

**The Mexican Supreme Court under New Federalism:
An Analysis of the Constitutional Controversies (1995-2000)**

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**Chapter 4. Thesis: "Separation of Powers in New Democracies:
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*“Es la primera vez que escuchamos la palabra controversia...Lo que podemos ganar (con respecto a las controversias en contra de la reforma en materia indígena) es que el gobierno sepa que no nos vamos a dejar”
Consejo Regional Indígena, May 2002*

Within presidential systems, judicial independence is generally institutionalised through the principle of separation of powers. Although this principle was included in the 1917 Mexican Constitution, the executive generally prevailed over the other two branches of government. Similarly, even if Article 40 defined Mexico as a “federal, representative and democratic republic”, in practice subnational governments were clearly subordinated to the central authority in the context of a dominant party system. With a political system that concentrated most political power in the presidency and was highly centralised, the Mexican judiciary was characterised for its weakness and passive role, often failing to act as an effective mechanism of political check and control.

For more than seven decades the Institutional Revolutionary Party (PRI) dominated virtually all levels of government, clearly undermining the system of checks and balances. Nevertheless, as opposition parties started to win strategic municipalities in the mid-1980s, there was an increased pressure to move toward further democratisation and a more genuine balance in Mexico’s federal system of government. Within this process, the 1984 Municipal Reform represented the beginning of vertical decentralisation. However, this reform and subsequent decentralisation efforts over the course of the decade, were mainly used to restore the regime’s eroding legitimacy rather than revitalising subnational governments. A decade later, President Ernesto Zedillo’s administration (1994-2000) promoted an era of “new federalism” with the main aim of shifting the balance of power to the state and local level. His project promised a more equitable resource distribution with increased financial and administrative autonomy, as well as the institutional strengthening of state and municipal governments.

Overall, the gradual process of political liberalisation contributed to the continued progress of vertical decentralisation and a more effective horizontal separation of powers. After the consolidation of more credible electoral institutions, electoral transparency finally ceased to be the main focus of discussion in Mexican politics. A renewed interest emerged in the need for a real division of powers, horizontal and vertical, where legislative and judicial powers, and the states in the federal context, could counterbalance the long-standing presidentialism. In this vein, it became clear that a key factor for the establishment of the rule of law should involve a profound reform of the justice system. The 1994 judicial reform represented an important first step for strengthening the third branch of government and making the justice system more independent, in order to resolve conflicts that could emerge

between different branches and levels of government under increasing political pluralism and new federalism. Particularly relevant for this thesis is the Supreme Court's role in shaping and defending the federal nature of the Mexican political system.

In this paper, I will focus on the Supreme Court of Justice as not only does it represent the highest level of the Mexican justice system, but also the final court of appeal in the federal context. The 1994 reform reinforced the Court's role as a check on the separation of powers through two types of recourses for the control of constitutionality: constitutional controversies and unconstitutional actions. Since 1995, the Court is increasingly ruling over controversies between the respective governmental levels, including the municipalities and the Federal District, which marks a change from the 1917 Constitution. With its rulings, the Court is regulating the coexistence among political actors and institutionalising new rules of behaviour. For the first time in history, the Court is also ruling on cases of unconstitutionality presented by one third of a legislative body against federal or Federal District resolutions or laws, and even suspending their enforcement.

Since constitutional controversies represent the legal mechanism to defend the federal nature of the Mexican political system and the principle of separation of powers, preventing the different levels and branches of government from exceeding their constitutional jurisdiction and invading others, these will be the subject of main interest in this paper. After many years when the federal nature of the political system was more theoretical than real, these recourses represent the legal means, particularly for the lower levels of government, to defend the autonomy and jurisdiction granted to them in the Constitution¹. In this context, I will argue that increasing party competition and the consequent alternation of political power in several municipal (especially since the mid 1980s) and gubernatorial elections (since 1989) evidenced the need for the creation of a Constitutional Court.

Indeed, more political competitiveness and frequent interaction between the main parties responsible of different levels of government, has made the judicial mechanism of constitutional controversies increasingly important. In the past, these recourses were not frequently used due to the hegemonic character of the party system. However, this situation has started to change gradually as these judicial mechanisms now represent a constitutional weapon to defend the preservation of each assigned jurisdiction. My main hypothesis is that behind most of the controversies between different levels and even branches of government presented in the 1995-2000 period, there is a clear conflict between opposing political parties regarding resources and powers. Furthermore, I will argue that the legal route has become more common to resolving political deadlock situations.

This paper will assess the role that the Mexican Supreme Court has played in the context of political pluralism. Indeed, since 1995 the number of recourses to resolve federal intergovernmental disputes and review the constitutionality of actions has increased dramatically. In order to evaluate to what extent the Court has exercised the new role assigned to it by the 1994 judicial reform, I will present a detailed analysis of the constitutional controversies that have been presented in the 1995-2000 period. I will show that an important number of these controversies has been presented by the municipalities, which were explicitly included in the 1994 reform after historically representing the most vulnerable level of government in the federal context. As the basis of political and administrative organisation of power, as well as being the first entities to be governed by opposition parties, the municipalities are increasingly participating in this judicial process and in some cases their claims have been upheld by the Court.

This paper will be divided into three parts. In the first one, I will briefly refer to the democratisation process that has taken place in Mexico, in order to contextualise the weakening of the authoritarian regime in a guided transition. As the hegemonic regime gradually opened spaces for political participation, the need for normalising the rule of law and reinforcing a true federalism became an important opposition demand, especially for the centre-right National Action Party (PAN). Thus, I will argue that this party's strategy for gradual change through political alternation at the local level proved to be crucial for further democratisation at the federal level. Due to the party's legal background and being the first to experience the responsibility of local and state governments, the PAN has been particularly active in defending legally political and jurisdictional disputes.

In the second part, I will briefly refer to the judicial reform process that has taken place in Mexico, particularly concentrating on the historical evolution of the constitutional controversies. I will present a brief historical overview of the judiciary since 1917 and argue that although judicial independence has been practically non-existent in Mexico, constitutional rule has formed an essential component of the regime's legitimisation. I will argue that even if the constitutional controversies were contemplated in the 1917 Constitution, though in a much more limited manner, these recourses were rarely used as the hegemonic regime opted to resolve political conflicts through internal negotiation channels. Moreover, the few cases that were actually put forward did not have the judicial and political impact they are having in the context of a more plural society. Indeed, since 1995 the Supreme Court has become a more relevant actor in the context of increasing policy contestation, as controversial cases are being left to the Court's Justices.

In the last part of this paper, I will present a detailed analysis of the constitutional controversies, organising the discussion into four broad areas. Firstly, I will define which levels of government have been involved in the disputes that have been taken to the Court and what type of controversies have been more common in the 1995-2000 period. I expect to find more disputes between municipalities and state governments, and some against the federation. Secondly, I will identify which political parties were governing the entities that presented the legal recourses, expecting to find that most of them were from the opposition against PRI state and national governments.

Thirdly, I will look at the content of the demands to identify which issues were disputed. I will look specifically at seven areas: fiscal issues; internal budget and remunerations; tax-revenue; local judiciary; political conflicts; jurisdictional defense of exclusive competencies and geographical-limitations disputes. I will show that most claims have related to fiscal-budgetary issues, as different municipalities are claiming the proper allocation of funds assigned for regional development under new federalism. I will conclude by assessing the role that the Court has played in preserving the basic federal division and reinforcing the separation of powers in the ongoing institutionalisation process, as well as looking at whether this process has brought more credible constraints on the federal government.

Finally, I will present a regional analysis of the constitutional controversies, showing that some states have been much more legally active than others. I will demonstrate that most of the northern states in which crucial municipalities have been governed by the opposition since the mid-1980s, proved to be the most active in presenting legal recourses challenging the state and federal government in diverse areas. In particular, it will be seen that PAN strongholds such as Baja California and Nuevo León, were the most legally active after the 1994 reform. I will also present the case of PRI-governed states such as Puebla, Tamaulipas and Oaxaca, where increased legal activism is shown by opposition-governed municipalities.

Finally, I will also show how since its first gubernatorial victory in the crucial Federal District in 1997, the Revolutionary Democratic Party (PRD) has also moved to an increased litigation by presenting different legal recourses aiming to defend its jurisdiction. In the last part of this chapter, I will briefly discuss how increasing balance of power has been made possible by greater opposition presence in Congress. After the election of the first opposition majority in the lower chamber in 1997, the Congress has radically changed the nature of its relation vis-à-vis the executive power not only in terms of its traditional rubber-stamping attitude, but also showing an increasing legal activism to defend its constitutional powers.

