party and became the “power behind the throne” who effectively selected and controlled successive presidents. But Calles’s choice for presidential candidate for the PNR in the elections of 1934, General Lázaro Cárdenas, managed to sideline Calles forcing him into exile in 1936. During Cárdenas’s presidency (1934–1940), the PNR (which became the *Partido de la Revolución Mexicana* (PRM) in 1936, and then the *Partido Revolucionario Institucional* (PRI) in 1946) was transformed and consolidated as a corporatist political hegemonic machine.

To the extent to which the revolution provided common ground for both civilian and military elites, it contributed indirectly to shaping and circumscribing the role of the armed forces (Serrano 1995: 428). Indeed, Obregón and Calles initiated a series of reforms intended to reduce the size and budget of the armed forces as well as to make them more professional. Both purged the armed forces of rivals, or perceived rivals, by retiring hundreds of generals, eliminating others, and bribing the rest. They cut the armed forces’ budget almost in half. However,

Obregón and Calles also made progress in professionalizing the armed forces, creating the Commission of Military Studies (1926) and the Superior School of War (1929) (Díez and Nicholls 2006: 6–8).¹²

III.III The justices' role: *Adjudicators*

Let us start with the justices' *constitutional role* whose complete description, as we have said, is composed by the set of powers, prohibitions, rights, requirements, and permissions found in the original Constitution of 1917. According to this constitutional text, Supreme Court Justices were elected by a simple majority from the total members of both houses of Congress out of a list composed of one candidate submitted by each state legislature (Art. 96); they enjoyed life tenure (i.e. "during good behavior") (Art. 94),¹³ and could be eventually removed only if a simple majority of the house of deputies initiated an impeachment process (Art. 109). The Supreme Court was at the top of judicial power, not only in jurisdictional terms through constitutional interpretation and court of cassation, but also because it was in charge of the appointment of lower court federal judges (Art. 97). Regarding the instruments for constitutional review, the Constitution of 1917 included the *amparo suit*, an instrument to protect constitutional rights from government violations with *inter partes* effects, and created the constitutional controversy, an instrument to adjudicate conflicts of constitutional competence between branches and levels of government (Arts. 103, 105–107). In sum, the constitution established independent Supreme Court Justices with powers to make decisions over governmental infringements of individual rights, as well as to become the arbiters of political conflicts.¹⁴ In a nutshell, *de jure* judicial independence was quite considerable, and the *de jure* powers of the court allowed it to intervene at least moderately in the political system.

The *political role* of justices in this period was not clearly defined since the political system was extremely volatile and therefore there were no stable political norms defining the powers, rights, permissions, and prohibitions of justices. The crucial point in understanding judicial behavior in this period of a highly fractionalized political arena is that political roles in general were not consolidated and therefore the effectiveness of the justices' *constitutional* role was not threatened by competing incentives coming from their *political* role. In other words, the fact that the political arena was so unstable and fractionalized enhanced the efficacy of the justices' constitutional role for two reasons.

First, one of the main sources of constitutional inefficacy is what Robert K. Merton called intra-personal role conflict, which occurs when the mandates of a role conflict with those of another role (see Pozas-Loyo 2012b). As we will argue in Section III, to some extent intra-personal role conflict between Supreme Court Justices' political and constitutional roles accounts for judicial behavior between 1941 and 1997. But because the justices' political role between 1917 and 1940 had not by then been well defined, it did not challenge their

constitutional role: constitutional incentives could motivate individual justices without being tampered with by informal political incentives (as happened in the PRI era). Second, the fact that the political arena was so fractionalized meant that the roles of other institutional actors were not stable either, inhibiting external political threats that could have blocked the efficacy of the justices' constitutional roles. In sum, given that the Supreme Court Justices' constitutional role made them independent arbiters of conflict, and given that they lacked a well-defined political role, we would expect their jurisprudence on military jurisdiction to follow the clear and explicit criterion established by Article 13.

Prima facie one could think that political fragmentation implies a greater degree of democratization, and that therefore this period was highly democratic.¹⁵ However, it is important to note that the relation between fragmentation and democratization is not linear since extreme fragmentation can lead to political instability and actually damage the prospects of democracy. This arguably was the case in the volatile period that immediately followed the revolution, where the lack of consolidated parties and the rampant political violence rendered the possibility of consolidating democracy very slim.

III.III Jurisprudence on military jurisdiction

What did the Supreme Court do in cases related to the armed forces? When the armed phase of the Mexican Revolution ended in 1920 and some kind of regular politics started to operate under a vigorous multiparty system, cases on military jurisdiction began to arrive at the Mexican Supreme Court. And the court consistently upheld, in line with Article 13, a quite narrow scope of military jurisdiction. For instance, in a *tesis de jurisprudencia* of 1924, the court argued that "it is not enough that a crime has been committed by a member of the armed forces, because if it does not affect military discipline or the armed forces honor, or it was not committed during military service, it cannot fall under the jurisdiction of military tribunals" (Reg. No. 285 360).¹⁶ This strict application of constitutional Article 13 was the norm during the period. The court does not usually provide further argumentation than simply restating the literal content of Art. 13 (e.g. Reg. No. 811 824; Reg. No. 290 730).

During those years, the court also clearly stated that civilians should not be tried in military courts. Again, the court more often than not simply restates Art. 13 without further argumentation: "military tribunals never, and for no reason, will extend their jurisdiction to persons that do not belong to the armed forces" (Reg. No. 290 340). The court again upheld a limited scope of military jurisdiction when facing the difficult case of military officers committing a crime with civilians as accomplices: presumably responding to the litigant's request that the military official should be judged in a military court and the civilian in a civilian court, the court decided that "the same civilian tribunal should decide the case, so that it is not split into two courts" (cited in Cossío 2010: 328).

The Supreme Court's narrow interpretation of the scope of military jurisdiction, in line with Article 13, was in general upheld until 1933–1934. During those years the Supreme Court also restricted, more often than not, military autonomy mostly in administrative matters. For instance, when an ordinary judge suspended a military court order to detain a soldier, the Supreme Court upheld the lower court's decision saying nothing more than simply "military discipline is not damaged simply by suspending a detention order" (Reg. No. 291 315).¹⁷ These decisions were not welcomed by members of the government or by members of the armed forces. The governments of those years, led by Generals Obregón and Calles, were trying to discipline the armed forces while getting rid of rivals within them. For this political goal, a broad military jurisdiction comes in handy, in particular if the government has influence over the top echelons of the armed forces and, through them, over the military judges and prosecutors. But the Supreme Court consistently truncated these efforts upholding the spirit of the constitution regarding the narrow scope of military autonomy and of military jurisdiction.

