

Judicialisation of Politics: The Changing Political and Social Role of the Judiciary in Mexico

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Introduction

The paper seeks to explore the impact of the phenomenon of judicialisation of politics on the prospects of rule of law construction in democratising societies. Mexico represents an interesting case study as the judiciary since the mid 1990s has become a relevant political actor which must be reckoned with by political power holders.

The paper hopes to shed some light on our understanding of what we mean by the judicialisation of politics, and its connection to the prospects of rule of law construction. The first part of the paper will develop a conceptual characterisation of the phenomenon of the judicialisation of politics, providing a definition, and exploring the political and social processes that contribute to this phenomenon. The judicialisation of politics is in general terms a feature of the modern democratic state. The paper will specifically address the phenomenon in the context of young democracies in Latin America. The judicialisation of politics in systems which have less than adequate rule of law and where the state is weakly embedded in society is likely to take a different form in contrast to its impact in more established and developed democracies. In this regard, the paper will ask the question as to whether the judicialisation of politics improves the prospects of rule of law construction, or alternatively whether its emergence in contexts of delegative democracy and weak state-society relations can in fact re-enforce and replicate illiberal habits of “un-rule of law”. In other words, does the judicialisation of politics in weak democracies re-affirm long-standing structures of practice of the “politicised judiciaries”? The paper will review specially the Mexican case, with an emphasis on the politics of the Supreme Court in recent years.

Judicialisation of politics – a tentative definition

The judicialisation of politics has increasingly come to be recognised as a feature of modern political development.¹ From a political science perspective this has led to an increasing scholarly interest on the role of judges in politics and society, departing from a traditional neglect of the workings of the judiciary in mainstream politics. In Latin

¹ See Guarnieri and Pederzoli (1999), Waltman and Holland (1988), Tate and Vallinder (1995), Cappelletti (1989).

America, studying the role of judicial institutions has become a feature of political analysis in the 1990s, in part linked to the interest in broader state reform processes, which have included judicial reform, but also in relation to the concern with rule of law construction as part of the aspiration to democratic consolidation

The judicialisation of politics suggests firstly a greater presence of judicial processes and court rulings in political and social life. Secondly, it is a manifestation that political, social or state-society conflict is increasingly resolved in the courts. Thirdly, it is the consequence of the process by which political and/or social actors increasingly see advantage in invoking legal strategies and the arbitration of judges to advance certain interests. The mobilisation of legal strategies to some extent empowers judges in political and social decision-making processes. Finally, the judicialization of politics to some degree reflects the tendency by which regime legitimacy is increasingly perceived to be linked to the state's capacity to deliver on rule of law promises of rights, due process, and legally accountable government.

The judicialisation of politics, thus, indicates a greater involvement by judges in law-making and social control. Its occurrence suggests rulers are allowing this to happen, and in some cases may even be facilitating processes of constitutional and legal reform which increase the powers of judges of either as arbiters of conflict or in their law-making faculties. For this to happen, rulers must see some benefit in delegating powers to judges, especially as this is not a risk-free process.² It is to be expected, moreover, that the empowerment of courts also can lead to a reassessment of changing institutional relationships which can increase the temptation of power-holders to re-establish either a weaker judicial function (more difficult to achieve), or to seek to control the courts (either through court packing, or outright corruption).

The judicialisation of politics may also be discursively linked to regime legitimisation around rule of law and rights-based democracy. In appearing to bow before court rulings, power holders can stake a more credible claim to observing the principles of rule of law and limited government. In times of regime or political crisis this may emerge as a useful strategy in terms of bolstering legitimacy capital. Where other branches of power are perceived as deficient or lacking in credibility, facilitating the judicialisation of politics forms can give credence to a public discourse of attachment to rule of law, acceptance of limited government, and commitment to strengthening rights protection mechanisms.

It is important to stress that the definition of judicialisation of politics adopted in this paper refers to more than a re-positioning of the courts in relation to the executive. Not only does it include a redefinition of the balance of power between the judiciary and other branches of state, but also to the repositioning of the courts in social and state-society relations. The judicialisation of politics thus also concerns changing legal and political cultures regarding rule of law and rights entitlements, and also the recourse to courts as a channel for social redress and rights claims. Legal mobilisation from below is thus also an important part of the phenomenon of the judicialisation of politics.³

Connection between judicialisation of politics and rule of law

The judicialisation of politics is a phenomenon of modern democratic rule. It begs the question then as to how it impacts on the nature and prospects of rule of law. Moreover, is there a useful distinction to be made on its consequences in terms of the degree of

² Ultimately, judges can only play the role expected of them by the political and social context in which they are situated (Stotzky, 1993)

³ See Epp, (1998), Smulovitz, (1998) and Peruzzotti and Smulovitz (2003).

prior embeddedness and consolidation of the practice and culture of rule of law? Where rule of law is weak, will it contribute to its advancement? Where rule of law already exists in a minimally credible manner, does it create new ways of thinking about law and legal strategies? What is the impact of the judicialisation of politics towards improving mechanisms of restraint and legal accountability on rulers? And does it in meaningful ways contribute to advancing a rights culture and democratic citizenship? Finally, what are its implications for the prospects of deepening democracy?