Democratisation and “Federalisation” in Mexico

The Mexican hegemonic regime institutionalised mechanisms of unequal competition by constantly reshaping the electoral rules. The absence of authentic political competitiveness and the absolute hegemony of the ruling party over the other levels of government explain why the balance leaned in favour of the central government and against subnational autonomy. In the context of one-party domination and fraudulent elections, electoral institutions became the central point of negotiation between opposition parties and the government. Although Mexico was a highly centralised country with a virtually unchecked executive power, the discussion was very much focused on consolidating an electoral democracy. Political liberalisation involved the legalisation of additional parties and the creation of new opportunities for electoral representation. In 1977 the government launched an electoral reform which broadened political representation and started a gradual process of political liberalisation it would later prove unable to stop.

The 1982 crisis and the subsequent program of economic liberalisation undermined the PRI's traditional support bases, bringing to the fore the need for opening the political system. After scandalous frauds in a number of local elections in the mid-1980s, the government recognised opposition victories in a number of strategic municipalities². The 1984 reform of Article 115 strengthened the municipalities' economic and political independence by increasing sources of revenue and guaranteeing free administration of their finances (Rodríguez, 1997). Nevertheless, little change was achieved and gradually the centre regained its political control.

At the end of the 1980s, divisions within the PRI deepened and a new centre-left party was founded in order to contest the 1988 presidential election. As the PRI lost its historical levels of electoral support, Cuauhtémoc Cárdenas of the Democratic National Front's (FDN) rejected the final outcome. Cárdenas did not want to legitimate the PRI government and adopted a confrontational attitude (Bruhn, 1997:218, 241)³. Conversely, the PAN supported President Salinas in moving forward his ambitious political agenda, pressuring him to reform the electoral law. Negotiations between PRI and PAN resulted in three electoral reforms and the creation of the Federal Electoral Institute (IFE) in 1990.

Without a solid party structure and facing deep internal conflicts, the PRD lost much of its support and failed to win a single gubernatorial contest until 1997. In the meantime, the PAN steadily accumulated a number of victories in strategic cities and states. With the recognition of the PAN's victory in Baja California in 1989 and Chihuahua in 1992, a gradual opening of

the political system began. With the victories that followed in other states the opposition began to press, from the periphery, for democratic change and for an authentic federalism (Mizrahi:1997). Nevertheless, Salinas' administration was still characterised by a low degree of institutionalisation and strong federal intervention in state affairs with a tendency to resolve local conflicts through political rather than legal mechanisms.⁴ Although some decentralisation measures stressing community participation continued under Salinas, presidential and central power was reinforced.

Thus, the opposition was shared by two main parties that offered different approaches to political democratisation. The PAN, with more than 50 years of existence, supported the idea of a loyal opposition and pursued political alternation at the local level as the most stable path towards institutionalisation. The PAN insisted on the need for normalising the rule of law, presenting several electoral reform initiatives. The other actor was the PRD, created in 1989 to promote radical political change, which it sought to construct at the national rather than the local level.

Riker (1964) has argued that the most important variable for defining the nature of a federal system is party competitiveness. Although several studies have insisted that the authenticity of federalism is measured by the distribution of fiscal resources, Riker argued that it was useless to decentralise the fiscal system when the centre still dominated the political scene. According to Mizrahi (1997: 3) regional autonomy is gained not only by increasing the flow of resources to states and municipalities, but also by creating more responsible authorities and more participatory governments through the actual experience of governing. Indeed, federalism remained inert in Mexico because of the lack of competition and absence of political plurality. With the victories of the opposition at the local and state levels, a growing pressure emerged to re-define the nature of inter-governmental relations and to fight for more regional autonomy.

Thus, I will argue that it was political pluralism in the states what has really allowed substantive issues of the federal agenda to be discussed by a plurality of forces. Furthermore, I will sustain that it has been the strengthening of the opposition what really evidenced the need to create a Constitutional Court that could resolve independently disputes between different levels and branches of government. As I focus on the changing role of the judiciary in the context of democratic consolidation, it will be seen how this institution has increasingly played a more prominent political role, particularly after the 1994 judicial reform.

The 1994 presidential elections were widely hailed by foreign observers as a significant advance in the long path towards democracy. After its second place in this election, the PAN also won the 1995 gubernatorial elections in Jalisco and Guanajuato. The growth of institutionalised opposition became more evident after the 1997 mid-term elections. With a low turnout, the PRI gave way for the first time to an opposition-dominated Congress and the first governorship to the PRD in the crucial Federal District, while the PAN won in Nuevo León and Querétaro. In 1998, the PRI lost three governorships (Aguascalientes to the PAN, Tlaxcala and Zacatecas to the PRD), while the PRI recovered the northern state of Chihuahua. In 1999, the PRI lost the gubernatorial race in Baja California Sur and Nayarit, where different opposition alliances challenged the PRI candidate.

The 2 July 2000 presidential election finally ended more than seven decades of one-party dominance with the victory of Vicente Fox of the Alliance for Change. The PRI also lost the central state of Morelos to the PAN and Chiapas to an alliance, while in 2001 the PAN won in Yucatán and the PRD in Michoacán. At last, the focal point of discussion has shifted from electoral democracy to the need to strengthen other institutional features of the developmental process of democratic consolidation (Diamond, 1999). Recent events have shown that the “centripetal” route towards democracy -where democracy would advance through the steady accumulation of opposition governments at the state level (Mizrahi: 1997)-, was a realistic scenario. Although some PRI hard-liners have resisted democratic progress (Cornelius, 1999:11), Fox’s victory proved that political pluralism at the subnational level can enhance the likelihood of a gradual democratisation.

Since the mid-1990s, new federalism policies have given local and state governments more autonomy, with more effective party competition at the different levels of government. Although mechanisms of accountability have been tightened, there is still an evident gap between institutionalisation at the federal and the subnational levels, especially regarding the judiciary. In the following sections, I will demonstrate that most of these “opposition” municipalities and states were the most active in presenting legal recourses challenging state and federal governments in various areas. With political pluralism, there is a special need for independent institutions that can resolve controversies that emerge between different parties and levels of government. Thus, in the next part I will discuss the historical evolution of the constitutional controversies, in order to understand the Supreme Court’s role while resolving disputes in the context of increasing political pluralism.

Historical Evolution of the Constitutional Controversies

Traditionally, the Supreme Court was viewed as a branch that had always been subordinated to the executive in a strongly presidentialist and essentially undemocratic regime. However, under the 1917 constitutional settlement, the judiciary granted the Mexican political system the degree of legal authority it required to maintain the unique hegemonic nature it had achieved over the post-revolutionary period. While until the mid-1990s electoral processes were generally considered fraudulent, in terms of the judiciary the regime was particularly concerned by a “state of legality”. Despite its traditional passive role, the judiciary has undergone numerous constitutional reforms since 1917⁵. These continuous reforms were a clear disincentive to the exercise of judicial interpretation and constitutional evolution due to the relative “ease” of modifying the Constitution (Fix Fierro, 2000: 179). In this respect, these reforms have shown that the relation between the judiciary and the executive has not been static and that there have been certain periods in which the judiciary has enjoyed relatively more independence than others⁶.

The greatest weakness of the Mexican judiciary over most of the last century has been the very fragile nature of its independence vis-à-vis other branches of government. According to Fix Fierro (2000: 176), this weakness can be explained by three main factors: constitutional interpretation; the reach of the amparo suit as a mechanism of constitutional control; and the organisational context of the federal judiciary. In the end, the truth is that in the context of a hegemonic regime, presidential power easily overrun the Courts’ independence by constantly shaping their internal rules through the manipulation of appointments, the dismissal of undesirable judges and even the shutting down of courts. In this vein, it is important to present a historical overview of the Mexican judiciary, particularly concentrating on the changes it has been subjected to in terms of its constitutional powers.

Since the 19th century, the judiciary underwent a process of institutionalisation and administrative reforms that promoted the creation of a centralised legal system. Judicial review was made constitutional in 1857 in connection with the amparo suit⁷. During this century, conflicts between different powers and levels of government were considered political disputes, so it was decided to resolve them in political terms. Both the 1824 Constitution (Article 137) and the 1842 *Bases Orgánicas* granted similar powers to the Supreme Court to know about the nature of the differences between the states and the federation. Nevertheless, during the first half of the 19th century the judiciary did not hold this role exclusively, as the General Congress, the Government Council and the Supreme Conservative Power usually resolved conflicts between different levels of government.

The 1836 Second Constitutional Law established that the Supreme Conservative Power was responsible for annulling laws. The Seventh Law recognised Congress's power to resolve any type of constitutional conflicts. The 1847 Reform Acts established that local laws which breached the Constitution or general laws could be annulled by Congress. The Court's role was reduced practically to making only the public announcement, although it still resolved conflicts between states. As can be seen, in this period constitutional problems were resolved politically, and in the case of laws that were against the Constitution these were generally annulled.