Then the process of undermining the independence of the Supreme Court was launched, and its effects can be seen in the erratic, yet interesting, jurisprudence on military autonomy during the period 1934–1940. On the one hand, in an important thesis of February 12, 1934 (which is atypical because of its relative length, its argumentation, and the fact that it was a divided vote of 8–7), the Supreme Court sustained the criterion that when both military personnel and civilians are involved in a crime an ordinary court should decide the case (Reg. No. 279 328; see also Reg. No. 309 807, a thesis of August 30, 1939). But by the end of the period the court consolidated a striking criterion that had already appeared in 1933: when military officers and civilians are involved in a crime, the former should go to military courts and the latter to civilian courts (e.g. Reg. No. 815 803; Reg. No. 809 416), even though this was contrary to the basic rights of due process (i.e. of equality and unity of justice) and also created significant problems in practice. The court went further in expanding the scope of military jurisdiction when it held that civilians could be considered capable of committing military crimes (Reg. No. 310 173). It should be noted that despite the fact that the Supreme Court admitted the expansion of military jurisdiction from strictly military to service-related crimes, the court did establish some limits to what it meant to be "in service" excluding passionate crimes (Reg. No. 309 272), and those committed by drunk officers in a bar fight (Reg. No. 309 881).

To understand the erratic jurisprudence from 1934 to 1940 it is important to remember the political context. As Mónica Serrano puts it:

while it is true that by 1940 the possibility of army officers securing control of the party was averted with the withdrawal of the military sector, it is also clear that between 1920 and the 1940s disagreements and differences

regarding the selection of party candidates and institutional responsibilities continued to challenge the civilian–military pact.

(Serrano 1995: 433)

The conflicts of competence between civilian and military courts, and the pressures that both sides exerted on the Supreme Court are nicely reflected in the jurisprudence produced during these years. At that time, the Supreme Court was in transit from being quite independent to becoming a functional institution of the hegemonic party system.

In conclusion, the period that immediately followed the Mexican Revolution was an unstable time when the political sphere was fractionalized into several groups all led by caudillos from the military. There were no consolidated political parties and the political system had not yet produced a set of informal political norms to stabilize expectations. These political conditions enabled a certain degree of constitutional efficacy, and justices' autonomy granted by the constitution was materialized in jurisprudence that upheld the constitutional limits of military jurisdiction creating discomfort among the armed forces. These decisions, which upset the "revolutionary forces" in government, were not isolated, since similar jurisprudential patterns can be found regarding challenges to the revolutionary labor and agrarian legislations produced by the regime (see, e.g., James 2006).

Toward the end of this period the need for an organization capable of coordinating all political–military groups was palpable. To that effect General Calles founded the National Revolutionary Party (PNR) in 1929. The PNR stabilized and centralized political power: heterogeneity of alliances within the military was no longer tolerated. This did not mean that the civil government and the armed forces were separate. In this period military power and political power were one and the same. This political transformation had negative consequences for the efficacy of the justices' constitutional role, in particular for their autonomy, as we will discuss in the Section II.III.

IV The Supreme Court Justices as Regime Supporters: 1941–1997

IV.1 Political context and civil–military relations

From 1928 to 1934 Plutarco Elías Calles became the *Jefe Máximo de la Revolución*, the leader of the newly founded PNR who pulled the political strings behind the presidential seat. Things changed when General Lázaro Cárdenas, selected by Calles as the PNR candidate to the presidency and elected in 1934, managed to expatriate Calles and expel the *caillistas* from his government. During General Lázaro Cárdenas's (1934–1940) administration, the party successfully integrated the army and the coordinated workers and peasants into its structure and changed its name in 1936 to *Partido de la Revolución Mexicana* (PRM). The PRM gradually became the single most important political machine in the country within which

most decisions regarding “who gets what, when, and why” were made. A decade later, in 1946, the party became hegemonic and changed its name to *Partido Revolucionario Institucional* (PRI). That same year the first civilian president, Miguel Alemán, was elected (see Garrido 2005; Serrano 1995).

Cárdenas’s incorporation of the organized peasants, workers, and the armed forces into the PRM secured stability for the nascent regime, simultaneously reducing the relative power of the army. Despite the resistance of the armed forces (Serrano 1995: 433), Cárdenas introduced further changes for disciplining and professionalizing them, such as dividing the Ministry of War and Navy into two autonomous defense ministries (the Ministry of Defense, which included the Army and the Air Force, and the Ministry of the Navy), enacting legislation barring serving officers from participating in any political activity, and expanding earlier efforts aimed at the progressive education and training of the forces.¹⁸ By the end of Cárdenas’s administration, “the Mexican armed forces had been weakened and brought under the control of the national party” (Díez and Nicholls 2006: 9).

In exchange for loyalty to the PRM, as well as to the revolution and to the “Revolutionary family,” the armed forces were given an important degree of autonomy in both legal and real terms with regard to the military’s internal functioning, training, and promotions, along with a high level of discretion in spending. The exchange of loyalty to the regime for military autonomy is, in essence, what scholars refer to as the “civilian-military pact” (e.g. Díez and Nicholls 2006: 10; Serrano 1995: 433). While the basis of the pact was established under Cárdenas, it was further developed and sustained in successive administrations. A cornerstone of this development was the election of Miguel Alemán (1946–1952) as the first civilian president of the PRI era.

Civilian supremacy, however, did not imply that the armed forces lost political influence, but rather that it was channeled through more subtle mechanisms, and often behind the scenes (Ronfeldt 1985). In fact, while the president of the republic has been a civilian since 1946, the president of the PRI was a member of the armed forces until 1964, when Carlos A. Madrazo was elected.¹⁹ Moreover, from 1940 and until 1994 “the presence of at least one military officer serving as a Supreme Court justice was a constant” (Caballero 2010: 157–158).²⁰ Military officers have also held several seats in Congress since 1940, always elected under the PRI label (Díez 2008).

The armed forces were key actors in securing internal political order during the golden years of the PRI regime. Importantly, the armed forces intervened at the behest of civilian authorities and always on a temporary basis. This was the case in 1958 when they were asked to suppress a railroad workers’ strike, in 1968 when they intervened to suppress a student movement, and indeed throughout the 1960s and 1970s when they were ordered to put down guerrilla uprisings, especially in the southern state of Guerrero (Díez and Nicholls 2006: 10). The basic exchange of loyalty for autonomy of the civilian-military pact remains to this day (February

2016), but with some important changes produced both by the transition to democracy and by the increase in non-traditional tasks performed by the military since the 1970s and especially since the 1980s (Díez 2008, 2012; Serrano 1995).

