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**JUDICIAL INDEPENDENCE: THE POLITICS  
OF SUPREME COURT JUDGE IN MEXICO**

## *Introduction*

Judicial independence is upheld as a desirable aspect of constitutional rule. Within presidential systems it is generally institutionalized through the principle of separation of powers. The principle of judicial independence is, at least nominally, present in most constitutions of Latin America. This is true for Mexico since the last half of the nineteenth century. The history of political development in Mexico to all appearances attests to the absence of judicial independence in the relationship between the executive and the judiciary. Indeed, in the academic analysis of the Mexican political system, the judiciary has been noticeably disregarded or overlooked. By contrast, the political elite itself has been far less dismissive of this branch of government, and at different times, the power-holders have undertaken to pass numerous constitutional reforms which have altered the judiciary since the drafting of the 1917 Constitution. The judiciary has by no means been a negligible aspect of the constitutional legitimation and relative stability of the Mexican regime.

However, in terms of fulfilling its role of keeper of the constitution and, providing adequate mechanisms of judicial accountability and rule of law, it is the case that the judiciary falls considerably short of meeting the criteria for democratic rule of law, and control of the legality of the acts of the power-holders. The Mexican Supreme Court is characterized for its passive political role, and its subservience to the will of the executive, in a political system which concentrates most political power, both formal and *de facto*, in the hands of the presidency.

This paper will examine the relationship between the Supreme Court and the executive from two perspectives which have determined the nature of the relationship, namely the institutional aspects and the career patterns of Supreme Court ministers. Firstly, I will address the question of judicial independence and its relevance for constitutional rule. Secondly, the paper will examine in the Mexican case the institutional aspects which have acted as constraints on the advancement of the independence of the judiciary *vis a vis* the executive, and how this has significantly shaped the relationship between the two branches of government. Here it is important to consider the nature of the Mexican political system, and the peculiarities of the form of constitutional rule that developed in Mexico in the post-revolutionary years. The final section of the article will link this to the career paths of the members of the Supreme Court.

Given the nature of the Mexican political system, there is a clear connection between the political and institutional factors which determine the kind of individuals that accede to the position of Supreme Court member, and the relation that these establish with the executive. The degree of independence of the Supreme Court, it will be seen, is not only a function of the institutional precepts which define the Supreme Court structure and scope of action. Judicial autonomy is also strongly determined by the nature of dominant party rule, which affects the career paths, ambitions

and aspirations of the members of the Supreme Court. Constitutional reforms and the changing nature of the power structures of the Mexican political system are, as a combination of both processes, changing the pattern of career paths, and the nature of the relationship between the executive and the judiciary. With regard to the more recent reforms of 1994 and 1996 it is still too soon to predict the long term implications for judicial independence, and more so for the political implications of these changes.

### ***Judicial Independence***

Rule of law and constitutional government is associated with separation of powers as a control mechanism on the different branches of the state, with the objective of subsuming the government process to the constitution, and binding power-holders to the law. An independent judiciary is generally upheld as a desirable, and even necessary aspect of this.

Judicial independence is presented as an asset for a number of reasons in terms of the advancement of rule of law, and is upheld as necessary for the achievement of impartiality and neutrality in the function of adjudication (Russell, 1987). A first question is from whom or what are the judges to be independent? Fiss speaks of three forms of insularity which lie behind the principle of judicial independence (Fiss, 1993). Firstly, independence from the litigating parties is essential in terms of maintaining impartiality. Judges should be free from the control or influence of the disputing parties. Bribery is an outright form of influence, but more subtle forms such as cultural or social bonds can also impair the detachment of the judge from the parties. Judicial independence also requires the individual autonomy of the judges, that is, minimizing the influence on judicial decisions from collegial relationships of other judges.<sup>1</sup> A third form of independence is what Fiss calls, "political insularity", that is autonomy from the other branches of government.

An additional form of insularity which is desirable, but more difficult to measure or to control, is ideological independence. The connection between the personal preferences of the judge can affect his or her attitude and judgement towards the parties and interests that are brought to court (Kahn, 1993; and Shapiro, 1981).

Additionally, it is also desirable that the judges be isolated to some extent from populist or plebiscitary pressures, especially in a time of mass media and increasing public scrutiny of judicial practices. Whilst this scrutiny is not entirely undesirable, it may imperil the degree of impartiality and neutrality of the judges in the task of

<sup>1</sup> Some legal systems incorporate collegial control or review mechanisms on the work of the judges as a positive measure to ensure fairness and impartiality. In the United States, the introduction of these forms of bureaucratic control mechanisms was received with alarm and concern, and viewed as an encroachment on a tradition of individual autonomy for judges, (Fiss, 1993, pp. 55-56).

adjudication, as they become visible public figures, particularly in cases which are of public interest.

Whilst judicial independence is valued, it is worth stressing that we are not talking about unqualified independence. Indeed, there is a tension between democratic rule and judicial independence. As Fiss duly points out, democracy is a matter of principle and preference, where the role of the judges is to guard the principle of constitutional rule, which is not to be left to the whims of short-term majority preferences (Fiss, 1993). In the same way that the judiciary acts as a countervailing force upon the other branches of government, it is desirable that these too hold certain mechanisms of control over the judiciary. Judicial independence is valued as a mechanism to tie the governmental process to the constitutional principles and rule of law; in turn, the judges should be subjected to some degree of political influence, to ensure some degree of democratic accountability and responsibility on behalf of the judicial branch.<sup>2</sup> This is all the more so when judicial decisions have a political impact, for through their decisions, judges are also participating in the law-making and social control functions of the state. Thus, the objective of separation of powers principle is to achieve an optimum rather than maximum degree of institutional independence, or rather inter-dependence.