Later on, the 1857 Constitution created a judiciary that would have clear political and constitutional powers, mainly through the amparo suit⁸. This Constitution did not consider explicitly the constitutional controversies but included two defense recourses: the autocontrol (Article 121) and the amparo suit. Article 116 established that the federal powers would protect the states against any invasion or external violence. However, regarding internal conflicts that might emerge within the states, the federal power was restricted to the legislature or governor's specific call. In the end, the President gradually became the final arbiter of these types of internal conflicts.

After a secondary law was approved under Benito Juárez's presidency in 1870, Article 98 of the 1857 Constitution granted powers to the Supreme Court to resolve controversies between states and those in which involved the federation. While this article was valid, serious legal problems emerged as there was no secondary legislation to render it effective. During the 1867-76 period, the Court defended its political power mainly through the thesis of "incompetence of origin" that was established with the Amparo Morelos under the presidency of José María Iglesias (1873-76). Nevertheless, as soon as he was substituted by Ignacio Vallarta (1878-82), there were increasing criticisms against the excessive interpretative power of this institution and the need to depoliticise the Court⁹.

In this context, several constitutional projects were presented seeking to strengthen the Supreme Court's role in the aftermath of the revolution. In the end, Venustiano Carranza's project and the 1917 Constitution clearly distinguished the type of conflicts that could emerge between different levels of government. On the one hand, political conflicts were reserved to the Senate, which according to Article 76, Section II, could even declare the disappearance of powers within a state. On the other hand, constitutional conflicts had to be presented before the Supreme Court¹⁰.

The original Article 105 considered the following type of conflicts:

- a) controversies between two or more states
- b) between different powers within a state over the constitutionality of their acts
- c) conflicts between the federation and one or more states
- d) and those in which the federation was a part

In sum, constitutional controversies were included in the Mexican Constitutions in 1824 (Art 137, Section I), in 1857 (Arts 97 and 98) and in 1917 (Art 105). Nevertheless, the actors that were originally granted the power to use this legal mechanism were only the federation, the states and the three powers within a state, but neither the Federal District nor the municipalities were included. Before the 1994 reform, Article 105 was modified twice, in 1967 and 1993. The first reform that was published in the *Diario Oficial* on 25 October 1967, granted Congress the power to determine in which controversies was the federation involved and which of them would be presented to the Court. The second one was published on 25 October 1993 as part of the Federal District's political reform. The 1993 reform incorporated the different powers within the Federal District to become part of the legal controversies.

Before 1994, some municipalities attempted to use this recourse but were unsuccessful as this legal mechanism resulted much more theoretical. The most important antecedent to the involvement of municipalities in constitutional controversies was the amparo suit (4521/90) presented in 1990 by the municipality of Mexicali, in Baja California, against the federation (González Oropeza, 2000: XXIV). By resolving this recourse on 7 November 1991, the Court established prior to the 1994 judicial reform that the municipality was legally recognised to make use of constitutional controversies, even going against previous rulings where the municipality was not recognised as a legitimate actor. Later on, after having presented an amparo suit before the Court that was considered invalid, the municipality of Delicias in Chihuahua presented a recourse against the state government (SCJN, CC 1/93, 29 April 1993). On 30 August 1994, the Court ruled in favour of the municipality, formally setting the basis for future municipal participation¹¹. It is interesting to note that both municipalities were then governed by the PRI and in the second case confronting the PAN state government

Following the judicial precedent established with Mexicali's amparo suit and the favourable ruling for the claim presented by the municipality of Delicias, the Court Ministers reinforced a crucial aspect of the Mexican federal system: the recognition of the municipalities as a separate power from the legislative, executive and judiciary. The Court defended the rights granted to the municipalities since the 1983 and 1987 reforms, in order for these entities to receive what historically had been denied (Cárdenas, 1995: 2). Since then, the Court

decided to recognise constitutional controversies that were presented by municipalities which did not happen before.¹²

From 1917 to 1994, there were few controversies formally presented before the Court by the actors who were legally authorised to do so. During this time, only 55 constitutional controversies had been taken to the Court: 14 between the federation and a state; 22 between powers within a state; one between different states; 12 between municipalities and states and one between a municipality and one state (Cossío, 1995: 1039). According to Arteaga (1999: 1376), the constitutional controversies' lack of operability was mainly due to the undemocratic nature of the regime, strong presidentialism and excessive centralisation of power.¹³

1994 Judicial Reform: The Constitutional Controversies

A few days after assuming office, President Ernesto Zedillo (1994-2000) presented his proposal to reform the judiciary. The 1994 reform amended 27 provisions of the Constitution, transforming the nature and size of the Supreme Court of Justice. This reform considerably limited executive control over Ministerial (Court Justices) appointments. Since 1995, the Court comprises eleven Ministers (reduced from 26) appointed for 15 years (no longer lifetime positions), each one to be selected by the Senate with a two-thirds majority vote from a list of three candidates nominated by the President¹⁴.

Ministerial candidates are now required to have a law degree and at least ten years of experience, preferably within the judicial system. Several changes were introduced in order to strengthen the Court Ministers' impartiality, stating clearly that candidates must not have held a political position for at least a year before the appointment. Similarly, Ministers can not receive other salaries or remunerations, with the overall aim of consolidating a constituency of career judges by shifting the weight of potential candidates away from senior political appointments. Before 1994, it was established that the salaries of the Ministers and lower judges could not be reduced while in office.¹⁵ The idea of maintaining judicial independence through their financial autonomy was kept in the 1994 reform.

The 1994 reform also created the Federal Judiciary Council (Consejo de la Judicatura) to separate jurisdictional and administrative functions. The main functions of this new administrative judicial agency were to appoint and oversee the circuit and district courts, as well as to undertake training for the federal bench. From 1995, the Council would also approve and administrate the judicial budget¹⁶. The main aim with these changes was to

relieve the Supreme Court of its administrative work and to establish a more rigid meritocracy and better performance.

Aside from all these important issues, I will argue that a crucial feature with regard to judicial independence from the executive is the scope of review powers that is granted to the Court. In this sense, the 1994 reform considerably increased the Court's constitutional control powers¹⁷. The reform sought to strengthen the principal appellate legal tools and two mechanisms of constitutionality control were established: the reinforcement of constitutional controversies and the creation of unconstitutional acts. The constitutional controversies are conflicts that arise between governmental levels such as federation against a state government, federation against a municipality, state against a municipality, executive and the legislative branches, etc. In these cases, the Supreme Court is empowered to protect the constitutionally-based jurisdiction of each branch and level of government, reinforcing a true horizontal and vertical separation of powers.

As discussed above, for most of last century the Federal District and the municipalities were excluded from the list of entities with legal standing to request review by the Court of conflicts that might arise between the governmental levels. Moreover, a piece of secondary legislation was approved in 1994 in order to clearly regulate these procedures. Although these verdicts are limited in terms of creating precedents, in recent years there has been a significant increase in the consideration of constitutional controversies, strengthening the involvement of the Supreme Court in inter-governmental issues¹⁸.

Table 1 (around here)

Constitutional Controversies: Who can Request Them Before and After the 1994 Reform

In the case of unconstitutional actions, one third of a legislative body may challenge the constitutionality of actions of other branches of government and even suspend enforcement of a law. Thus, cases of unconstitutionality can be brought up by 33 per cent of the lower or upper chamber of Congress or by the attorney general against federal or Federal District laws or resolutions. Similarly, 33 per cent of local legislatures can also oppose their own state laws or resolutions. However, an important criticism that has been made regarding the creation of this new legal mechanism is the short time frame allowed for presenting these legal challenges as it becomes particularly difficult to study and intelligently oppose to constitutional legislation within only 30 days (Arteaga, 2001).

In sum, the 1994 judicial reform was an important first step to strengthen the credibility of the judiciary as an independent and impartial system of justice, granting the third branch of government with renovated powers in the context of increasing political pluralism and new federalism. According to Domingo (2000: 711), the 1994 reform “marks a break with the past, and potentially represents a qualitative change in terms of judiciary-executive relations. However, if it proves to have inaugurated a new period in the judiciary’s history, this will be as much a result of changing political circumstances”.

In the next part of this paper, I will discuss the role that the Supreme Court of Justice has begun to play in the context of political pluralism by resolving intergovernmental disputes. I will argue that immediately after the 1994 reform, there has been a significant increase in the use of these legal mechanisms, particularly by the municipalities. Since 1995, there is clearly a more visible role for the Supreme Court in political disputes as the main instance of adjudication, strengthening its involvement in federal issues. With political pluralism at the subnational level, pressures to protect and re-activate the nature of the federal system have increased as these reinforced mechanisms have proved the ideal path to legally oppose the central government. In sum, I will argue that over the last seven years there has been a clear process of *judicialisation of politics* (Fix Fierro, 2000: 170) where rival political parties are increasingly using the Court to resolve a wide diversity of policy disputes and even situations of political deadlock in the context of political pluralism and a more democratic framework.