IV. II The Justices’ Role: Regime Supporters

The constitutional and political roles of the Mexican Supreme Court drastically changed with the emergence of the hegemonic party because it was accompanied by changes that completely transformed the justices’ powers, prohibitions, rights, requirements, and permissions. Let us start with transformation of the Supreme Court Justices’ constitutional role.

From the aftermath of the Mexican Revolution, *ca.* 1920, until the consolidation of the hegemonic party regime, three important reforms—which took place in 1928, 1934, and 1944—altered the constitutional role of Mexican Justices. These amendments basically affected the appointment and tenure of Supreme Court Judges, and they had as one of their main goals curtailment of the autonomy of the Supreme Court to fit it into the political dynamic of the one-party system.

In 1928 a constitutional amendment augmented the number of Supreme Court Justices from eleven to sixteen and modified their method of appointment: instead of exclusive congressional appointment by a two-thirds vote, the reform gave the president the right to propose a candidate, subject to Senate ratification. In 1934 another amendment again increased the number of judges to twenty-one and transformed the original life tenure of justices into a six-year tenure coincident with the presidential administration. Ten years later, in 1944, life tenure was restored with an interesting caveat: the President of the Republic could initiate proceedings to remove a judge who exhibited “bad behavior.” When the tenure was restored the justices’ political role as key players of the hegemonic party equilibrium had already been established so that this increment in their *de jure* independence was no longer a threat to the interests of the party. In a nutshell, the creation and consolidation of the hegemonic system brought important changes in the constitutional role of justices that made them less independent, and therefore facilitated the consolidation of a new political role under which Supreme Court Judges were integrated to the one-party political machine (see: Magaloni 2003; Weldon 1997).

To understand the emergence and consolidation of the justices’ new political role and the consequences it had for their decisions, let us first notice that the fragmentalization and instability of the political arena was one of the conditions that enabled the efficacy of the previous *Adjudicator* constitutional role. As political fragmentalization and instability disappeared and a new highly centralized political reality emerged, the government was able to respond to the independent judicial decisions that threatened its interests. In particular, the constitutional reforms described above were a reaction to the independent Supreme Court

decisions during the 1920s that, according to the government, were delaying the implementation of the revolutionary program regarding, for instance, the expropriation and redistribution of land (see James 2006; Marván Laborde 2010). The Supreme Court decisions on military jurisdiction were also producing reactions from the armed forces, which were also being disciplined and weakened by president Cárdenas. Hence, the constitutional autonomy that the justices enjoyed in the previous period disappeared and they became another piece in the political board game of the hegemonic party.

However, the justices' constitutional role was changing, and by 1934 they had acquired the new political role of *Regime Supporters*. There are two central features to this new role. First, starting from 1933 and lasting until 1994 an important unwritten political norm was in place: to be part of the Supreme Court, justices needed to be affiliated to the hegemonic party (Cabrera Acevedo 1998: 145). Second, justices' tenure coincided with the presidential one. New presidents had the *de facto* prerogative to ask the justices to "move on." This was the case even with the restoration of *de jure* life tenure. From 1944 to 1994 most presidents appointed more than 50 percent of justices during their terms and almost 40 percent of the justices lasted fewer than five years, coming and going according to the presidential term (Magaloni 2003: 288–9; see also Caballero 2010).

Therefore, the political rule establishing a short length of tenure collided with the constitutional role establishing a longer one, making the latter ineffective. Note that this is a clear example of intra-personal role conflict (see previous section), where the political role undermined the efficacy of the constitutional one. To understand why justices accepted this political norm even after constitutional life tenure was restored is fundamental to understanding that the Supreme Court was only one of many offices through which the political elite continually circulated, so justices who left the bench often "moved on" to another institutional post, and the possibility for continuing in the "political circuit" required obedience to the norms of the system (see Magaloni 2003).

The description of Supreme Court Judges as *Regime Supporters* would be incomplete without a central element: the great power justices had (and to an important extent continue to have) within the judiciary (see Pozas-Loyo and Ríos-Figueroa 2011; see also Pou (Chapter 5 in this volume). This duplication of characteristics, the political role of the court being externally subordinated (i.e. vis-à-vis the president and the party) but internally dominant (i.e. vis-à-vis the judiciary), was typical of the way the hegemonic party operated. As we have seen it also applied to the armed forces and to many other corporations. While the heads of mayoral institutions were required to put up with the "stick" of external subordination, they could enjoy the "carrot" of internal domination that gave them great political and economic gains. Losing these gains increased the costs of breaking the system's rules.

Internal dominance was (and still is) a characteristic of the constitutional role of justices in Mexico. Since 1917 the Supreme Court has had control over the

appointment and promotions of lower court judges, which has arguably promoted clientelist practices. It is noteworthy that in 1987 a constitutional amendment transferred power to the Supreme Court to control the material resources of the judiciary, including not only the budget, but also decisions over the number and jurisdiction of courts. These new capacities added to their already great administrative powers.²¹

Noting that the internal dominance/external subordination character of the Supreme Court was a consequence of the hegemonic party politics is important since it is the source of one of the central characteristics of the Mexican judiciary to this day: the Supreme Court's centralized administrative power. It is important to understand that even if democratization brought an end to external subordination it has not been able to break internal dominance. As we will discuss in Section II.III, such dominance has had negative effects on the judiciary's performance.

Finally, there was another series of reforms aimed at improving the administrative efficacy of the judiciary, by expanding the number of lower federal courts, to deal with the ever-increasing caseload. Two reforms are good examples of this trend. First, in 1951 a constitutional amendment approved the appointment of auxiliary judges to the Supreme Court and also created a new layer of circuit courts with the aim of reducing the highest court's caseload regarding *amparo* suits,²² namely cases where an individual citizen challenges a state action based on the argument that a public authority had violated his/her constitutionally protected rights (see Caballero 2010: 149–152). In 1968, again to overcome the backlog, another reform decided to limit the Supreme Court's appellate jurisdiction and to transform the collegial circuit courts, which were doubled in number, into last courts of appeal for most cases (see Caballero 2010: 166–170).