The connection between rule of law construction and the judicialisation of politics is far from straightforward. The form that the judicialization of politics takes and its specific characteristics in particular political, institutional and social contexts is more likely to determine the impact of the phenomenon on rule of law and democratisation than the fact itself of judges acquiring greater public prominence. Nonetheless, there is a connection between the judicialisation of politics and the development of mechanisms of legal accountability of rulers and rights protection in any given polity and society.

In as far as the judicialisation of politics involves rulers relinquishing law-making power to judges, it suggests that mechanisms of “horizontal accountability” are being activated. The discussion on the different forms of political accountability is useful for understanding the consequences of judicialisation of politics. Here I refer particularly to the concepts of “horizontal accountability” and “societal accountability” (O’Donnell, year and Smulovitz and Peruzzotti, year).

Horizontal accountability, according to O’Donnell, refers to “a legally grounded and legally activated interaction between state agencies in view of presumed unlawful actions or omissions (encroachment or corruption)”(O’Donnell, 2003).⁴ To the extent that this involves judges acquiring a more active role in their oversight functions, the effective activation of horizontal accountability is conditional upon at least the following features. Firstly that judges operate with sufficient political autonomy and that they do not collude with attempts by rulers or powerful groups in society to favour certain outcomes (political, social or economic). Where collusion is evident, then the mechanisms of horizontal accountability are discredited to the detriment of rule of law construction (O’Donnell, 2003). Moreover, judges must act in good faith in their role of adjudication and constitutional guardianship (Ferejohn, 1998). Finally, their rulings must have the effect of enforcement. Their judgements must matter for horizontal accountability to be effective and to become respected.

The judicialisation of politics would suggest that judicial rulings acquire greater presence at the horizontal accountability level, but they may not necessarily be inspired by a commitment to rule of law on behalf of the judges. Judges can be motivated to pass more emboldened and confrontational rulings with respect to the executive, for reasons other than a commitment to protecting constitutional principles (for instance of other powerful groups, thus marring the principle of legal equality). Equally, the decision to invoke judges’ oversight functions (or to abide by their rulings) by political actors may not be motivated by a genuine commitment to limited government, but may instead be the outcome of short-term strategies responding to electoral pressures, to a legitimacy crisis or to the attempt to delegate unpopular decision-making on political and social matters to courts. Over-time, though, greater political presence of the courts may activate a “proper” functioning of horizontal accountability mechanisms which may become self-enforcing through repetition and routinisation of oversight mechanisms.

⁴ Mainwaring (2003) develops a suggestive categorisation of the different conceptions of political accountability. For in depth treatment of the concept of accountability see the works in Schedler, Diamond and Plattner (1999) and in Mainwaring and Welna (2003).

The judicialisation of politics can also be activated from within society. Here the concept of “societal accountability” developed by Peruzzotti and Smulovitz is particularly useful and broadens the definition of forms of political accountability. “Societal accountability” denotes a “ non-electoral yet vertical mechanism that enlarges the number of actors involved in the exercise of control” (..)performs watch dog functions without fulfilling special majority requirements or constitutional entitlements, or without having legal attributes to sanction or punish wrong-doers (Smulovitz and Peruzzotti, 2003 – check quote). It includes legal mobilisation strategies, and can contribute to raising the public and political profile of judges – for better or for worse. Societal accountability, claim Smulovitz and Peruzzotti, can activate the judicial functions of oversight and rights protection. Moreover, its “watchdog “ characteristics, however diffuse or even unstructured, can lead to public forms of oversight of the judicial control functions themselves. Judges who do not meet with public expectations that have been unleashed either on matters of rights protection or rendering government accountability through particular cases, risk being discredited. Clearly the dangers of mediatic justice can also undermine the supposed desired effects of justice and rule of law, (Smulovitz, 2002). At the same time though “societal accountability” processes can create reputational costs which both judges and rulers may care not to dismiss too easily and which can overtime perhaps create incentives for a more careful fulfilment of the judicial function on the part of judges.