BALANCE OF CONSTITUTIONAL CONTROVERSIES (1995-2000)

In this section, I provide an overview of the constitutional controversies presented by different levels of government before the Supreme Court in the 1995-2000 period. Firstly, I will show that most of these recourses have been taken to the Court by municipal authorities. As I have argued before, even after the 1983 Municipal reform the legal status of municipalities was ambiguous and it was only after the 1994 judicial reform that they were explicitly included in the list of entities with legal standing to request review by the Court of a purportedly unconstitutional action or the jurisdictional violation of another public entity.

Alternation of parties in power at all levels of government has profoundly changed the pattern of governance by strengthening institutions that had been traditionally weak. In particular, the institutional upgrading of the judiciary has proven crucial in the emerging separation of powers. At the national level, the Supreme Court has been empowered to review the constitutionality of actions of other branches of government. Regarding constitutional controversies, there has been a significant increase in the number of recourses filed before the Supreme Court.

While for almost eight decades (between 1917 and 1994) only 55 constitutional controversies were presented before the Court (less than one per year), in only four years (1995-1998) after the reform, 144 constitutional controversies were registered. In an even more plural scenario after the 1997 mid-term elections, almost 140 controversies were taken to the Court in only three years (1998- 2000). In 2001, more than 300 controversies were presented by a number of municipalities from eight different states just related to the indigenous law approved by Congress on April 2001.

Although the mechanism of constitutional controversies existed in the past, the novelty of its use can be explained due to the fact that it represents an ideal method for legally resolving disputes that emerge in a more plural political scenario. In the current context, constitutional controversies represent a superior method that under democratic conditions is essential for institutional consolidation and future governance. Therefore, as can be seen in Table 2, these legal mechanisms have become a more common and routine instrument in Mexico.

Table 2 (around here)
Number of Constitutional Controversies
and Unconstitutional Actions filed at the SCJN (1917-2000)

A new legal recourse, unconstitutional actions, has been used to a considerable degree, particularly since 1996. As it has been argued, unconstitutional actions have a 30-day time limit in order to be presented as formal cases before the Court. Constitutional controversies have existed for a longer period of time and municipalities seem to have found them to be the ideal method to defend their autonomy with respect to state governments and even with the federation, as well as to resolve internal political disputes that may imply taking unpopular decisions. As can be seen in Table 2, while 33 constitutional actions had been presented up to 1998, the number of constitutional controversies was almost five times higher, totalling in 1996 almost 60 cases as compared to ten for the first recourse.

In fact, due to the increasing number of legal recourses that have been filed before the Court over the last seven years, the highest level of the justice system has begun to refer many cases to lower courts in order to concentrate on issues of “exceptional interest” for the country. Some of the issues include cases related to the indigenous law, the construction of a new airport close to Mexico City, geographical disputes regarding the limits between different states and unconstitutional actions related to electoral disputes, among others (SCJN, Abril 2002, Comunicado de Prensa 516). This step has clearly reinforced its position as a Constitutional Court along the lines of the United States Supreme Court.

Parts in the Constitutional Controversies

Vertical Separation of Powers: The Municipalities as a New Actor

Since 1995, an important number of the constitutional controversies taken to the Supreme Court have been presented by municipalities. As can be seen in Table 3, 80 percent of the controversies up to 1998 were disputes between municipalities and state governments and/or local congresses. The immediate interpretation of these facts is that since political pluralism became a reality first at the municipal level, together with the gradual decentralisation process, this level of government has acquired legitimation to formally use this type of recourses and is doing so increasingly. On the one hand, municipalities have been formally included in the list of entities with the right to access the Court and defend their jurisdiction. On the other, as the opposition parties started to govern municipalities there has been a significant increase in their legal activism. However, it could also be argued that there are still clear weaknesses in state's regulation aimed at preserving municipal autonomy, reflecting the deficiencies of the Mexican federal system.

**Table 3 (around here)
Parts Involved in Constitutional Controversies (1993-1998)**

In 1993 and 1994, all five controversies were between municipalities and state governments. Moreover, four of these controversies were presented by northern municipalities and just one by the central San Luis Potosí. In the aftermath of the 1994 reform, there was an immediate increase in the number of controversies as 19 recourses were presented in 1995. Eighteen of these disputes were presented by municipalities and just one by the government of Tabasco against the federation. Seventeen disputes were between municipalities against state governments, while just one of those disputes was between a municipality (Tijuana) and the federation over the invalidation of the 1995 Annual Budget (through the budgetary line known as Ramo 26, formerly PRONASOL and later called Ramo 33)¹⁹. Sixteen cases involved northern municipalities and just two dealt with a political conflict in Tepoztlán, in the central state of Morelos.

In 1996, a similar pattern can be found as out of 57 disputes only one was between a municipality (Mérida) and the federation again over Ramo 26 (CC 2/96). Another dispute was the first claim to be presented by the federation against a municipality (Guadalajara) over the "*Ley de Protección al Ahorro*" (CC 56/96)²⁰. The rest were conflicts between municipalities and state governments, including two different blocks of 22 controversies from diverse municipalities in Oaxaca against the PRI state government. Three cases were

immediately ruled unfounded due to the fact that these disputes were presented by actors who were not constitutionally recognised to take part in this legal recourse.

In 1997, two more disputes between a municipality and the federation were registered. Tuxtla Gutiérrez demanded once again the 1997 annual budget that determined the formula for distributing Ramo 0026. Similarly, the municipality of Berriozábal in Chiapas presented a controversy against the President, the Senate and the state government for the presidential appointment of Julio César Ruiz Ferro, replacing governor-elect Eduardo Robledo²¹. The first dispute between different state governments was presented as a controversy by Quintana Roo against Campeche regarding geographical limits. More recently, new actors have become involved in the use of constitutional controversies, particularly interesting have been the cases presented by the Congress and the Federal District –mainly against the executive- which will be discussed later.

Resolution of Constitutional Controversies

Until 1998, the percentage of success of the controversies presented had been very low, only six percent. Among the founded cases in the 1995-98 period was precisely the one presented by the federation against the municipality of Guadalajara, resulting in the Court annulling the municipal regulation. Another ruling in favour of the claimant was the one presented by the municipality of Río Bravo against the state government, establishing public security and transit as areas of exclusive competence for the municipality.

Table 4 (around here) Resolution of Constitutional Controversies (1995-1998)

As some experience has been gained in the way of presenting these legal recourses, more controversies have been ruled in favour of the claimant. In 1997, five controversies were ruled in favour of the claimant. Three were between municipalities and the state government (CC 27/97; 32/97 & 35/97), one between the executive and legislative power in Colima (CC 36/97) and two controversies were ruled in favour of the state judiciary against Jalisco's legislature regarding two impeachment procedures against local magistrates (CC 19/97 & 26/97). In CC 32/97, the Court ruled in favour of the municipality of Valle de Bravo and against the Congress's resolution to strip the municipal president of his mandate (SCJN, 2000: 155-56). More recently, crucial cases have been ruled in favour of the claimant, including controversies presented by the opposition-dominated Congress against the executive (ex President Ernesto Zedillo and President Vicente Fox), as well as by the PRD's new Federal District governor against President Fox.

As shown by the data, 68 percent of the cases have been unfounded, meaning that the Court has analysed the controversy but has not ruled in favour of the claimant. If this percentage is combined with almost 90% of unanimous rulings, it could be said that the claimants were not able to present a solid constitutional case. Dismissed cases, where controversies were not analysed in depth and there was no final ruling, have been around 13 percent. In the end, what has probably been more relevant is the interpretation criteria set in many of the controversies resolved. As will be seen in the next section, the criteria of some Ministers in controversial cases was changed after more controversies were presented. This was the case regarding Congress's approval of the municipalities' annual budget because it was violating their autonomy established on Article 115, which were decided at the beginning by unanimous vote but later two Ministers changed their criteria (CC 13/95).

Finally, it should be noted that the normal procedure for the resolution of constitutional controversies has lasted generally no less than three months. However, it is tending to take at least 15 months to resolve crucial issues that require more prompt resolution. According to critics of the 1994 reform, this mechanism has proved quite unsuccessful as it was apparently intended to cover the defects (slowness) of the amparo suit but has been plagued by the virus of "bureaucratic" (Arteaga, 1999:1372-76). In order to rule over the constitutionality of different acts, it was necessary to accelerate and facilitate the procedures, guarantee that the resolutions would have general effects and at least that the actor presenting the mechanism would not have to face a complicated and laborious task. Nonetheless, the contrary was established in the reform as there were longer periods allowed for presenting, counterposing, responding to and widening the demand, and even responding to this widening. It was also determined that there would be different recourses to appeal against the rulings, *causales de improcedencia*, as well as the mechanism of dismissing complaints on the grounds that it lacks legal foundation *sobreseimiento*.