The mechanisms by which judicial independence are achieved are first and foremost, institutional. The degree of independence of the highest tribunal of the judiciary is determined largely by three institutional factors. Firstly the appointment procedure to a large extent determines the degree of political influence on who is elected to the supreme court. Secondly, the tenure system will affect how independence is achieved from the appointing institution. Life tenure, in principle, ensures that the appointed magistrate will not have to respond to the political body that elected him or her. Thirdly, financial autonomy and decent salaries will contribute to isolating the judiciary from pressures, both political and from the litigating parties.

The political environment in which the legal system is embedded will have a strong impact on the degree of judicial independence. It will be seen that, in fact, in purely institutional terms, the Mexican system is not necessarily all that different from the United States system with regard to at least two of these three factors, namely, the appointments procedure and tenure system. Yet the nature of the relationship between the supreme court and the executive in both countries is qualitatively different. The role that judges play in a given political system is largely determined by the extent to which the political class and society in which they are embedded wish them to have a political role (Frankel, 1993). Regime stability, which is the case of the Mexican, is also an important factor, although not sufficient in itself.

<sup>2</sup> In the case of the United States where Supreme Court decisions are politically influential, Dahl raises questions regarding the democratic value of these decisions, the degree to which they can be taken to be a clear and truly impartial test of constitutionality and whether they can ever be divorced from the personal views of justices on policy issues (Dahl, 1981).

Finally, it is important to stress that independence in itself does not account for the kind of political role that a judicial branch may have in a political system. Ultimately this is determined also by the political effect and scope of judicial decisions which will shape the political and public nature of the judiciary and their influence on political matters. How the judiciary performs in the function of judicial review, however this is defined, provides some indication as to judicial autonomy from political pressures.

### *The Institutional Framework of the Mexican Supreme Court*

This section will present an historical overview of the Supreme Court since 1917, with particular emphasis on the constitutional reforms which have altered the design of the Court, and have modified its relationship with the executive. The objective here is to examine how judicial independence has changed since 1917, and to what extent this is linked to very specific institutional aspects of the court structure, appointments procedures, tenure system and financial autonomy, and also to the scope of legal action that the court effectively has within its jurisdiction and competence. However, it will also be argued that the relatively passive and non-politicized role of the Court in Mexican politics is not only a consequence of the constitutional design, but also of the nature of dominant party rule which has characterized the Mexican political system.

Generally, the Supreme Court is viewed as a branch which has historically been subordinated to the executive in a strongly presidentialist and essentially undemocratic regime. To speak of judicial independence in the Mexican context, then might seem unimportant given that the power structures were not, once the revolutionary family had been consolidated, essentially driven by rule of law or constitutional precepts. Nonetheless, constitutional rule has formed an essential component of Mexico's political development, and has been crucial in the reproduction of the regime's legitimation. The three branches of power were maintained, and electoral processes have been consistently respected and upheld, albeit through fraudulent and often violent practices. The constitutional aspect of the Mexican political system has been crucial in terms of regime legitimation, and the separation of powers, although essentially limited in its functions of divided government, has formed the institutional bulwark of the regime. Moreover, political mobility to a large extent was fed through such institutions as congress, although far less so in the case of the judiciary, merely in terms of the numbers and turnover rate which are involved.

Within this constitutional arrangement the judiciary buttressed the regime, complementing its nominal constitutional and legal discourse, and granting the political system a considerable degree of legal authority. The numerous constitutional reforms (approximately 345) (Gutiérrez and Rives, 1995, p. 155), clearly attest to the importance that the regime gave to legal forms. The regime was (and is) underpinned by a state of legality, although not essentially by rule of law. The judiciary itself has

undergone a number of significant constitutional reforms since 1917, and its relationship to the executive has not been static. These reforms have signified both restrictions and progress at different times in terms of judicial independence from the executive.

Cárdenas Gracia identifies four different stages in the executive-judiciary relationship since 1917 (Cárdenas Gracia, 1996). The first extends from 1917 to 1928, in which the judiciary enjoyed a considerable degree of independence from the executive (although not necessarily from other sources of political pressures) as established in the original constitutional text of 1917. The second period to which Cárdenas Gracia refers to ranges from 1928 to 1944, a period in which the judiciary was subordinated to the executive, and in which the presidency was strengthened, under President Plutarco Calles and then under President Cárdenas. The reforms of 1928 and 1934 were clearly designed to curb the Supreme Court's independence —both times the entire Supreme Court was replaced with new members. These reforms were somewhat reversed under President Ávila Camacho in 1944. The third period, between 1944 and 1988, marks a process of internal institutionalization and administrative consolidation. It is a period of stability, but also a period in which the Court, already effectively subordinated, played a passive and compliant role *vis à vis* the executive. Since 1988, according to Cárdenas Gracia, the Supreme Court's autonomy has been enhanced, particularly in the reform of 1994 (Cárdenas Gracia, 1996). However, given the current political instability and uncertainty regarding the future of the Mexican political system, it is difficult to predict the role that the Court will carve out for itself.

Since the 19th century, and particularly since 1857 the judiciary underwent a process of institutionalization, and infrastructural and administrative improvement, allowing for the advancement of a unified and increasingly centralized judicial apparatus and legal system (Cárdenas Gracia, 1996; and Fix-Zamudio, 1988). Judicial review was consolidated around the *amparo* suit mechanism, a limited, but nonetheless initially effective form of individual rights protection.<sup>3</sup> Despite these advances, by the turn of the century the Court was still fairly subordinate to the executive, all the more so during the *porfiriato*. The principle of non-political intervention by the court in electoral matters was well consolidated by the beginning of the 20th century, and was maintained also in the Constitution of 1917 (Cárdenas Gracia, 1996; and Moctezuma Barragán, 1994). This was maintained until the recent reforms of 1996, and even these only allow a limited scope for judicial review of electoral matters. Also, significantly, in 1900, the office of *Ministerio Público* (public attorney) was made independent from the judiciary, but became part of the executive, thus further limiting the scope of jurisdiction of the Court.