It is important to stress that legal mobilisation from below is not sufficient in itself to assure greater judicial activism, either on rights protection or with regard to judicial oversight functions, in the sense of counteracting government decisions. In the end judges need also to be sensitive to societal demands, and willing to take potentially controversial decisions on political, social or economic matters, (Gloppen 2003). To the extent that they do, then courts can provide an institutional voice for social groups which may otherwise have limited access to the political process. In as far as judicial activism may challenge key political decisions, such as economic or social policies, for instance, under the premise that social and economic rights are justiciable, then judges may become a formidable forum of opposition to forms of delegative democracy operating under the constraints imposed by neo-liberal economic policies. Of interest (to be further researched) is the role of courts as a locus for providing an alternative voice of social opposition to governmental decisions. If so, then judges are not only acting within their remit as a mechanism of legal oversight in their “horizontal accountability” relationship with the other branches of state. They may also be providing a channel for redefining the political relationship between state and society. In this sense, the judicialisation of state-society relations may be of significant consequence for the workings of democratic forms of government.

Thus the judicialisation of politics is likely to have an impact on redefining intra-institutional relations, and may under certain conditions, (independent, receptive judges endowed with certain forms of oversight and adjudication powers, who in addition are willing to exercise judicial activism) contribute to enhancing rule of law and certain forms of rights-based development. However, it is important to stress that these by no means are inevitable, or even necessarily likely outcomes of greater judicial presence in politics and society. In this regard it is important to establish what judicialisation of politics is not.

The judicialisation of politics does not necessarily increase the prospects of predictability in legal rulings, or equality before the law associated with rule of law.⁵

⁵ There is indeed a case for arguing that in many weak democratic polities, predictability might precisely associated with the assumption that the judiciary will generally follow executive will. In fact the

The greater public profile or political presence of judges does not assure that they are not acting in the name of private or politically motivated interests. Greater judicial autonomy can create a sense of uncertainty in judicial rulings as far as the interests of rulers are concerned, but not necessarily in the direction of more reliable and legally grounded judicial decisions. Equally, greater judicial activism does not necessarily improve the prospects of equality before the law. Active judges may also be prey to powerful social groups who seek special treatment before the law.⁶ Thus the judicialisation of politics can take place under the aegis of illiberal judges.

In the event that judges are committed to advancing rule of law through greater judicial activism, this may activate illiberal strategies by rulers. Even when rulers, say for electoral reasons, have contributed to enhancing the political role of judges, the risks that this involves may prompt them to seek to control the judges through such means as court packing or outright bribery. If controlling the judges becomes unfeasible, then two other strategies can unfold. Rulers may seek to undermine the prestige (deserved or not) of disobedient judges. An additional or parallel strategy might involve appealing to majoritarian sources of legitimacy as a way of counteracting the judicial branch, (Mexico in the 1920s and 1930s).

Conditions may be such that rulers are pushed towards accepting more effective judicial oversight of their actions, for instance during moments of legitimacy crisis. When this coincides with independent judicial rulings undertaken in good faith to uphold constitutional principles (as opposed to acting in collusion with political or private interests), then some advancement towards rule of law takes place – notwithstanding the corresponding caveats regarding the inevitable tension between the majoritarian component of democracy and judicial review.⁷ In this sense, the judicialisation of politics is one means by which limited government and effective mechanisms of accountability of power-holders may come into effect. And this is linked to the prospects of rule of law construction, which crucially requires that power-holders accept subordination to a higher constitutional order which expresses a consensual view of the rules of political and state-society interaction. This in itself raises important questions about the conditions under which this acceptance of limits on power becomes a possibility. Moreover, as Holmes usefully reminds us, historically rule of law is the exception rather than the norm, and is by no means the inevitable consequence of modernisation (Holmes, 2003).

judicialisation of politics can put an end to this form of predictability in judicial rulings as far as the power-holders are concerned. Here perhaps we should distinguish between predictability that is associated with illiberal forms of adjudication and predictability that relates to a reliable application of the law carried out in good faith and in keeping with constitutional principles – notwithstanding the margins for interpretation that this involves.

⁶ The Argentine case is interesting precisely as an example where at the moment of most critical confrontation between the judicial branch and the executive under the Duhalde presidency, justice decisions appeared to be a matter of political negotiation between two branches at loggerheads in which the very survival in their posts of court members (accused of malfeasance and acting in bad-faith) was at stake. At the same time, Argentina had clearly undergone throughout the 1980s and 1990s a marked process of judicialisation of politics and state-society relations (Smulovitz, 19??).

⁷ Finally, it is important to stress that while judges may play an important role in advancing the cause of limited government, we must not lose sight of the potentially “undemocratic” characteristics of “rule by the judiciary”. Gargarella (year) in particular develops a critical view of the assumptions behind mechanisms of checks and balances based on counter-majoritarian and basically “undemocratic” forms of rule of law construction around unelected judicial powers. He suggests that rule of law can be premised on other forms of majoritarian structures.