IV.III Jurisprudence on military jurisdiction

The Supreme Court's jurisprudence on military jurisdiction nicely reflects its loss of independence from the government. The place to start is the Code of Military Justice enacted in 1933, which in its Article 57 not only considerably expanded the list of crimes that could be decided in military courts (including, for instance, fraud, robbery, and assault) (González Oropeza 2006),²³ but also stated that service-related crimes committed by military personnel would be decided in military courts. Thus, the scope of military jurisdiction defined in Art. 57 of the Code of Military Justice is manifestly broader than that stipulated by Art. 13 of the constitution. What did the Mexican Supreme Court do? After resisting somewhat erratic jurisprudence from 1934 to 1940, the court interpreted the constitution in such a way that made the code constitutional. In other words, the court adapted the constitution to the code, instead of the other way around.

Regarding military autonomy, during this period there are several examples (actually the majority of *tesis*, as shown in Figure 1.1) where the Supreme Court

upheld what had been done within the armed forces. This includes cases where the court relaxed some rights of due process, for instance regarding times of appeal or standards of evidence, for cases within military jurisdiction on the grounds of an ambiguous notion of military honor (e.g. Reg. No. 233 985; Reg. No. 235 275; Reg. No. 235 276; Reg. No. 304 493). There is also a thesis where the court defends the due obedience of a soldier even if he knows that obeying an order implies a crime (Reg. No. 295 749).²⁶ Of course, in the ambiguous nature of the authoritarian electoral regime of the PRI (Schedler 2013), there was room for the Supreme Court also to limit military autonomy, for instance, reversing a military court decision based exclusively on hearsay provided by an untrustworthy witness (Reg. No. 802 453), or a murder conviction made without an autopsy (Reg. No. 302 454). The court also sometimes granted the *amparo* against military courts whose composition violated some requirements (Reg. No. 300 502), and even granted one when the petitioner argued that his right of freedom of expression had been violated (Reg. No. 235 466).

Regarding the scope of military jurisdiction from 1940 onwards, the Mexican Supreme Court basically upheld a criterion based on the identity of the person involved in a crime: if the person belongs to the armed forces then the case comes under military jurisdiction. Some outrageous examples that were sent to military courts include a rape case based on the argument that it was a "crime against military honor" (Reg. No. 235 610); a case of a drunk officer "in service" who killed a civilian (Reg. No. 236 995); and a case where a military officer dressed as a civilian and while off duty killed another military officer for reasons unrelated to any kind of military service (Reg. No. 257 727). As with military autonomy, the "personal identity" criterion was sometimes attenuated by sensibly keeping some conducts and situations out of military courts, such as when the officer is on vacation (Reg. No. 235 143), or when a military officer killed the referee during a soccer game (Reg. No. 235 231). It is noteworthy that the court explicitly invoked the "personal identity" criterion as late as 1991 (Reg. No. 206 199).

In this electoral authoritarian regime it is not completely surprising that there are also many *tesis* in which when facing apparently identical situations the court reaches the opposite conclusion. For instance, sometimes being drunk is enough to consider that the military officer has abandoned his position (Reg. No. 234 522) but other times it is not (Reg. No. 245 676). Sometimes obedience to a superior officer is due even when the subordinate is off duty (Reg. No. 312 980) but not others (Reg. No. 313 404). Sometimes retired officers still enjoy the prerogatives of military jurisdiction (Reg. No. 315 464), but not others (Reg. No. 315 245). One possible explanation for these inconsistencies may be that the Supreme Court decided differently depending on the level and the political connections of the military official in question. For instance, in 1945 there was a case against the governor of Sinaloa, a military officer close to the then President Manuel Ávila Camacho, who was accused of murder. The National Secretary of Defense, none other than former president General Lázaro Cárdenas, who argued

that the case should be tried in military courts, filed an *amparo* suit. In the end, the governor was granted the *amparo* and eventually set free (cited in Caballero 2010: 142).

V The Supreme Court Justices as Constitutional Interpreters: 1998–2013

V.1 Political context and civil–military relations

One of the most interesting features of the PRI was its capacity to remain in power for more than seven decades (1929–2000). Through a series of gradual reforms PRI successfully adapted to changing conditions, both internal and external, while simultaneously holding on to power. These reforms touched on every issue of the political and social system. The electoral reforms since 1977 are the paradigmatic example of constant and hard bargaining between the PRI—which did not want to lose much—and opposition forces—which needed to gain enough—that made the PRI order possible during seventy-one years. There are three crucial dates in the gradual electoral decline of the PRI: 1988 when the PRI lost the two-thirds majority in the lower house and thus the capacity to unilaterally change the constitution; 1997 when the PRI lost the majority in the lower house of Congress; and 2000 when it lost the presidency.

The changing political circumstances since the 1960s, but especially those of the 1970s and 1980s, had an impact on civilian–military relations. In particular, several crises in Central America in the 1980s, the emergence of drug trafficking as a threat to national security, and the 1994 Chiapas rebellion changed the role of the Mexican military as they acquired responsibilities well beyond acting as guardians of the regime, and of the "revolutionary family." These new responsibilities were accompanied by a corresponding growth in the size of Mexico's standing army, influence on policymaking, especially regarding public security, distortions in the process of promotions, and the development of military industries (Díez and Nicholls 2006: 27; Serrano 1995: 439–442).

The military's involvement in combating drug trafficking has been particularly consequential. This involvement started in the 1970s, but accelerated in the late 1980s under Carlos Salinas's administration (1988–1994) when he declared drug trafficking to be an issue of national security, and involvement continued to grow under Presidents Zedillo (1994–2000) and Fox (2000–2006). Under the administration of Felipe Calderón (2006–2012) it acquired tragic proportions. It is possible to trace a parallel increment in the involvement of the armed forces in policymaking, in particular regarding public security: Since the Zedillo administration, for example:

the Drug Control Planning Center (CENDRO), the Federal Preventative Police (PFP) and the National Institute to Combat Drugs have been

headed by military officers, and the Center for National Security and Intelligence—Mexico's intelligence agency—increasingly has been run by the military.

(Díez and Nicholls 2006: 33)

Perhaps the clearest example of increased penetration by the armed forces into civilian branches of government was the appointment in 2000 of Brigadier General Rafael Macedo de la Concha to be Attorney General, the first time in Mexico's history that a military officer has ever served in that office.

Increased involvement of the military in the anti-narcotics campaign also had a huge cost in terms of violation of human rights, especially under the Calderón administration. From 1999 until 2004 the National Human Rights Commission received 1,069 complaints of abuse perpetrated by the armed forces. In 2008 the number of complaints was 1,231 and during the first six months of 2009 the National Commission on Human Rights (CNDH) received more than two thousand complaints against the army (Díez 2012). The Inter American Court of Human Rights (IACHR) has also decided against Mexico in cases where the army is involved, most famously in the *Radilla* case.²⁵ In any event, the involvement of the armed forces in the "war on drugs" as well as in other non-traditional activities has been accompanied by increments in the military's size, budget, and influence on policymaking; but also by very mild reductions in terms of military autonomy.