The 1917 constitutional process involved a lengthy discussion of the role of the judiciary, its degree of independence from the other powers of state, and the ex-

<sup>3</sup> The *juicio de amparo* was made constitutional in 1857.

tent of its judicial review powers. With regard to the latter, the *amparo* suit was maintained as it was. More progress was made, in principle, regarding the degree of independence of the Court. Members of the Supreme Court were given life tenure, and in addition, the appointments procedure established that the eleven members were elected by an absolute majority of the members of congress in secret ballot from a list of candidates proposed by the local legislatures of the states. The executive was strikingly absent from the appointments procedure. This increased independence originally granted to the Court was in reaction to judicial subservience under Porfirio Díaz.

During the first years after the text of 1917 was promulgated, there is evidence to the effect that the Court acted independently, and at times against government interests.<sup>4</sup> Where there was conflict, it occurred regarding the judicial interpretation of the new social elements of the Constitution (Fix-Zamudio, 1990; Fix-Zamudio, 1988; and Cárdenas Gracia, 1996). Non-interference in electoral matters was maintained, however, and the constituent assembly did not reverse the 1900 reform which had placed the public attorney's office under executive control.

Despite this apparently promising starting point for the judiciary, at least in terms of its independence from the executive, the revolutionary process, and the complex advancement towards a dominant party political system involved an institutional process by which the separation of powers was subsumed to the increasing powers of the presidency. In the process the judiciary, through a number of constitutional reforms, was progressively weakened.

A closer look at the constitutional reforms which since 1917 have affected the judiciary give an institutional explanation regarding the process by which the judiciary was subordinated to the executive. However, although this certainly contributed to forging the passive, but significant role that the judiciary played in the Mexican political system, it is important to stress that the Supreme Court's self-limitation was also the consequence of other factors, such as the political culture of the legal profession, the informal and clientelist networks which operate within the judicial apparatus with regard both to promotion and career paths, and most important the political environment in which the judiciary is embedded. These contextual factors which have affected the career paths and incentives structures for the judicial staff are less evident, but are crucial for an understanding of the nature of the relationship between the executive and the judiciary in post-revolutionary Mexico.

As discussed above, from an institutional view-point, judicial independence is determined through such factors as appointments procedures, tenure, stability in office and the degree of financial autonomy. The level of political activism and impact of the judiciary also will largely depend on the scope of judicial review powers.

<sup>4</sup> Four of the first Supreme Court members had been members of the constituent assembly in 1917.

The appointments procedure was the first institutional aspect to be modified. President Calles reformed the procedure in 1928, establishing a system very similar to the United States system, in which the Supreme Court members were appointed by the executive with the approval of the Senate. The executive was reintroduced into the appointments procedure. As the political system was stabilized under dominant party rule, the reform effectively ensured executive control of the judiciary. The judicial reform of 1928 corresponded to a constitutional reform proposal put forward by President Alvaro Obregón, and was clearly motivated by a desire to subordinate the judiciary to the executive. It is interesting to note that the perception at the time was that the appointments system, as it existed in the original 1917 text, allowed for local strongman politics to place their friends on the list to Court positions (León González, 1990).<sup>5</sup> The Court was viewed by the more revolutionary sectors of the moment as a reactionary body that represented the interests of the landowners (*Derechos del Pueblo Mexicano*, 1994, tomo IX). Although the original intention of the 1917 text had been to establish an independent Court, this independence was not so with regard to local *caudillos* who put forward the names of the Court candidates for their election in congress. It was in a similar vein of argument that President Cárdenas passed his reforms of the judiciary in 1934. The 1928 reform, moreover, involved replacing all of the Court members.

In addition to this, a constitutional article was introduced in 1928 which allowed the presidential removal of Court members for bad conduct with the approval of congress. Prior to this, the magistrates could only be removed through an impeachment process. This clause survived until 1982. Between 1928 and 1976, according to one source (Carpizo, 1979, pp. 185-186) only three members of the Court were removed by this procedure, but the very existence of the clause conceivably established a powerful deterrent against Court confrontation with the executive. This appointments procedure was kept intact until the reforms of 1994. The current article 96 establishes a system in which the Senate elects each member of the Court with a two thirds majority vote. As party pluralism in Mexico increases, then this reform in principle incorporates a stronger mechanism of Senate control over presidential appointments which in the long run will weaken the bond between the judiciary and the executive, enhancing independence. However, the immediate result of this was that President Zedillo took the opportunity of the reform to change the entire Court, and, moreover, the PRI senators voted in the new Court with marked ballot papers.

The constitutional reform in the first year of Cárdenas' rule in 1934 further and dramatically weakened the notion of judicial independence from the executive. The reform of article 94 replaced the original system of life tenure by one of fixed tenure of six years, coinciding with the presidential term. The years of the Cárdenas administration were the height of the revolutionary process in terms of social reforms.

<sup>5</sup> It is of interest to note in the congressional debates of 1928 regarding the judicial reform, that the independence of the court was seen as detrimental to the revolutionary advances, and as a reactionary institution (*Derechos del Pueblo Mexicano*, 1994, tomo IX).

The judicial reform of 1934, was clearly designed to further subjugate the judiciary, with the purpose of ensuring minimum judicial interference in a complex political moment. The congressional debates of the time place the judicial reform of 1934 as a progressive move to advance the revolutionary process, and guard the social reforms against reaction, again, much the same as in 1934 (*Derechos del Pueblo Mexicano*, 1994, tomo IX).