Categorisation of Constitutional Controversies

In this part, I will present a categorisation of the constitutional controversies resolved during this period covering the cases presented until 1998. The controversies will be grouped into seven broad areas: fiscal issues; internal budget; tax-revenue; local judiciary; political conflicts; jurisdictional defence of exclusive competencies and geographical-limitation disputes. In this section, I will prove that most of them have been related to fiscal and budgetary issues, particularly regarding the allocation to state governments of the funds assigned under new federalism for regional and social development through the budgetary line Ramo 26.

Since the nature of the controversies related to exclusive competence is so wide, I will not analyse them in much depth. In other cases, it will be seen that no jurisdictional claims were properly made in terms of the invasion of spheres of competence between different levels of government. Commonly the reason for many of these controversies was purely political, but there can be no doubt of the expanding role of the Supreme Court in responding to intergovernmental disputes.

As I argued in the first section, the Mexican President has had tremendous influence over state and local governments through his control of the federal budget, on which they depend for most of their income. Mexico's federal budget is divided into ramos or budget lines, which generally correspond to a specific investment or expenditure program. In 1996, some of the most important were Ramo 26, for social policy and poverty alleviation (Solidarity) and Ramo 28 which corresponded to the allocations (*participaciones*) to states and municipalities. Solidarity's budget line was integrated into each state's Social Development Agreement (*Convenio de Desarrollo Social*), while all other federal investment after 1989 became the Programa Nacional (Ward & Rodríguez, 2000:104-107).

Based on the Fiscal Coordination Law, federal assistance is distributed among the states through the General Participation Fund and the Municipal Development Fund. According to this law, states must distribute among their municipalities at least 20 percent of the allocations from the first fund and 100% from the second (Rodríguez, 1995: 154). In 1998, transfers to states and to municipalities were reorganised into allocations and federal contributions, where 24.4 percent would be allocated to states and municipalities and 4.7 percent assigned directly to the municipalities by the federation.

Indeed, it is not surprising to see why most controversies have been related to the proper allocation of funds to lower levels of government. Table 5 shows that fiscal controversies have been the highest number of cases presented against state and federal governments. Although closely related, I decided to separate other similar controversies that are more related to internal budgets and decisions for remunerations within states and municipalities, as well as the ones that deal with administrative municipal autonomy regarding the collection of taxes that constitutionally correspond to these lower levels of government.

Table 5 (around here)
Categorisation of Constitutional Controversies (1993-1998)

Other controversies have opposed local judicial institutions and regulations. Particularly interesting is the case of Ciudad Victoria which presented a controversy against the reforms to Article 124 in which the local Tribunal of Justice was empowered to oversee not only civil conflicts but also constitutional ones(CC 7/95). Exclusive competences is another category that differs from the purely financial claim since it deals with other broader areas of municipal autonomy, generally in opposition to state governments.

It is important to note that most of the fiscal disputes have been dismissed or decided in favour of the higher level of government. It is clear that, at least until 1988, there was still a problem in presenting genuine and well-founded cases where the jurisdiction of levels of government had been invaded. Thus, many disputes had and still have a political tone. Particularly relevant is the case of Tabasco where there was an allegation of the misuse of Ramo 26 funds for electoral purposes. Evidence was found by the federal attorney general that the PRI candidate to the gubernatorial election, Roberto Madrazo, spent 50 times the legal limit on his 1994 campaign. After a debate about whether the federal government was empowered to conduct such a probe of Tabasco state matters, the federal Supreme Court ruled that Tabasco's state attorney general was the proper authority to investigate the matter. The investigation then was turned over to that PRI-dominated agency which ruled that Madrazo had violated spending laws, but that "electoral crime" punishments were not specified in the state penal code.

The lower chamber tried to reopen a federal probe in 1997 that was stalled by a state rights lawsuit filed by Tabasco against the federation. The first controversy (CC11/95) was presented by then governor Madrazo and the president of the local congress against the federal deputies, arguing that Congress had no jurisdiction nor right to investigate how the local congress spent its resources. The Supreme Court made no pronouncement on whether the funds had been misused but accepted the investigation of the possible misuse of federal funds under the budgetary line 'Combating Poverty' of the 1997 annual budget. In November 1997 (CC33/97) the Court recognised the role of the deputies to investigate this matter since it did not violate the spheres of competence of Tabasco.

Another relevant political case focused on Morelos governor Jorge Carrillo Olea who in 1998 was charged with corruption, incompetence and links to drug kingpins. These charges led to the retired army officer being condemned by the federal Human Rights Commission, the local legislature, opposition parties, the church and business leaders. In mid-May Carrillo finally succumbed to Mexico City pressure and stepped down. In August 1999, a constitutional controversy (CC 21/99) was presented by the PAN-dominated state congress

against the president and the local judicial tribunal because of their refusal to keep the “governor on licence” under house arrest and for declaring the impeachment process invalid. In February 2000, the Supreme Court decided unanimously that state governors are accountable and accepted the proposal of the local congress to hold an impeachment trial against Carrillo. The Morelos local constitution was the only document at the state level that protected governors from impeachment procedures. Both rulings clearly show how the Supreme Court’s intervention put an end on a situation of political deadlock, setting important precedents for future inter-governmental disputes.

Regional Analysis

In this section, I will present a regional analysis of the constitutional controversies presented and resolved mainly in the 1995-1998 period, showing that some states have been much more legally active than others. In this analysis, it will be seen that many of the claims involved municipalities in the northern part of the country, where the opposition parties – particularly the PAN- had the first experiences of governing at the local and state level. In the case of the PAN-governed municipalities, a clear tendency is registered in the use of legal recourses to defend their attributions and powers: Nuevo León clearly heads them, followed by Chihuahua and Jalisco. States still governed by the PRI, such as Puebla, Tamaulipas and Oaxaca, also show an interesting legal activism by opposition-governed municipalities. More recently, the first governorship to be won by the PRD has also presented different controversies aiming to defend the jurisdiction of the Federal District vis-à-vis the federal government.

The states which presented the highest number of constitutional controversies before the Court were Tamaulipas with 19; Nuevo León 13; Puebla 9; the State of Mexico 8; Chihuahua 7 and Jalisco 6, followed by states such as Chiapas, Morelos, Michoacán and Sonora with less than five recourses. Most of these cases were presented by urban and strategic municipalities within the states, especially those dominated by the main opposition parties. However, it is interesting to highlight that in the case of Puebla it was also the PRI state government that presented legal recourses against different urban municipalities, mainly the capital city and others governed by the PAN. There was a clear confrontation between the PRI state government and the Panista capital, not only regarding the allocation of federal resources through Ramo 33, but also in terms of the implementation of an urban project known as Angelópolis designed by Manuel Bartlett’s government.

Table 6 (around here)
Regional Analysis: States and Municipalities that Present Controversies

In terms of the municipalities which were most legally active after the 1994 judicial reform, Río Bravo was the first one with twelve legal recourses, followed by the PAN-governed Monterrey which presented 6 controversies; Ciudad Victoria in Tamaulipas and the municipality of Chihuahua with 4 cases, and the northern San Pedro and San Nicolás Garza García in the state of Nuevo León with three cases each. As will be seen in more detail in the next chapter, Río Bravo represents an interesting case since two different opposition parties in government consistently followed the legal route to defend the municipal jurisdiction.

From 1992-1995 while the PAN governed this municipality, Río Bravo filed two controversies against the state government (CC 14/95 and 19/95). In the last recourse which demanded the invalidity of local Article 91, the Court ruled in favour of the municipality, recognising that public security and transit policies are the exclusive domain of the municipalities (CC19/95, 5 December 1995). Although the PRD municipal government in Río Bravo presented ten controversies before the Court while governing for two consecutive periods since 1995, the Court did not rule any of them in favour of the municipality. It is worth noting that the PRD-governed Río Bravo and the PAN-governed Tampico claimed separately in May 1996 the same issue: the Planning Law and the distribution of federal resources under Ramo 26, but were unsuccessful. More recently, Río Bravo was won by the ex Panista mayor who was supported by the PT in the 2001 elections. This case could be used as an example of how political competitiveness and alternation of power at the local level can enhance the federal nature of the Mexican political system through the actual experience of governing and defending legally the local jurisdiction.

Partisan Legal Activity

In this section, I establish a link between the actors of these legal recourses and the political party they belonged to in order to test the main hypothesis of this paper. With this analysis, I aim to prove that these were disputes between rival parties, mainly presented by opposition local and state governments, against a different party occupying a superior level of government. Thus, it will mainly be the case that PAN and PRD entities opposed PRI state and federal governments, although some PRI representatives also confronted PAN governments and even the federation in some specific situations.