The armed forces have continued to operate with significant autonomy and weak legislative oversight, especially in the area of promotions and of allocation of the internal military budget, both processes in which civilians are not involved despite the prerogatives of both houses of Congress to do so (Díez 2008, 2012). In this regard, it is noteworthy that a restriction on military autonomy, in particular on the scope of military jurisdiction, came from the IACHR in the *Radilla Pacheco* case in 2009, followed by the intervention of the Supreme Court in 2010 in response to *Radilla*, and especially with a series of decisions in related cases during the summer of 2012.

V.II The justices' constitutional and political roles: Enabling constitutional interpretation

Let us start by accounting for the changes in the constitutional role. The key constitutional reform in this period took place in 1994 when the Supreme Court was delegated considerable powers of judicial review and its membership was reduced and renewed in order to increase its legitimacy and independence vis-à-vis the other branches of government (see, e.g., Fix-Fierro 2003). The 1994 reform substantially increased the judicial review powers of the Mexican Supreme Court Judges by creating instruments of both concrete and abstract control with the possibility of generating *erga omnes* effects, and granted justices an effective fifteen-year tenure. These changes transformed the constitutional role of Mexican

Justices, giving them new powers and, as we will see, the possibility of becoming at times constitutional interpreters.

These changes to the justices' constitutional role did increase their independence and their powers of constitutional interpretation. However, it is important to mention that access to the two new instruments of constitutional review created or strengthened in 1994 (the action of unconstitutionality and the constitutional controversy, respectively) was allowed only to political authorities such as political parties, representatives of the three branches of government, or a legislative minority. Ordinary citizens do not have the standing to use these instruments, and this is also true for most autonomous organs such as the Federal Electoral Institute (IFE) or the Federal Institute of Transparency and Information (IFAI).²⁶ Moreover, the other instrument for constitutional review, the *amparo* suit, was weak not only because of its limited, *inter partes*, effects, but also its *de facto* inaccessibility for ordinary citizens because throughout the years it had become technically complex and quite expensive (see Pou, Chapter 5 in this volume). This limited accessibility to the highest court has had important consequences. In particular it has filtered the type of cases that reach the justices and therefore has arguably limited the potential spectrum of their decisions, most importantly regarding rights.

By then the role of *Regime Supporters* was twofold. On the one hand, justices needed to respect the system's rules and withstand the "stick" of external subordination. The set of constitutional powers, prohibitions, rights, requirements, and permissions that supported this subordination disappeared with these constitutional reforms. On the other hand, *Regime Support* justices had another set of constitutional powers that increased the costs of insubordination: those that gave them dominance vis-à-vis the judiciary. These latter powers are largely still in place, and as we will argue have affected the efficacy of the former (see Pou, Chapter 5, in this volume).

Details of the evolution of the constitutional powers that granted the Supreme Court dominance within the judiciary are as follows. The reform of 1994 also created a judicial council to which was delegated the enormous administrative power formerly enjoyed by the Supreme Court, both in terms of the administration of the judiciary's budget and of the appointment of judges and the management of their careers. The political motives behind the creation of the council were, first, to make the constitutional jurisdiction the special focus of the Supreme Court, and second, to reduce the Supreme Court's corporatist management of judicial careers. According to former Justice Jorge Carpizo, Supreme Court Judges used to take turns to fill a vacancy at any level of the judiciary, and the new judge's career was overseen by his "mentor" on the court, so that after some time each Supreme Court Justice had his own loyal clientele within the judiciary (Carpizo 2000). Also, Supreme Court Judges protected unprofessional and dishonest judges whom they had mentored, reasoning that public scandals damaged the reputation of the entire judiciary.²⁷

The judicial council was originally composed of a majority of judges selected by lottery, a method that effectively removed from the Supreme Court control over lower court judges and over the material resources of the judiciary. The Supreme Court did not like this and started to lobby strongly in order to regain control over the administration of the judiciary and of the judicial career (see Carpizo 2000; Fix-Fierro 2003). The pressure was successful: in 1999, after four years of interesting battling between the council and the Supreme Court, a constitutional amendment changed the mechanisms to appoint judicial council members (see Pozas-Loyo and Ríos-Figueroa 2011). In essence, the amendment transformed the selection by lot of judges from different levels into a direct designation by the Supreme Court of judges from the district and circuit courts. This effectively gave the Supreme Court control over the majority of seats in the council, which automatically gave back to it control over the material resources of the judiciary and the careers of lower court judges.²⁸

In sum, during the PRJ era, the Supreme Court's internal dominance and external subordination were two faces of the same coin. Transition to democracy brought an end to the court's external subordination but it has still been unable to break its internal dominance. This had, and still has, negative effects on judicial performance for at least two reasons. First, it affects the Supreme Court's behavior because it takes up much time, focus, and energy from constitutional adjudication, which is its most important (still underdeveloped) task. Second, it arguably affects the performance of lower court judges because it enables and promotes clientelist relations, thus blocking meritocratic selection. Hence, the lack of change in the justices' dominance over the judiciary has maintained many of the clientelist political practices which characterized the judiciary in the PRI era (see Pozas-Loyo and Ríos-Figueroa 2011).

With changes in the justices' political role, the PRI lost its hegemony so that the justices' political role was obviously transformed. To start with, justices were no longer members of the party. Most of the judges proposed in 1995 by the president and confirmed by the Senate were the product of consensus between at least two political parties, the PRI and the right-leaning PAN (*Partido Acción Nacional*) (Magaloni et al. 2011). So, as opposed to what had happened previously, to be able to be part of the Supreme Court candidates to it should not be perceived as unconditional for the PRI.

The elite circulation system also became ineffective: when tenure of the Supreme Court finished, justices could no longer rely on "moving on" to other important political offices. This change arguably had very important effects on justices who arguably had started to become more concerned about their legacies. This and other political transformations of the party system changed the political role of justices: little by little many of the unwritten political norms of the PRI era became ineffective. Moreover, as political fragmentation increased, the political roles of all the institutional actors changed. The increasing political diversity

in the legislative and executive branches, as well as in local governments, decreased the threat of retaliation to independent rulings.