The 1934 reform was reversed in 1944, under Ávila Camacho's administration. However, by this time a compliant court had been consolidated in terms of its relationship with the executive, a relationship which has not essentially changed, until perhaps recently. This process of subordination was part of the process of institution building for the stabilization of the post-revolutionary regime around dominant party rule. It is interesting to note that even though life tenure was restored (until the reform of 1994), there does not seem to be a visible change in terms of court activism, or judicial independence. The reform of 1994 changed life tenure to a staggered fifteen year fixed term, on the argument that fifteen years is sufficient in terms of judicial independence from incumbent presidents, and has the advantage of allowing for healthy renewal of the maximum tribunal.

Both in terms of the tenure system and the appointments procedure, it is also worth stressing that, except for the years between 1934 and 1944, there is little to distinguish, by all appearances, since 1928, the Mexican system from the United States system of judicial independence at least until the reforms of 1994. Yet, the nature of the relationship between the executive and the judiciary is profoundly different in both countries. In the first place, in the United States, the appointment to the highest tribunal are not only checked by the Senate, but also, the president's choice is in reality constrained both by public opinion, and by the legal community (Fiss, 1993; Baum, 1987; and Abraham, 1986). Supreme Court appointments in the United States, are a matter of public discussion, and a measure of professional merit and intellectual achievement are expected in the presidential choice.<sup>6</sup> The American Bar Association plays an important role in the supervision of justice appointments as an additional check (Baum, 1987; and Abraham, 1986). Finally, the principle of separation of powers in the United States effectively works to check the executive, and rule of law, as opposed to state of legality, is more operative and underpins a regime of constitutional rule in a more fundamental way than in Mexico.

In Mexico, by contrast the institutionalization of dominant party rule under heavily centralized power structures around the presidential office has greatly weakened the notion of divided government. The fact that Congress came to be dominated by the PRI rendered the notion of Senate check of the judicial appointments procedure meaningless. In addition, until recently, the media was restricted and censored, and

<sup>6</sup> The political and ideological component of Supreme Court appointments in the United States is very present (Abraham, 1986; and Baum, 1987). Previous political activism is normal for Supreme Court judges. The difference is that the public scrutiny of the professional and personal merits of the appointees is lacking in Mexico.

Court appointments are not subjected to public scrutiny as in the United States. The legal community has played a minimal role in the supervision of Court appointments (Arteaga Nava, 1990, p. 404), and no consultation takes place with the professional associations, equivalent to the American Bar Association. This is also the result of a judicial structure which has not fostered meritocratic promotion mechanisms.

Throughout the judicial system appointments requirements are lax and minimal. In the 1917 Constitution, article 95, the requirements to be a member of the Supreme Court include being a Mexican citizen, not below the age of thirty five, having a degree in law, and being a *bona fide* citizen, with no criminal record or public scandal, and having lived in the country for the previous five years. This was reformed in 1934, by which the only requirements were to be between the ages of thirty five and sixty five, and to have possessed a law degree for at least five years.<sup>7</sup> Of interest in the 1994 reform is that candidates must be law graduates with ten years experience, preferably with experience in the judicial system, and *who have not held a political position (as secretary of state, head of administrative department, attorney general, member of congress of either chamber, governor or head of the Federal District) for at least a year before the appointment*. The latter is important in terms of curbing the political as opposed to the judicial criteria for appointments.<sup>8</sup> Considering that at least 47% of Court appointments come from previous political positions, this is bound to have an impact on the career paths of Supreme Court members (see Table 2 in the section below). The pyramidal structure of the judiciary bred top-bottom clientelist relations, and high levels of professional competence were not particularly fostered. This has clearly been a concern to the extent that the 1994 constitutional reforms created a Judicial Council, *Consejo de Judicatura*, which has as its principle task to relieve the Supreme Court of its administrative burdens, notably, appointments to the lower courts and the administration of the judicial budget, and to establish more rigid merit and performance in office criteria. It is still too soon what the effects of this will be on the quality of court services, and more particularly on the career paths of Supreme Court justices.

An additional factor which has affected both the level of judicial independence, and the career paths of the members of the Supreme Court is the question of fi-

<sup>7</sup> Interestingly Cárdenas removed the specification that a clean record was required for appointment to the Court.

<sup>8</sup> It is worth noting that the US requirements are not any more specific than in Mexico. Indeed, Justice Frankfurter asserted with regard to US appointments that:

One is entitled to say without qualification that the *correlation between prior judicial experience and fairness for the Supreme Court is zero*. The significance of the greatest among the Justices who had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo. They were thinkers, and more particularly, legal philosophers (quoted in Abraham, 1962, pp. 55-58).

Nonetheless, professional competence is very important (Baum, 1987, pp. 50-63).

nancial autonomy. There is little information on this issue in terms of what Supreme Court judges are paid. The general impression is that until recently, budgetary autonomy was weak, and salaries were low. Until 1994, the only financial guarantee provided for in the Constitution was that the salaries of the Supreme Court members and of the judges in the lower courts could not be reduced during their time in office (which does not say much in times of inflation). This is similar to the United States (Fiss, 1993, pp. 60-61). Until 1976, the judicial budget was granted at the discretion of the executive, and its administration was to be approved by the Secretary of Planning and Expenditure (*Secretaría de Programación y Presupuesto*). A budget law of 1976 established that the judiciary no longer required executive approval with regard to how the judicial budget is administered. This was incorporated into the Constitution in the reform of 1994. This does not tell us very much, however, about the level of the salaries. The general impression is that prior to the late 1970s salaries were low. This not only affects the degree of judicial independence, making Court justices more vulnerable to bribery and corruption, weakening judicial independence, both political and from the parties involved, but it also makes the position of member of the Supreme Court not very attractive. The number of Court Justices that have left a life tenure position to other walks of political life attests to this (see Tables 2 and 3 in the next section). In 1982 it appears that the salaries were raised significantly (Welna, 1996; and Soberanes, 1992). In addition to the raise in salaries, the judicial budget increased notably since the years of the López Portillo presidency and throughout the 1980s (Welna, 1996; Fix Fierro, 1994, p. 80; and Soberanes, 1992, pp. 62-63). This would suggest that in financial terms, the position of minister of the court became much more attractive in the 1980s, which could affect career options and aspirations, reducing the number of deserters.