Table 7

Political Parties that presented Constitutional Controversies (around here)

Table 7 shows that municipalities governed by the PAN presented the highest number of controversies against PRI state governments. Immediately after was the PRD, which also through their municipalities confronted PRI state governments. It is interesting to note that five municipalities governed by the PRI used five controversies to oppose the PAN state government in Chihuahua. More interestingly is the fact that the five controversies presented by municipalities against the federation were all governed by the PAN, as well as two cases where Panista governments opposed the federation.

In the case of PAN-governed municipalities, these included urban cities and capitals in Nuevo León, Baja California, Puebla and Tamaulipas. In Nuevo León, the prosperous municipalities of San Nicolás de los Garza, San Pedro Garza García and Santa Catarina in Nuevo Leon, governed by the PAN since 1991, and the capital Monterrey controlled by the PAN since 1994, clearly pursued the legal route to defend their local jurisdiction against the PRI state government until 1997. Most of the cases referred to issues of administrative municipal autonomy, especially demanding full control over local employees in terms of their remunerations, annual tax declarations and dismissal procedures. Although most recourses were unsuccessful, the Court ruled partially in favour of San Nicolás de los Garza regarding their claim against the Fiscal Coordination Law and the invalidity of some official documents approved by the PRI state government (*Oficios 531/97 Y C-3-785-97, CC 18/97, Supreme Court, June 2001*).

In Baja California, the amparo suit (4521/90) presented by the municipality of Mexicali against the federation, constituted a crucial antecedent to the involvement of municipalities in constitutional controversies. Five years later, the municipality of Tijuana which has been governed by the PAN since 1989, presented the first constitutional controversy (CC 6/95, 9 June 1995) against the federation regarding the 1995 Social Development Agreement agreed by the governor and the federal executive. Although the Court ruled in favour of the federation, this municipality set an important precedent by opposing to the involvement of the Social Development Ministry in what, in their opinion, should be decided independently by the municipality in accordance to Article 115, section IV.

As it has been argued, in Puebla the PAN municipal urban municipalities adopted a confrontationalist attitude against the PRI state government. Legal activity started in September 1996 when the capital Puebla and other PAN municipalities opposed the creation of a system to operate water services (CC 51/96 and 52/96), as well as the so-called “Ley Bartlett”, where the PAN claimed that the local congress was acting unconstitutionally in changing the formula for the distribution of fiscal resources to municipalities (CC 4/98 and

6/98). In February 2000, the Court decided that the state legislature and the executive had asserted their rights to determine the nature of revenue sharing in the state and had not acted improperly. However, the Court did consider the Planning Committees as intermediate authorities that were affecting the municipal jurisdiction (SCJN, 1998: 219-220). The other disputes were that focused on the urban development program known as Angelópolis, were mainly presented by the state government against PAN-governed municipalities and were ruled unfounded.

Finally, it is worth noting that although the state of Tamaulipas remains a PRI stronghold, opposition parties have gradually won more municipalities and have consolidated their political presence in the most populated areas. Important cities that were governed by the PAN in the 1992-95 period such as the capital Ciudad Victoria and Río Bravo, as well as the industrial Tampico (1995-98), presented different recourses before the Court against the PRI state government. For instance, the Panista administration that governed in Ciudad Victoria presented three controversies against the state government. The first one challenged once again the income law for invading the municipal autonomy (CC 3/95, 25 May 1995). The other controversies related to aspects of municipal revenues collected for the provision of services such as licenses for selling alcohol, as well as the municipal jurisdiction to regulate police services (SCJN, CC 5/95, 8 June 1995). The last one was presented on July 1995 opposing the local judicial reforms that empowered the State Tribunal to decide not only on civil, but also constitutional conflicts between different levels of government (CC 7/95). In these three cases, the Court ruled unanimously in favour of the state government.

Following the argument that opposition governments have been crucial in reinforcing an authentic federalism, in some occasions through the increasing use of the law, it is crucial to analyse the case of the Federal District, especially since in 1997 it became the first governorship to be won by PRD's Cuauhtémoc Cárdenas. Since 1997 and even more after Andrés Manuel López Obrador's victory in 2000, intergovernmental relations with the federal government have not run smoothly for PRD governments in the capital. Some of the most problematic issues have related to the budget allocated to debt; federal spending cuts, the Coordination Fiscal Law and the withdrawal of revenue sharing to the Federal District from 1999 onwards. During this time, five constitutional controversies have been presented before the Supreme Court by the centre-left governments. These controversies were mainly related to fiscal matters, as the three PRD governors, Cárdenas, Rosario Robles and López Obrador have continued the same procedure of demanding from the federation an equal allocation of federal resources. Another interesting case related to the Education Law presented by Robles' government and approved by the PRD-dominated local Assembly on 8

June 2000. After more than a year of discussions, the Court ruled unanimously that the Legislative Assembly of the Federal District does have constitutional powers to legislate norms in the area of education, clearly determining the Federal District's attributions in the federal context (SCJN, 16 November 2001).

During López Obrador's administration, a renewed source of conflict with the federation focused on the "daylight saving summer timetable" presidential decree (CC 5/2001). The Court ruled that President Vicente Fox misused his constitutional attributions specified in Constitutional Article 89, Fraction I, invading the congressional sphere. (SCJN, Comunicado No. 444, 4 September 2001). Days after the announcement was made, López Obrador emphasised that this ruling proved that "the Court is not entirely subordinated anymore to the executive, as it happened previously, and expressed sympathy for the emerging Court's independence and a true separation of powers (La Jornada, 7 September 2001: 5). More recently, the government of López Obrador presented another legal recourse before the Supreme Court against President Fox, for deciding to construct a new terminal of Mexico City's airport in Texcoco (SCJN, 4 December 2001). Even if these cases do not claim substantive issues, they clearly show the increasing use of the law in a wide variety of issues seeking to improve personal and political prospects of certain policies, even if the rulings are against them.

After the 2000 election, with a more plural local Assembly and PAN's victories in seven *delegaciones*, horizontal disputes have emerged within the Federal District. The local Assembly has presented a recourse against the PRD state government for not applying the compulsory car insurance known as SUVA in the metropolitan area. Similarly, three of the six PAN delegates in the Federal District, presented a constitutional controversy against López Obrador's government regarding the invalidity of an agreement on social communication (SCJN, 1 April 2002). Other claims presented by the *delegaciones panistas* have covered wide issues such as the use of partisan colours in official documents; preventing the functioning of a preparatory in the Colonia del Valle, as well as the need to devolve the administration of Chapultepec's Park. As it can be seen, in many cases disputes seem to have a political tone rather than a constitutional basis. By analysing these cases, it can be seen how the Court has become a sort of "super-referee" that is increasingly being used to resolve political disputes between rival parties and even deadlock situations.

In sum, political competitiveness in the different branches and levels of government has revitalised the issue of federalism and a true separation of powers. Since the 1994 reform, the legal route has been increasingly used to defend specific jurisdictions. Gradually, more

actors have become involved in the use of constitutional controversies, gaining experience in presenting solid constitutional cases of jurisdictional invasion. While in the 1995-1998 period few cases were ruled in favour of the claimant, this pattern has begun to change as more cases have been ruled founded. In the last part of this chapter, I will briefly discuss an important feature of horizontal separation of powers related to the federal Congress and its relation vis-à-vis the executive power.

Horizontal Separation of Powers: Disputes Between Congress and the Executive

Since 1997, when the PRI lost its majority in the lower chamber, not only has Congress fundamentally changed its traditional rubber-stamping attitude towards the executive but it has also been much more active in legal terms by defending its constitutional powers. In this sense, I will discuss three important controversies presented by the federal Congress against the executive: the Fobaproa case, the electricity decree and more recently the presidential decision to exempt taxes for the beverage industry after the fiscal reform was approved (“fructuosa”=sweetener derived from corn to manufacture soft-drinks).

Firstly, in September 1999, the Federal Congress presented a recourse (CC 26/99) against the federal government, including the President, to demand complete information about the trust fund operated by *Banca Unión* in connection with the bank rescue agency (*Fondo Bancario de Protección al Ahorro, Fobaproa*)²². More than a year later, the Supreme Court unanimously ruled in favour of the opposition-dominated Congress in its interpretation of Articles 73 and 74. In this ruling, the President was forced to give this information to the legislative branch (SCJN, 24 August 2000). This was a historic case because it was the first resolution against the President, giving him 30 days to hand all the information needed to Congress, which incidentally had been required since February 1998 (*Semanario Judicial*, Novena Epoca, Tomo XII, August 2000, pp 575, 962-963, 966-967 and 980).