In sum, since 1999 the justice system has concentrated much of its power on the Supreme Court, an institution that dominates the system combining functions of constitutional tribunal, last courts of appeal, court of cassation, and administrator. Nowadays the constitution gives justices the possibility of becoming true constitutional interpreters: their instruments of judicial review, their relatively high independence, their power to attract cases deemed "transcendent and important," and their capacity to oversee lower courts' jurisprudence and to resolve conflicts of interpretation open this door. However, as we have said, access to constitutional litigation is still very restrictive and justices are also the head of administration of material and human resources of the whole judiciary (indirectly, via its influence over the judicial council).

These features of the justices' constitutional role and the difficult and long-lasting process of shaping a new political role for a multiparty system have arguably delayed the efficacy of the role of constitutional interpreter. On the issue of the scope of military jurisdiction, constitutional interpretation began to crystalize in 2009.

V.III Jurisprudence on military jurisdiction

Since 1994 and until 2009, despite judicial reform, the Supreme Court mostly kept a deferential silence regarding military autonomy. During more than a decade after the reform of 1994, the most important decisions of the Mexican Supreme Court regarding military justice were a handful of *tesis* in which the court imposed some restrictions on what it considered military crimes for military jurisdiction (e.g. Reg. No. 195 107; Reg. No. 192 786); a few *tesis* respecting the autonomy of the military jurisdiction on procedural matters (e.g. Reg. No. 200 451; Reg. No. 200 540; Reg. No. 200 661; Reg. No. 198 706); and a highly consequential 1996 (Action of Unconstitutionality 1/96) decision where the court upheld the constitutionality of military participation in matters of internal public security (cf. Carbonell 2002; Pedroza de la Llave and Thalia 2011).

In the action of unconstitutionality 1/96 (which produced *tesis* Reg. No. 192 084; Reg. No. 192 083; and Reg. No. 192 082) the court established four conditions for the participation of the armed forces in internal public security: that a civilian authority ask for help, for a limited time, specifying the functions to be played by the armed forces, and without violating human rights. Whereas the conditions were sensitive and well-intended, the internal security crisis overwhelmed them. Cases of human rights violations by the armed forces piled up and increasingly made headlines (remember the figures of complaints filed before the National Commission of Human Rights: in 2008 only, more than a thousand). Meanwhile, for quite a long time the Supreme Court remained aloof. The most telling example of this is the "Reynalda Morales" case. The case is named after the woman who filed an *amparo* suit against a lower court that granted

jurisdiction to a military tribunal over a case related to her husband's death by military officers. The Mexican Supreme Court dismissed the *amparo* arguing that Ms. Morales lacked the "juridical interest" in this case required to file an *amparo* suit, because she was not "directly affected" by the members of the armed forces.²⁹ This was in 2009.

The Reynalda Morales case also marks the beginning of a change regarding jurisprudence on military autonomy. Justice José Ramón Cossío wrote a dissenting opinion in which he basically argued for the unconstitutionality of Article 57 of the Code of Military Justice and proposed a radical jurisprudential change in military jurisdiction (Cossío 2010). The importance of this dissenting opinion lies in its close resemblance to a recent opinion by the Mexican Supreme Court, where the scope of military jurisdiction is interpreted in very narrow terms (the so-called "Radilla Case"). Interestingly, on the Radilla case the Mexican Supreme Court merely issued an opinion agreeing with the arguments of the IACHR that pointed to, among other things, the unconstitutionality of Article 57 of the Code of Military Justice (see Mejía Garza 2011).

During the summer of 2012 the Mexican Supreme Court issued a series of decisions upholding and even extending its holding in the Radilla case, arguing that cases of violations of human rights do not belong in military courts, and started to distinguish the types of cases that could properly be heard in them.³⁰ To illustrate the spirit of this jurisprudence, focus is on the case of Bonfilio Rubio (AR 133/2012). Bonfilio was killed by members of the armed forces at a military checkpoint in the state of Guerrero in June 2009. The military jurisdiction attracted the case but Bonfilio's relatives, his father and brother, with the assistance of some non-governmental organizations (NGOs) filed an *amparo* suit arguing that the case should be heard in an ordinary criminal court. The *amparo* was granted, the Ministry of Defense appealed this decision, and the case reached the Supreme Court.

The first interesting point is that, in contrast to the Reynalda Morales case, the Supreme Court did not argue that Bonfilio's relatives lacked "juridical interest" and thus did not dismiss the *amparo* (although a couple of justices argued that it should have been dismissed on those procedural grounds). Moreover, the court ruled that Bonfilio's case should be decided by a regular criminal court. But perhaps more importantly, in its decision the court declared parts of Article 57 of the Code of Military Justice unconstitutional, as it had already established in the Radilla opinion but this time in a decision with real jurisprudential value. The Bonfilio case, therefore, closes a long history that started during the 1930s when the Supreme Court disingenuously interpreted the constitution in light of the Code of Military Justice.³¹ This jurisprudential change was clearly influenced by the so-called human rights and the *amparo* reforms.

During April and July of 2011, that is to say in between the Radilla and Bonfilio cases, yet another couple of important constitutional reforms that directly affect the Supreme Court were approved in Mexico. The first reform transforms the human rights regime in the country. First, it expands the catalogue of

justiciable rights: the reform introduces into the constitution the term "human rights" instead of "individual guarantees," which is not merely a linguistic change because whereas "individual guarantees" are located in the first twenty-nine articles of the constitution, "human rights" can be found anywhere in the constitution or in international treaties.³² Second, the reform changed Article 1 of the constitution, which now includes the wording that all Mexican citizens enjoy the rights established in the constitution and in international treaties ratified by Mexico, and that the interpretation of those rights should always be the most favorable for the individual.

While the reform of human rights is important in itself, its potential was considerably augmented by the simultaneous reform of the *amparo* suit: the individual instrument of constitutional complaints which is the main legal tool for the protection of rights in Mexico. This reform expands the accessibility, scope, and applicability of the *amparo*. Contrary to the old *amparo* which was accessible only for someone with a "juridical interest" in a case (someone directly affected by a public authority), the new *amparo* is accessible for anyone with a "legitimate interest," and it will be useful for filing so-called *acciones colectivas*, which are similar to class actions. Contrary to the old *amparo* which was only useful for challenging governmental acts allegedly violating one of the "constitutional guarantees" present in the first twenty-nine articles of the constitution, the new *amparo* will be useful for challenging government acts that violate any human right recognized by the constitution or by international treaties. Last but not least, effects of decisions with the new *amparo* are somewhat more easily generalizable to a set of people beyond the parties in the case. The Supreme Court in the Bonfilio case was clearly influenced by human rights and *amparo* reforms. Whether these recent reforms will actually produce a broader "rights revolution" in the country remains to be seen.