What marks the difference in judicial independence with regard to the executive in Mexico and in the United States goes beyond the institutional aspects which formally determine the degree of autonomy. The political environment in which a judicial system is inserted has an important impact on how the judiciary develops. Of significance with regard to the political role of the judiciary, and which will have an impact on its degree of autonomy is the scope of review powers that is granted to the court. The Mexican system of review is based on the *amparo* suit, designed for the protection of individual rights, but which came to constitute the principle procedure for judicial control of the constitutionality of acts of authority and legislation (Fix-Zamudio, 1988; Schwartz, 1977; and Biles, 1976). The complexities of the *amparo* suit go beyond the scope of this paper, however mention of how it operates is important to understand the role that the Supreme Court was expected to play, and how this has affected the type of Court that developed. The *juicio de amparo* has undergone numerous transformations, both with regard to what areas of rights protection it covers, how jurisprudence is established, and at what level of the judicial hierarchy *amparo* cases may be resolved (Fix-Zamudio, 1990).

Briefly, until 1994, the *amparo* suit was the mechanism available to contest the legality or constitutionality of a law, resolution, act or judicial decision. The Court's decision on these matters, however, did not have *erga omnes* or general effects in terms of the abrogation of the law or act in question, but only had *inter partes* effect for the affected plaintiff. Only when the Court makes the same ruling for five consecutive cases is jurisprudence established, whereby lower courts must apply the same conclusion to all similar future cases (Schwartz, 1977, pp. 144-145). The process for the *amparo* suit has changed several times since 1917, but the essence of this judicial review mechanism has remained basically the same. This apparently limited form of constitutional review, however, is considered by numerous Mexican jurists to have had considerable success in protecting individual rights against. This is documented by some academics (González Casanova, 1965; Carpizo, 1979; Schwartz, 1977; Biles, 1976). These findings point to a far from negligible degree of judicial independence in the *amparo* suit in matters which are not overtly political, or where the consequences of judicial decisions can affect in a significant way the interests of the executive. In those matters which are not politically relevant, there appears to be a considerable degree of judicial independence, perhaps precisely because of the limited impact of court rulings on matters of constitutionality, in the sense that they do not have general effect. Moreover, the traditional justification for the limited form of judicial review which exists in Mexico, is that its function is not essentially to make law through broad interpretative powers, but to apply the law, as the judicial function is not meant a political function. It was not seen as desirable for a non-elected institution to have too strong a political role.

It is important to stress that where the judiciary has acted in an independent manner it has been in matters which were not overtly political or controversial. Where important political interests were at stake the Court chose to play a passive role. A notable example of this is the quick support that the Court gave to the executive regarding the *amparo* suits which challenged the constitutionality of the bank nationalization in 1982, (Elizondo, 1992). Equally, when *amparo* suits were filed to protect individual rights during the student rebellion of 1968 in Mexico city, the Court dismissed the cases as issues which were beyond their jurisdictional competence.<sup>9</sup>

How judicial review effectively operates is a fair measure of the degree of judicial independence which actually exists in a given political system. In Mexico, there is clearly a strong degree of self-limitation or "shyness" on the part of the Supreme Court with regard to political activism, which speaks of a lack of political independence from the executive, and which deserves some attention. By comparison to

<sup>9</sup> A number of jurists lament the limited review powers that the *amparo* represents for the Supreme Court (Cárdenas Gracia, 1996; and Reséndiz Núñez, 1996). On the one hand, there is discontent with the limited impact of the judicial review powers of the Court. On the other, there is a strong argument that as the case load has increased to unmanageable numbers, the effective protection of rights through the *amparo* has diminished considerably (Reséndiz Núñez, 1996; and Fix Fierro, 1994).

other Latin American countries, where the absence of the judiciary as a political actor to some extent corresponds to a problem of regime instability and precarious institutional permanence, the Mexican Supreme Court has enjoyed considerable longevity and stability, at least since 1944. Verner characterizes the Mexican Court in the following terms:

This type of court is “stable” in that it has not experienced direct assaults on its integrity or authority by an arbitrary executive or by a new military regime. The Court’s semi-independent status has evolved gradually and predictably within a rather favorable and stable political environment [...] This court is routinely respected by the government as long as it restricts itself to “non-political” questions: that is, it does not concern itself with questions of partisan political nor fundamental public policy. The court functions to limit governmental behaviour with regard to civil liberties and property rights... [Verner, 1984, pp. 484-485.]

It appears evident that in addition to the above specifically institutional limitations on judicial independence (despite the apparent formal similarities to the United States, in terms of tenure and appointments procedures), there are additional pressures, of an informal or external nature which have acted to inhibit the Court’s independence with regard to the executive. These are likely to correspond to political loyalties, informal financial rewards, and, as will be seen below, career objectives which go beyond remaining in the Supreme Court. A relatively high proportion of the members of the Supreme Court are PRI militants.<sup>10</sup> As the judiciary is subordinated to the executive, it appears that the interests of the members of the judicial hierarchy unsurprisingly tend to coincide with broader regime interests —notably, regime stability, rendering a passive judiciary with respect to notions of limited government.<sup>11</sup>

The reforms of 1994 and recently 1996 have altered both the formal aspects which determine the relationship between the executive and the judiciary in terms of tenure and appointments procedures, and the review powers of the Court. The latter have been considerably broadened. The 1994 reform establishes that the Supreme

<sup>10</sup> In the US, Supreme Court Justices often have political party backgrounds, but the outcome of appointments is more balanced, if only through the alternation of parties in power. In Mexico, to the extent that they have explicit party membership, it is almost always from the PRI. Surprisingly, according to the members’ history the number of PRI members increased in the mid 1970s. However, this does not necessarily mean that others were not.