After the 2000 presidential elections, the Congress in plenary presented for the first time in Mexico’s history a controversy (CC 22/2001) against the executive in June 2001. This recourse demanded the invalidity of the presidential decree announced on 24 May 2001 relating to secondary legislation regulating the electricity sector (*Reglamento de la Ley de Servicio Público de Energía Eléctrica*). With this decree, President Vicente Fox authorised the Energy Ministry to modify the percentage of excess capacity which independent generators could sell to the Federal Electricity Commission (CFE) without the need of public auction. According to the Permanent Commission, President Fox violated Articles 73 and 89, which clearly establish that Congress has exclusive power to modify laws or regulations in

this area.²³ The Court once again had a crucial issue in its hands and finally ruled that the President was not constitutionally allowed to issue a decree over this sensitive area.

More recently, Congress presented a recourse against the executive regarding his decision to exempt the beverage industry from a special 20 percent tax on the sweetener that is produced in Mexico and the one imported from the United States, as well as for extending some fiscal incentives for the industry (SCJN, 2 April 2002). The recourse demands to invalidate the presidential decree published on 5 March 2002 in which, according to the congressmen, the president invaded once again their sphere of competence by revoking the fiscal reforms approved by Congress in December 2001. The fiscal reforms only exempted the beverage producers who used “*azúcar de caña*” as an incentive for an industry which has faced a difficult situation since the implementation of NAFTA, but established a special tax for those who used “*fructuosa*”.

The congressional reaction was initiated by PRD deputies who in the end obtained support from the rest of the parties represented in Congress, except the PAN, to present this legal recourse before the Court (255 votes in favour, 198 against). Although a third legal victory seems more difficult for the Congress, this recourse demonstrates once again how the legal challenges have become a common means for the branches and different levels of government not only to defend themselves from the invasion of their respective jurisdictional attributions, but also as a means of political protest. The political argument for most congressmen was that with this decision the president was benefiting foreign over national producers. The time that the Court Ministers will take in deciding this recourse will probably coincide with the six months period that president Fox established for the exemption of this special tax. However, the ruling will reinforce the fact that a secondary law should not prevail over the Constitution.

Conclusions

As opposed to the traditional hierarchical relation between the federal government and lower levels, new federalism policies facilitated the reduction of centralism and presidentialism by reinforcing municipal autonomy and state sovereignty. The process of vertical decentralisation has gradually promoted a more genuine balance between the three branches of government, inserted in a broader climate of political change that started in the 1980s. The judiciary (since 1994) and the legislative (since 1997) are sharing a greater role in the governing-process dynamics, demonstrating greater independence and a stronger sense of separation of powers.

In this chapter, I have argued that processes of institutional reform and increasing balance of powers have derived from gradual electoral opening and alternation of parties in power at all levels of government. The series of electoral reforms introduced since the 1970s have finally produced a more credible electoral framework. Moreover, political pluralism has brought with it the upgrading of traditionally weak institutions such as the congress and the judiciary. Over the past decade not only horizontal but also vertical separation of powers has strengthened as the municipalities and the state governments are playing a more active role in the institutionalisation process.

In terms of constitutional controversies, I presented an analysis covering the 1995-2000 period, showing how municipalities have increased their judicial activity. After the 1984 Municipal Reform, the amparo suit of Mexicali in 1990 and the constitutional controversy presented by the municipality of Delicias in 1993, these entities were explicitly included in the list of entities with legal standing to request review by the Court of unconstitutional actions or the jurisdictional violation of another public entity. In the 1994 reform, the Federal District was also included as an actor who could use this legal mechanism and is doing so increasingly. Since political pluralism became a reality first at the municipal level, together with the gradual decentralisation process, the municipalities increasingly challenged not only state authorities governed by opposing parties, but also the federal government. In the regional and political analysis, I also showed that 70 percent of the controversies were presented by opposition municipalities against state governments.

Since the 1994 reform there does appear to be a more visible role for the Supreme Court in political affairs, although not necessarily a more respected one. Increased Court activism is not equivalent yet to greater political autonomy or better rule of law. The Supreme Court's role in the actual institutionalisation process turns to be fundamental for the future of Mexico, as public policy is much more contested in the Court with less predictability of the outcome. The democratisation process has indeed brought new and greater expectations of the Supreme Court's role. However, it seems that the Court has become a type of escape valve in moments of political tension. After the 1994 reform, the "apolitical" branch of government has been increasingly defining the way most political processes work. The response of the Court to most political issues may have important implications for its own credibility and legitimacy, not to mention the ongoing institutionalisation process in Mexico. The eleven Ministers that comprise the Supreme Court since 1995 hold in their hands key decisions for the future of democratic consolidation in Mexico.

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¹ According to Wheare (1963: 22), “federalism has never existed in Mexico. It is an undisputable commonplace that the Mexican nation is now and always has been federal in theory only; actually it has always been centralistic”.

² Since the 1940s, the PAN mobilised to protest against fraudulent elections. While in most cases these demonstrations ended with repression, in others “interim mayors” were named promising to convene new elections. Since then, the PAN as a “moderate actor with a consistent risk-adverse attitude” began to press for electoral reform from within the system (Loaeza, 2000: 101). Between 1980 and 1983 the municipalities governed by the PAN grew from 13 to 31, including the five capital cities of Chihuahua, Durango, Hermosillo in the north and the central states of San Luis Potosí and Guanajuato (Molinar, 1991: 124). In the 1985 gubernatorial elections, the PAN candidates in Nuevo León and Sonora strongly rejected the final outcome presenting legal and international complaints of electoral fraud.

³ The break-up of the FDN and the transformation into the Party of the Democratic Revolution (PRD) as a legally registered party on 16 May 1989, did not change the basic character of the Cardenista movement or the fundamental consolidation problems it faced (Bruhn, 1997: 165-166). The PRD mobilisations not only did not result in concessions, but also resulted in injuries and deaths of the party activists that confronted the regime’s decisions. This party still followed the mobilisation route as most of its legal recourses were rejected, especially in the authoritarian enclaves (Eisenstadt, 1999a: 93).

⁴ Salinas imposed several interim governors as “*concertaciones*” (“concertation” and “concession”) with the PAN were crystallised in Guanajuato and San Luis Potosí in 1991. These arbitrary interventions that were followed by similar actions by other PRI Presidents, clearly affected the development of the rule of law and the existence of independent electoral institutions at the subnational level.

⁵ As opposed to the US where the Constitution has been modified only in four occasions in order to overturn Court’s rulings, in Mexico almost 400 reforms have been approved in diverse areas during last century showing the importance that the hegemonic regime gave to legal forms (Lopez and Fix, 2000: 13). In terms of judicial reforms, the most relevant ones were approved in 1988 by specialising the Supreme Court in constitutional issues, strengthening the stability and professionalisation of judges and local magistrates; in 1994 when the Supreme Court was not only granted with more constitutional power but also when the jurisdictional and administrative functions were separated with the creation of the Judicial Council; and more recently the 1999 reform. During Vicente Fox’s administration there have been consistent arguments about the need to approve not only an Amparo Law but also a further judicial reform that could guarantee a more effective independence with respect to the other powers. Apparently, the PAN is planning to present an initiative that aims to restructure the Judicial Council by the interference of the other two powers in the judges’ nominations. This idea with the prohibition for the president of the Supreme Court of being the Judicial Council’s president at the same time, have been widely criticised and even considered a counter-reform (Milenio, 12-13 March 2002).

⁶ In his classic work, Casanova (1970) presented data of the 1917-1960 period, indicating that the Supreme Court operates within a certain degree of independence with respect to the executive power. Similarly, Schwarz (1977: 147) argued that the Mexican federal courts, especially in their exercise of amparo jurisdiction, are not as passively oriented to the executive as is commonly assumed. In a few areas such as the broad reviewability of federal and state tax laws and military courts-martial, they are even more activist than their counterparts in the United States” (p.156). Overall, Cardenas (1996: chapter five) has identified four different periods in the relationship between the executive and the legislative branches. In the first period (1917-1928), the judiciary enjoyed a considerable degree of independence from the executive. The second period extends from 1928 to 1944 when the power was centralised and the judiciary’s subordination to the executive guaranteed as the official party was strengthened. The third period covers from 1944 to 1986, in which a process of internal institutionalisation and administrative consolidation emerged. Finally, since 1986 Cardenas argued that several reforms have enhanced judicial autonomy.

⁷ Until 1994, the *amparo* suit was the mechanism to contest the legality or constitutionality of the law. The amparo was conceived in 1842 but was made a constitutional guarantee to protect individual’s civil rights against any violation by public authorities in the 1857 Constitution (Arteaga, 1999: 498). However, in reality it generally represented a very limited form of judicial review since it only applies to individuals without setting any precedents for the future (Burgoa, 1986). The “Formula Otero” constitutes one of the main restrictions of the present amparo law where judgements granting amparo are not a binding precedent for application in subsequent similar cases. The only binding case law precedents that exist in Mexico are through the so-called *jurisprudencia*. To qualify as a *jurisprudencia definida*, the legal principle set forth in an amparo suit must be decided the same way in five consecutive cases by majority vote of the judges. Such rulings are binding only on equal or lower courts and administrative courts, not on executive administrative agencies. It should be noted that the Supreme Court has recently (April 2001) produced a draft to reform the amparo law, proposing the disappearance of the “Formula Otero”. According to a recent World Bank publication, amparo suits now represent about 90 percent of the federal case load in Mexico (2001: 736).