VI Conclusion

We argued that the dual legal/political nature of the Supreme Court should be analyzed, to the fullest extent possible, from the perspectives of legal scholarship and the social sciences simultaneously. We presented a clearly defined notion of role that enabled an analysis of judicial behavior from these two perspectives. Our empirical research had a diachronic structure, and we focused on a single issue: the Supreme Court's jurisprudence on the scope of military jurisdiction from 1917 to 2013. Our analysis identified three periods in which the justices' political and constitutional roles changed in an important way, as did their response to the military jurisdiction question.

We chose to focus on the jurisprudence of military jurisdiction because this is a relatively small but privileged window from which to observe the dual legal/political nature of the Supreme Court. We thus believe that our findings—in particular the three roles that the Supreme Court has played in Mexico's recent

history—are generalizable to other areas. But the timing of the Supreme Court's reaction to changing circumstances varies depending on the specific issue. For instance, the court's jurisprudence limiting the government on labor and agrarian *amparos* during the first period (1917–1940) is very similar to that on military jurisdiction (see James 2006). But while the court's jurisprudential change on military jurisdiction started to take shape in 2007, the role of constitutional interpreter is apparent much earlier in its jurisprudence on criminal process rights (ca. 2001) or in electoral cases (ca. 1997).

Finally, it is noteworthy that considerations about human rights (of both military officers and victims) appear in a consistent, yet still timid, way in the third period analyzed in this chapter (see Ginsburg's Introduction to this volume). This is due, in important part, to the restricted access to constitutional justice, simply because many rights violations cases do not reach the Supreme Court. But there are other factors that contribute to the poor performance of the court regarding rights protection, for instance, the weakness of the “support structure”³³ (see Epp 1998 for rights litigation in Mexico or the ideological and pro-judicial-restraint attitudes of some Supreme Court Judges [Magaloni et al. 2011]). Moreover, the fact that the Supreme Court is still “internally dominant” implies that, with its huge administrative load, Supreme Court Judges cannot concentrate on interpreting the constitution, providing persuasive arguments for their decisions, writing clear and concise sentences, and disentangling the abstract meaning of the rights clauses present in the constitution.

Whether the recently inaugurated Décima Época is characterized by the full enforcement by the court of human rights and *amparo* reforms is still unclear. On the one hand, some studies have documented a prudent but consistent change since about 2005 in the jurisprudence of the Mexican Supreme Court favoring the protection of, for instance, the right to privacy, some criminal due process rights, and the right to health (e.g. Madrazo and Vela 2011; Pou 2011; Magaloni and Ibarra 2008). On the other hand, the effects of the reforms will depend on how creatively and extensively litigants use the new *amparo* and how expansively judges interpret the “legitimate interest” standing in these suits. What is clear so far is that the new role of the Supreme Court as *interpreter of the constitution* now appears to have taken root. Debates are now around whether the court is interpreting the constitution well or poorly, rather than on whether or not it is the actor in charge doing that.

Notes

- 1 For a detailed review of socio-legal scholarship on Mexico, including the Supreme Court, see (Pérez-Perdomo 2012; Ríos-Figueroa 2012).
- 2 The Mexican Supreme Court itself has produced a database of its decisions at <http://www2.scjn.gob.mx/alex/> (accessed July 11, 2016).
- 3 An underlying, and not always explicit, explanation for the unsteady and incoherent jurisprudential construction is the traditional legal training, and socially conservative

ideology of some of the justices. Magaloni et al. (2011) show some evidence of the existence of these two dimensions, traditional legal training and conservative ideology, based on the frequency of voting coalitions in non-unanimous Supreme Court decisions. For a rich account on the causes of this “decisional fuzziness” see Pou Giménez (Chapter 5 in this volume).

4 As several authors have argued, understanding the role the Supreme Court played during the PRI era is fundamental not only for historical reasons, but also because without it one can hardly understand the structure of such central judicial instruments as the *amparo* and the legal paradigm that still shapes the constitutional understanding of several justices (Pou Giménez 2012).

5 Our analysis on this specific issue is based on Chap. 5 of *Constitutional Courts as Mediators*, a recently published book by one of the authors of this chapter (see Ríos-Figueroa 2016). We are grateful to the publisher for permission to draw on this chapter of the book, a previous version of which can be found in the Spanish edition of this volume.

6 The theoretical framework we present in this chapter, based on the concept of *role* (as we explain below), is more general than the one offered in Chap. 5 of Ríos-Figueroa (2016). Specifically, in Ríos-Figueroa (2016) the proposed theory of constitutional courts as mediators instantiates the three roles of the Supreme Court as arbitrators, delegates, and mediators (which, in the case of Mexico, correspond to the first, second, and third periods analyzed in this chapter). But a different theory could arguably instantiate in different ways the three roles for the court that we identify in this chapter.

7 While this chapter is merely descriptive, it is important to note that this notion of role can be used as an independent variable in explanatory studies.

8 Note that usually constitutional and political roles are not fully consistent, since in most places constitutional and political norms are not free from tensions.

9 A *tesis de jurisprudencia* is an authoritative interpretation of the constitution emitted by the Mexican Supreme Court. Jurisprudential *tesis* are short, law-like paragraphs or sentences, free of the facts of the case. While the ideal *tesis* contains a summary of the main argument made in the decision, the *tesis* are generally simple statements that make it difficult (sometimes impossible) to capture the legal reasoning that led the judges to reach that interpretation. The *tesis* are extracted from decisions on specific cases, and they constitute the relevant and obligatory interpretative guidelines of the constitution, the laws, and even the general principles of the law. This admittedly weird system of jurisprudence has its roots in Mexico's hybrid legal system, in place since the nineteenth century, combining features from Anglo Saxon common law and the European civil law systems (see López Medina 2009, 2011).

10 The database consists of 680 jurisprudential *tesis*, of which 507 come from *amparos* (individual constitutional complaints), 159 from conflicts of jurisdiction (between the ordinary and the military) that the Supreme Court resolves, and 14 from cases in which the Supreme Court solves conflictive interpretations of the same constitutional article or principle among circuit courts. With the help of Javier Zúñiga Ramiro we systematically and thoroughly searched the Supreme Court's database (IUS) for all cases on military jurisdiction and military autonomy. The full list of cases is available at <http://www.investigadores.cide.edu/julio.rios/>. If there are *tesis* not included in this database, we believe they would not alter the tendencies shown in Figures 1.1 and 1.2. Finally, this is a database of *tesis*, not decisions and there is no one-to-one relation between them. Moreover, the *tesis* deliberately omit facts and argumentation. Thus the *tesis* are used to establish general jurisdictional patterns, but when necessary the analysis in some parts of the chapter resorts to actual decisions.