<sup>11</sup> Arteaga characterizes the ministers of the Supreme Court in the following terms:

Si bien los jueces, sobre todo de los otros países, tienen fama de ser conservadores, la verdad es que en México, salvo raras excepciones, no se puede decir lo mismo: ello no significa que sean liberales o revolucionarios: los altos jueces son simplemente incoloros, comparten las ideas revolucionarias, conservadoras o anodinas de los más altos miembros del grupo gobernante, especialmente del presidente de la república... [Arteaga Nava, 1995(b), p. 489.]

Court can rule under certain conditions on the constitutionality of laws or acts of authority with the effect of abrogating the law or act in question, that is with *erga omnes* effect, in the following circumstances: in conflicts arising between federal government and states, between state governments and municipalities, between different state governments and between municipalities; and in suits of unconstitutionality brought up by 33% of either chamber of Congress against federal or federal district laws or resolutions, or 33% of local legislatures against their own state laws or resolutions (Arteaga Nava, 1995(a)). In addition, the recent constitutional reform with regard to electoral issues grants the Supreme Court some say on certain types of electoral controversies, breaking a tradition of judicial non-interference in electoral matters dating from the nineteenth century. It is too soon to assess the impact of the increased (although still limited) review powers of the judiciary, and whether this will substantively alter the relationship between executive and judiciary.

Since the reform of 1994 there appears to be a more visible role of the Supreme Court in political affairs, notably through rulings on constitutionality initiated in Congress (although decided in favour of the executive), and regarding state and federal government relations in the case of the Tabasco suit against the federal public attorney's office (also ruled in favour of the executive). Moreover, the activism of the Court has spread to areas of jurisdiction not reformed in 1994, as was the case of their recommendations regarding the Aguas Blancas massacre of seventeen peasants in 1995. This increased Court activism, however, is not equivalent yet to greater political autonomy. Moreover, greater presence of the Supreme Court in the political arena by no means amounts to all the other characteristics which ideally complement liberal judicial politics (independence, impartiality, transparency, reliability). The reforms of 1994 may have increasing political implications in the future, as competitive party politics inches its way into the political system, as yet, the effects of the reform are limited and hard to measure.

So far we have examined the institutional aspects of judicial independence in Mexico. A closer look at the career paths of the Supreme Court members will give a clearer picture of how this has evolved overtime in the Mexican case.

### *Career Paths of the Supreme Court Ministers*

The institutional context tells us much about the structure of incentives and opportunities which are built into the judicial system, and how this shapes the degree of judicial independence. A closer look at the career paths of the ministers of the Supreme Court will give a more accurate picture of the relationship between the judiciary and the executive. Although the available data is incomplete, and in some parts is inconsistent, nevertheless, some patterns of behaviour and career choices can be discerned which give an indication of the incentives and opportunity structures for the office of Supreme Court minister. This section will also examine whether throughout the history of the Court for the better part of this century there are perceptible chan-

ges regarding career paths and the ambitions of the ministers that are appointed, with a view to broaching some assessment on changes in the nature of the relationship between the executive and the judiciary.

From an institutional perspective, we have seen that, given the dominant party and hyper-presidential features of the Mexican regime since the 1930s, it is the case that the executive has virtually absolute control over who gets appointed to the Supreme Court. This control of the executive over who sits on the Court is in principle attenuated by life tenure since 1944, which 'allegedly is the mechanism by which some degree of autonomy in the judiciary from the influence of the presidency is ensured. Finally, better financial resources and autonomy since the late 1970s also theoretically will have reshaped the nature of the Court.

Career paths reflect certain patterns of ambition which characterize specific offices. Ambition is shaped both by personal preferences, and by the structure of opportunities which are built into the office in question. The structure of opportunities is determined by the institutional (and constitutional) framework, prevailing patterns of career advancement and promotion possibilities (Schlesinger, 1991), and also by the political environment in which the office in question is inserted.

Ideally, given the function and nature of the Supreme Court, the career ambitions that ought to characterize the office-holders are of a static type. Life tenure in principle, implies that there is a low if not almost zero turnover rate of the office, and should encourage career aspirations be that of remaining in office. Once a minister is appointed, in principle there should be no reason why he or she should wish to leave office. However, if we examine the number of Court Ministers that after 1944 (when life tenure was restored) leave office, normally to hold a political office, we find a high turnover and desertion rate. Unlike the United States where justices tend to remain in office once they have been appointed, in Mexico at least 26% do not fulfil life tenure (see Table 1). It is likely that in reality this percentage is higher; of those for whom there is available information leave office before time at least 20 % go to a political post either immediately after or some time later.<sup>12</sup>

The fact that so many leave to occupy political positions would seem to indicate that they do not leave as a result of having displeased the executive. In fact, there are only three recorded cases in which the President requested the resignation of Supreme Court ministers by one calculation (Carpizo, 1979). Thus the reasons for leaving office seem not to be bad behaviour but that the position is not particularly valued, undermining the notion of independence. If the aspiration is to leave office to a more valued position then it cannot be expected that the Court will decide cases that will contravene the interests of the executive, in the hope of future political rewards. Curiously, 2% return to lower positions within the judicial hierarchy.

<sup>12</sup> Of the remaining 74%, from the available information it is impossible to tell whether all of these actually fulfil life tenure or not.