⁸ The political dimension of the judiciary was confirmed by the fact that the Court’s Ministers were elected through an indirect popular election for a fixed period of time and also because the 1857 Constitution established that the Court’s President would substitute the President in case of temporary absence (Fix Fierro, 2000: 173).

⁹ Vallarta considered Iglesias’ position to be a potentially destabilising influence and established that political and legitimacy issues were not individual rights, excluding them from the amparo’s protection at the federal level (Moctezuma Barragán, 1994). The Court’s depoliticisation implied another constitutional reform where the

concept of “competent authority” and the temporary substitution of the President by the Court’s President were abandoned.

¹⁰ The US system of constitutional controversies has similar features to the Mexican system until 1994, but since then the Mexican constitutional controversies framework can be considered more similar to the European model. Vallarta was inspired in the US doctrine of “political questions” in which the Constitution established its resolution to only one power, without the intervention of the other, or those in which the Court cannot be involved (Moctezuma Barragán, 1994: 252)

¹¹ In this recourse, the PRI-governed municipality challenged the unconstitutionality of the Fourth Agreement signed by governor Francisco Barrio on 26 January 1993, where the municipality was not allowed to offer civil registration services. The municipal authorities argued that the state government was violating several constitutional articles, as well as local Article 125, but the state administration responded that the municipality was not yet recognised as a formal political power. In the end, the Court considered that the arguments presented by the Delicias’ administration were well-founded and ruled that the power to offer civil registration could correspond to both, the state executive and the municipal president. Moreover, the Court ruled that the Fourth Agreement went against Article 138, Section I, of the local Constitution, violating constitutional Article 115 and 124, as they both established that the municipalities could offer services that were determined by their local legislatures (Article 35, Código Civil de Chihuahua, SCJN, 30 August 1994).

¹² Several Court rulings, most of them related to the Fifth Period (Quinta Epoca) published in the *Semanario Judicial de la Federación*, decided not to consider the municipalities as a part that was legally empowered to present this legal mechanism. Apart from this, it is important to mention that the 1983 and 1987 reforms did not include a formal modification of Article 105 hence, the municipalities were not explicitly included as parts that could use this legal recourse. It was not until 1993, with the specific reform to Article 105 that I have mentioned, that the political delegations within the Federal District were recognised as legal parts and thus the municipalities were also included.

¹³ The Court resolved one of the last judicial conflicts between the federation and a state in December 1932. The case was presented by the government of the southern state of Oaxaca against the federal government regarding their local law of jurisdiction over the archaeological monuments issued in February 1932. The Court annulled the local law issued in reference to the discovery of the Montalbán tomb due to the fact it invaded the federal jurisdiction established in Article 73, Fraction XXV (González Oropeza, 1993).

¹⁴ It should be said that the process to nominate the eleven Ministers who currently comprise the Supreme Court was widely criticised for the way in which previous members were suddenly dismissed and the opportunity given to PRI senators to ‘pack’ the Court (Arteaga, May 2001). Only two Ministers were ratified from the previous Court: Juan Díaz Romero and Mariano Azuela Guitron. Although the Ministerial selection procedure established in 1994 incorporated a stronger control from the Senate to presidential appointments (Article 96), the last election in February 1995 was still done under an important PRI majority in the Senate. In the context of dominant party rule and a highly centralised presidential system, the senatorial approval did not have the significance it will have in 2003 when some Ministers will be replaced. The 1917 Constitution established the need of an absolute majority of congressional voting in secret ballots, in order to select the eleven members proposed by the local legislatures. Since this procedure ensured judicial autonomy from the executive but not from the local bosses, President Plutarco Elías Calles replaced the system by Presidential appointment with Senate ratification. Since then, further reforms subordinated the judiciary to the executive’s control.

¹⁵ According to constitutionalist Elisur Arteaga, even considering the new ministerial salaries set at the same level as those of under-secretary of state and some discretionary bonus, the final amount is not attractive enough for many recognised jurists who prefer to remain working privately rather than accepting a Ministerial position in the Court. Moreover, Arteaga argued that by receiving these discretionary bonus payments, the Ministers undermined their autonomy as they became indebted to the executive (Personal interview, May 2001).

¹⁶ Since 1976, the budget law established that the judiciary did not require executive approval regarding the administration of their budget. However, there is an increasing pressure from the Supreme Court to establish the judicial budget as a fixed percentage of at least 1.5 percent of the national annual budget, in order to guarantee their “financial autonomy to protect their impartiality and independence” (SCJN, Góngora, 6 February 2002). The last budget approved by Congress in 2001, decreased the judiciary’s budget representing only 1.04 percent.

¹⁷ The reform of Articles 94, 97, 100 and 107 to strengthen the judiciary was approved in August 1998. On 9 December 1999, President Zedillo submitted initiatives to reform the Organic Law of the Judiciary and the Law of Constitutional Protection, to strengthen the capacity of the Circuit Courts and the status of the Supreme Court of Justice as a Constitutional Tribunal, through the efficient redistribution of powers and jurisdictions.

¹⁸ Only when a controversy ruling is resolved by at least eight of the eleven Court Ministers, and if it is “top-down” in nature or relates to equal levels of government, can any ruling have wider precedence (Article 42, Secondary Law of Constitutional Article 105). In the end, successful ‘bottom-up’ rulings only apply to the parties engaged in presenting the specific controversy. (Arteaga, Personal interview, May 2001). Similarly, it has also been argued that Article 76, which recognises the power of the Senate to resolve political conflicts between powers within a state, clearly affects the scope of constitutional controversies as an eminently jurisdictional procedure.

¹⁹ According to Zedillo, almost 70 percent of the total resources in this Ramo 26/33 were to be distributed directly to the municipalities. By promoting more equitable and transparent processes of distribution, half of this amount was to be allocated by the state governments to the municipalities for social and development programs; while the other half was to be incorporated in the annual Social Development Agreement. During a personal interview with Ernesto Zedillo, he insisted in several occasions that one of the main aims of the 1994 judicial reform was to

reinforce the independence of this institution. He argued that in the context of increasing political pluralism, it would be increasingly necessary to resolve political disputes between rival parties governing different levels and branches of government, avoiding continuous presidential interventions and the subsequent deterioration of his power (Personal interview, 23 November 2001). This point, as opposed to considering the 1994 judicial reform as part of the second-generation reforms, was also reinforced in other interviews done during my field work.

²⁰ The argument behind this controversy was the establishment of specific conditions for the security of banks issued by the municipality of Guadalajara. The federal government claimed that this area was an exclusive domain of the federation. Indeed, the Court ruled in favour of the federation, arguing that although Article 115 allowed municipal authorities to regulate over public security issues within their jurisdiction, aspects related to the protection and security of banks had to be regulated by the federation.

²¹ Robledo was inaugurated in office on 8 December 1994 but in the context of the Zapatista uprising, separated “temporarily” from the governorship only two months after. In April 1996 Robledo was appointed Mexican Ambassador in Argentina as President Zedillo announced his replacement by Ruiz Ferro. Nicolás Acero Nandayapa, the PRI municipal president who presented this legal recourse against the federation, was elected in October 1995 but removed of office in December 1996 on corruption charges.

²² FOBAPROA was a government-sponsored trust fund created in 1990 under the Law of Credit Institutions. In 1995, the Treasury Ministry (SHCP) and Mexico's central bank activated FOBAPROA to provide “preventive support” by absorbing bad loans made by banks and businesses. This was a response to the crisis of 1994, as FOBAPROA was meant to inject liquidity into an ailing financial sector. As a result of the TESOBONO collapse in 1994, and the flight of \$30 billion from Mexico's banking system, FOBAPROA gave the banks 552 billion pesos in loan guarantees.

²³ Many sectors in Mexico have been fiercely opposed to ending the state's monopoly of the energy industry. Electricity was nationalised in 1960, partly to rescue struggling private companies. Since then, nationalists have tried to link this to the expropriation of foreign oil companies in 1938 by President Lázaro Cárdenas. In this context, changing the state's role has proved difficult in previous occasions as it means changing the constitution. During his administration, President Ernesto Zedillo tried to part-privatise electricity but gave up under hail of protest. Years later, as soon as Vicente Fox was inaugurated in office, opposition legislators went to court to block his decree. (Economist, August 25, 2001, “Energy policy in Mexico. The cost of power conservatism”. p.48). It should be mentioned that the Court's final ruling was extremely divided and it was only with the ‘last-minute’ vote of the only woman Minister Olga Sanchez Cordero that eight votes decided this case against the executive.