11 This question establishes the “constitutional scenario,” a factual question in which the interests of actors clash and whose answer requires an interpretation of the constitution (López Medina 2009: 154).

12 Important measures to professionalize and discipline the army actually started under Carranza, such as the reopening the Military College, the practice of rotation, the reduction in the number of troops, and the reorganization of the cavalry and infantry corps (Serrano 1995: 428).

13 Article 94 explicitly mentions that tenure during good behavior applies to those judges appointed after 1923. Those appointed in 1917 had two-year tenures, and the second cohort had a tenure of four years.

14 However, the role of adjudicator of political conflicts between levels of government was shared with the Senate, which enjoyed the power to resolve "political questions between branches of state governments" (Article 76).

15 As well as more democratic than the period since 1997 in Mexico during which we also observe political fragmentation but channeled through more stable institutional routes.

16 Reg. No. is the number with which the jurisprudential thesis cited is registered in the Supreme Court's Jurisprudence Database (IUS). The cited thesis can be accessed simply by writing down the reference number on the Supreme Court's website: <http://sjf.scf.jef.gob.mx/sjfist/Paginas/tesis.aspx?Tesis=Tesis> (accessed February 18, 2015).

17 Apparently, the court did not grant preferential treatment to generals either. Tobler tells a story of General Escobar who was accused of not paying for a ranch and lost his case before the Supreme Court (Tobler 1971: 69).

18 At the same time, Cárdenas passed the Law of National Military Service establishing compulsory basic military training for 18-year-old males.

19 The presidents of the PRI during that period were Generals Sánchez Taboada (1946–1952); Gabriel Leyva Velázquez (1952–1956); Agustín Olachea (1956–1958); and Alfonso Corona del Rosal (1958–1964). Carlos A. Madrazo (1964–1965) was the first civilian president of the PRI.

20 "The case of Agustín Mercado Alarcón who joined the SCJN in 1944 and was there until 1967 is noteworthy. In 1969 another military officer joined the SCJN, Alberto Jiménez Castro" (Caballero 2010: 159).

21 The reform of 1987, however, by limiting even further the jurisdiction of the Supreme Court to "important cases" also signals the beginning of a new series of reforms aimed at empowerment of the Supreme Court as a constitutional tribunal. There was another important reform in 1982 that takes away from the president the capacity to initiate a removal procedure of Supreme Court judges because of "bad behavior."

22 Especially those *amparos* filed against decisions of local judges, the so-called *amparo directo*. *Amparo* is sometimes translated as *habeas corpus* but it encompasses more than what this term implies in English. *Amparo* is more broadly an instrument of individual constitutional complaints.

23 The Military Code of Justice was published on August 31, 1993 by then President Abelardo Rodríguez who made use of extraordinary legislative powers delegated to him by Congress. The constitutionality of this executive unilateral publication was challenged in 2011, but the Supreme Court said its publication had been constitutional (with a dissenting vote by Justice Cossío, see Reg. No. 161 045 and Reg. No. 161 046).

24 The topic of what constitutes "due obedience" is raised in many *tesis* but the court does not develop a doctrine or even some rules on the matter (e.g. Reg. No. 233 978; Reg. No. 233 979; Reg. No. 234 162; Reg. No. 234 316; Reg. No. 234 306; Reg. No. 234 305; Reg. No. 235 077; Reg. No. 235 193, and Reg. No. 235 271).

25 *Caso Radilla Pacheco vs. México*, November 23, 2009.

26 The exception is CNDH, but only since 2006.

27 The corporatist logic within the judiciary reached its summit in 1993 when a former Supreme Court Judge was convicted on corruption charges in a case where circuit judges had liberated a defendant charged with the rape and murder of a little girl after

their "mentor" on the court asked them to do so in exchange for a sum of money paid by the defendant.

28 There is not much systematic information on the performance of the judicial council. Scattered data published in some analyses and by the council itself suggest that subordination of the council to the Supreme Court in 1999 had immediate consequences; see Fix-Fierro (2003: 235, 288) and González Compeán y Bauer (2002: 235).

29 A similar "deciding without resolving" strategy can be found in a constitutional controversy filed by the Mexico City mayor against the restriction placed by Mexico when ratifying the international treaty on forced disappearances (see Reg. No. 180 652).

30 The Supreme Court itself created a webpage on the topic in which it displays all the relevant materials, and holdings, on these recent cases. See http://fuero militar.scn.gob.mx/fm_jurisprudencia.htm.

31 In the series of cases on military autonomy that the Supreme Court decided in the summer of 2012 the focus was on violations of the rights of civilians. However, the court ignored potential violations of the rights of soldiers either by their superiors or by other soldiers.

32 The human rights reform also gives new powers to the CNDH. Among the most important are the power to investigate cases of grave violations of human rights and to give the results of investigations to prosecutors; the power of subpoena; the power to call on public security forces; and the capacity to demand detailed explanations from actors that fail to act according to the CNDH's recommendations.

33 The "support structure" refers to the existence of a network of lawyers, NGOs, and individuals who either litigate or contribute to finance litigation in favor of rights (Epp 1998: 2–3).

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2

THE LAW AS POWER

Strategic litigation in Mexico

Pedro Salazar Ugarte

I

This chapter aims to identify the state of strategic litigation in Mexico at the beginning of the twenty-first century. It highlights the political and institutional conditions that make this kind of legal phenomenon possible and asks what role the Mexican Supreme Court of Justice should assume to support those conditions. Therefore, a series of definitions is given first, along with a characterization of this kind of advocacy. A theoretical reflection is then carried out about its potential importance in a constitutional democracy. The Mexican political and legal context in Mexico over recent years is reconstructed in Section III and finally, in Section IV, some cases of strategic litigation in Mexico are mentioned as examples. It is important to acknowledge that the selection of these cases was made with attention to their specific relevance to human rights' protection in Mexico. There was no statistical or exemplary selection of cases, nor do they pretend to be representative of other litigations. They are solely examples to illustrate the main ideas of this chapter.

II

Strategic litigation is located within the context of "public interest law." In other words, it falls under the category of actions dealing with the teaching and practice of law in a way that has impacted on the public sphere of a given society. Specifically, strategic litigation—as dealt with in this chapter—is placed within the sphere of the defense of human rights.¹ Some of the definitions proposed by scholars and activists on this matter are discussed below.