*Table 1*

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Positions held by ministers of the Supreme Court after they leave office between 1940 and 1994	
Percentage of ministers of the Supreme Court who leave their position for a political post.	20%
Percentage of ministers of the Supreme Court who leave their position for another post in the judiciary.	2%
Total percentage of ministers of the Supreme Court who do not fulfil life tenure. <sup>1</sup>	26%
Percentage of ministers of the Supreme Court for whom there is no data, or the information is contradictory. <sup>2</sup>	74%

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<sup>1</sup> This includes ministers for whom their date of death is several years after their departure from office.

<sup>2</sup> These percentages will not give an accurate picture of the percentage of members who fulfil life tenure in the court. It can be assumed that many of those ministers for whom there is incomplete information will have remained in office. But it must also be taken into account that some of these will have left office.

Source: Adapted from Camp, 1995; and Fix-Zamudio and Cossío, 1996.

That incoming ministers of the Supreme Court have political aspirations beyond the judiciary might be deduced from the fact that 47% of the appointees proceed from previous political positions, as opposed to 29% who come from positions in the judicial hierarchy (see Table 2). The Supreme Court is seen as one more position in a political career which aspires to reach higher levels of office. The dynamic nature of career paths in the Court, despite life tenure is also clearly an indication of the relatively low esteem in which the office of Supreme Court minister is held. The reform of 1994 which forbids the appointment of individuals who have held a political position within one year before the appointment is made will certainly have an impact on this. A closer look at the histories of the ministers reveals that from the mid 1970s, Supreme Court members increasingly come from positions within the judiciary.

The impression is that the office of minister of the Supreme Court is not particularly valued. Arteaga Nava describes the position of minister as a third level position within the public sector, along with under-secretaries of state, members of congress and some of the governorships (Arteaga Nava, 1990, p. 406). It is a position from which its holders can and do aspire to move on to other political positions. One strong reason, at least until the 1980s, was the question of income (the judicial income improves considerably from the late 1970s onwards, including salaries). The office of Minister of the Supreme Court was seen by a number of its members as a ste-

*Table 2*

Positions held by ministers of the Supreme Court prior to their Appointment between 1933-1995	
Percentage of members of the Supreme Court who occupied a position in the judiciary prior to appointment.	29%
Percentage of members of the Supreme Court who occupied a political position prior to appointment. <sup>1</sup>	47%
Percentage of members of the Supreme Court for whom there is no information, or data is contradictory.	24%

<sup>1</sup> This includes positions in the attorney general's office which depends on the Executive.  
Source: Adapted from Camp, 1995; and Fix-Zamudio and Cossío, 1996.

pping stone to elective office or to a position either with better income perspective (both formal and informal, or even illegal), or better political perspectives. Table 3 shows the positions to which outgoing members of the Court move on to.

*Table 3*

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

Source: Adapted from Camp, 1995; and Fix-Zamudio and Cossío, 1996.

The incentives for not fulfilling life tenure are both financial and political. The fact that appointment requirements are lax signifies that appointees are not necessarily selected for their professional or judicial merits, but for reasons of political affinity, loyalty and friendship. In the United States, a high percentage of the appointments to the Supreme Court also bear a very strong political element, but this is generally checked by the control mechanisms (formal and informal) which also ensure that the incoming appointee meets proven professional merit criteria as well (although not necessarily within the judicial branch) (Abraham, 1986; and Baum, 1987).<sup>13</sup> The lack of these control mechanisms in Mexico heighten the political aspect of the appointments procedure. It also implies that the appointed individuals are not necessarily tied to a career in office in the Supreme Court, undermining any notion of judicial independence. This makes the position of minister of the Supreme Court a political one, and not necessarily a desirable one in the long term, but rather a stepping stone to other political opportunities. For those appointments who hold other political aspirations, it is a desirable position in as far as it signifies holding a public post while in waiting for other opportunities. The relatively high turnover rate is fairly indicative of the relatively low appeal that the office holds, given that it is designed to keep its appointees for life.

Clearly, then, the office of member of the Supreme Court in Mexico does not hold the same prestige or appeal for its incumbents as its United States counterpart. In the United States, appointment to the highest tribunal is highly prestigious, sufficiently well-paid, and has security of office through life tenure. The Supreme Court in Mexico is not particularly prestigious, until the late 1970s it was not well paid, making security in office not particularly attractive, especially if political opportunities elsewhere were available. It is indicative that outgoing members will take their place in such short-term positions as members of Congress, in preference to remaining in the Court.

The motivation for entering the Supreme Court is to a considerable extent political, and the ambition is not necessarily static. Ministers will easily move on to other political positions, although it seems increasingly less so since the late 1970s, coinciding also with the fact that they are increasingly selected from the judicial hierarchy. Although the available information is incomplete, it would appear that as this tendency is re-enforced, political ambitions beyond this office become less likely.

This trend towards less mobility from office coincides with a number of factors. Firstly it is correlative to the reforms since the 1970s which have strengthened the judiciary. Notably the issue of increased budgetary independence, and moreover, better salaries, make the office more attractive (although not necessarily more prestigious in the public mind). The recent reforms which seek to enhance the autonomy

<sup>13</sup> It is clear that the political preferences and profile of candidates to the Supreme Court in the United States play a very important role in their selection. But once in office they do not necessarily comply with the executive, because the principle of independence is more securely in place, and their political ambitions tend to disappear, given that life tenure is taken much more seriously.

and prestige of the Court, and the events of recent years have pushed judicial activity into the public limelight. Secondly, in a changing political environment where dominant party rule is no longer secure, the security of life tenure becomes more attractive. The PRI can no longer offer promises of future political rewards, nor can it ensure promotion in exchange for political loyalties as in the past. Thus, opportunity structures are changing, with a significant impact on the career paths of Supreme Court ministers, and their career ambitions. To the extent that this trend is consolidated, more independence from the executive can be expected.

With regard to the executive's viewpoint, providing career incentives beyond the Supreme Court was a way both of subordinating the judiciary to executive influence, and of including the judiciary within the sphere of state patronage and clientelist relations which have characterised the Mexican political system. An effect of relatively high desertion rates and therefore turnover rates within the Supreme Court meant that the executive can effectively "pack" the Court to some extent. If we take into consideration both this element and the fact that progressively since 1917 until 1994 the number of Court ministers was increased (motivated probably more by the excessive work load on the Court administration), it means that each Mexican President appointed an average of 54% of the Court during his time in office, again marring the principle of independence. This contrasts with the United States where the average rate of appointment per president is 33% of the Court, thus rarely holding a majority Court. In addition, in the United States, because the career paths of Supreme Court justices tend to be static rather than progressive, once the appointment is made, there is little by way of direct executive influence on judicial decisions (see Tables 4 and 5).

*Table 4*

Comparison of Percentage of Court turnover per presidential administration in Mexico and the United States	
Percentage of Supreme Court members appointed per president in Mexico, between 1944 and 1994 <sup>1</sup>	54%
Percentage of Supreme Court members appointed per president in the USA, between 1869-1981 <sup>2</sup>	33%

<sup>1</sup> This is calculated from the reform of 1944 when life tenure was restored for members of the Supreme Court, and takes into account the changing numbers which make up the Court.

<sup>2</sup> This is calculated from 1869 onwards when the number of members of the Court was established at nine, and has not changed since then. In addition it should be taken into account that the presidential term in Mexico is of six years as opposed to four year terms in the United States. The comparative distortion that this causes is somewhat offset by the fact that seven of the twenty two US presidents in question served more than one term in office, (including F.D. Roosevelt who served three).

Source: Adapted from Fix-Zamudio and Cossío, 1996; and Abraham, 1986, p. 54.

*Table 5*

Number of Appointments to the Mexican Supreme Court per Presidential Administration			
<i>President</i>	<i>Years</i>	<i>Number of appointments to the Supreme Court</i>	<i>Number of Ministers of the Supreme Court</i>
Congreso de la Unión	1917-1928	30	11 (text of 1917)
Plutarco Calles	1924-1928	12	
Ortiz Rubio	1930-1932	2	16 (reform of 1928)
Abelardo Rodríguez	1932-1934	1	
Cárdenas del Río	1934-1940	19	21 (reform of 1934)
Avila Camacho	1940-1946	23	21 and 5 additional
Aleman Valdez	1946-1952	18	members (reform of
Ruiz Cortínez	1952-1958	5	1944)
López Mateos	1958-1964	12	
Díaz Ordaz	1964-1970	13	
Echeverría Alvarez	1970-1976	15	
López Portillo	1976-1982	11	
de la Madrid Hurtado	1982-1988	19	21 members and up to 5 additional members (reform of 1987)
Salinas de Gortari	1988-1994	11	
Zedillo Ponce de León	1994-	11	11 (reform of 1994)

Source: Adapted from Fix-Zamudio and Cossío, 1996.

The career paths of the ministers of the Supreme Court reveal that despite institutional aspects which in principle might enhance higher levels of judicial autonomy from political pressures, the career paths of the ministers of the Supreme Court reveal sharp limitations in the possibilities of independent adjudication. The Supreme Court is perceived by a relatively high number of its occupants as a stepping stone to other political positions within broader career aspirations which extend well beyond the judiciary.

### **Conclusion**

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

The institutional design, however, is not sufficient to explain the role that the Supreme Court undertook to play within the political system since the 1940s. What has marked the degree of judicial independence, or lack of it, is the political environment in which the judiciary is embedded. The nature of the Mexican political system, characterized by dominant party rule, where the power structures are heavily concentrated around the presidential office has signified that the judicial system has been subsumed within the system of state patronage, becoming one more instance of employment possibilities for the politically loyal. Although more than half of the appointments have probably remained in office to fulfil life tenure (although this can only be an estimate, given the large gaps in the available information), for a significant number, the appointment was one step within political aspirations outside the judiciary. And until the last decade, the PRI structure, and the dominant party state was capable of fulfilling to some extent these aspirations.

Ideological independence under dominant party rule in which the selection procedure for Court ministers was in the hands of the presidency was clearly also minimal, given the impossibility of party alternation in government. Nonetheless, it is worth stressing that some alternation exists within the different groups that make up the revolutionary family, although this by no means amounts to competitive politics.

The effect of this has been to undermine the notion of judicial independence from political pressures. Given the undemocratic nature of the Mexican regime, this in itself is not surprising. Of interest is how, within an institutional framework which at a first glance does not differ greatly from the United States system in terms of the formal appointments procedure and tenure system regarding the Supreme Court, the presidential office in Mexico has been able, through informal clientelist mechanisms of unchecked recruitment, and promotion to other offices, to subordinate the judicial function to political pressures, and weaken therefore any notion of independent adjudication and divided government.

The process by which the judiciary was historically subordinated to the executive, significantly, was achieved without upsetting the constitutional order. This has contributed to the image of regime stability, and with regard to the judiciary, to stability in office. And the judiciary has been a fundamental legitimating block within the institutional order that underpins the Mexican regime.

With the recent reforms, and given the changing political environment in which they are being undertaken, it may be that the nature of the relationship between

the executive and the judiciary will change towards greater judicial autonomy. However, this will depend not only on the modifications to the institutional design, but more importantly on the direction that the political system in its entirety will take. While it is the case that minimum mechanisms of competitive party politics and democratic accountability are not in place, judicial independence can mean little in terms of constitutional rule based on true separation of powers and divided government.

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