Rational choice perspectives provide useful insights in this regard. Rule of law emerges when powerful groups (and rulers) reach the strategic decision that it is in their best interests to support it, and that non-abidance to the law is in fact a more costly option.⁸ Opting for rule of law may be the outcome of several calculations. Predictability in the application of the general rules that comes with rule of law can be an asset for governing parties in as far as it reduces instability and uncertainty in relations between state and society, and between political contenders. Promoting equality before the law that comes with rule of law, and reducing immunity of the powerful from legal scrutiny generates legitimacy. Legitimacy brings with it reputational benefits, and increases the prospects of governing by consent. Consent of the governed is more likely if the rulers are willing to abide by their own rules, and if the rules apply more equally across society.⁹ Moreover, the consent and cooperation from the governed that might result from rule of law also reduces the costly risk of subversion. In addition, delegating political power to judges by enhancing their law-making and adjudication powers has the advantage of being able to defer to the court room (and thus draw distance from) unpopular policy decisions.¹⁰ Smulovitz discusses the cumulative costs of non-law abidance that result from decentralised and even unstructured societal challenges to the state in terms of rights issues or regarding the probity of government actions. The costs of uncertain outcomes generated through decentralised societal challenges to the rules are reduced through the introduction of more effective (and predictable) mechanisms of limited government. (Smulovitz, 2003).

Rational choice approaches establish a useful starting point for mapping the conditions under which processes of judicialisation of politics can contribute to rule of law construction. But we need to look beyond to more structural and institutional processes in state formation and development that combine to facilitate a greater protagonism of the courts in the solution of political and social conflict. In the end, rule of law emerges as the result of a combination of long-term factors and short-term political calculations. The position of courts in the political system, and the nature of social and political attitudes towards legal institutions and the law gives us further information about how legally bounded limitations on political power operate and are determined, and the degree to which a rights culture is embedded in the public imagination.

Looking specifically at the judicial function, the development of the modern state, argues Cappelletti, generates multiple levels of oversight functions – including judicial oversight – as an inevitable outgrowth of greater levels of complexity of government and public administration. In line with a Weberian tradition of social theory, the expansion of the modern state and the increased complexity of government means that the state intervenes in larger spheres of social and economic activities generating greater areas of potential conflict in which the state is called upon to intervene or resolve. (Cappelletti, 1989). In terms of the judicial function this may manifest itself in two ways: the creation of “quasi-judicial” oversight mechanisms, such as special tribunals, ombudsman, arbitration boards, and so forth, on the one hand; on the other the expansion of the review powers of the judicial branch (typically the US model of separation of powers) by which its political role becomes more prominent. The effect of these developments of the judicial function would suggest both a greater

⁸ See chapters in Maravall and Przeworski (2003) for suggestive discussions by the different authors on rule of law construction. The emphasis throughout is a rational choice perspective.

⁹ Equality before the law can at best only be an approximation. Power asymmetries in society will always have a distorting effect in terms of how rules apply, and how rights are weighted.

¹⁰ See Holmes (2003) for an insightful discussion of rule of law construction.

political profile of the courts as well as a more complex and diversified operation of judicial oversight mechanisms.¹¹

A further contributing factor which contributes to enhancing judicial control mechanisms over political power is the “self-restraining” discourse that comes with the gradual acceptance in more than discursive ways of human rights commitments. This is a feature of the post-1948 global discourse on rights and both at a national and international level has led to the growing presence of a rights-based political culture of democratic rule. The institutional consequences of this are evident at both the national and international level. At the national level it has led to the “discovery” of the legal mechanisms as a way of advancing citizen rights. Courts, in fact, can act as an important “equalising” mechanism for rights redress precisely for social groups and individuals who otherwise have no access to political power or representation other than as voters (Cappelletti). In more established democracies this has taken the form of increasing levels of rights based legal mobilisation (Epp, 1999). In more recent processes of democratisation the efforts of human rights movements to prosecute violations of rights committed under authoritarian rule has contributed (in varying degrees subject to different country specific experiences) to promoting legal mobilisation strategies from below, (Smulovitz, 2002).

Institutional and discursive developments at the international level have an impact on the changes in legal cultures and attitudes towards the law and rights-based development. The consolidation of a widely accepted framework of universal rights is slowly generating in its wake, albeit in very incipient forms, a range of international and regional mechanisms of rights protection, treaties, symbolic commitments, which over time appear to be adding up to more than purely tokenistic gestures. States which aspire to be accepted in the by the international community may be willing to pay more than lip service to their international commitments on rights. Judicial activism is slowly making its presence felt at the regional level - certainly in Europe, but also in the Inter-American system of rights protection. Human rights groups have capitalised on the opportunities afforded by rights commitments at both the domestic, regional and international level (Keck and Sikkink, 1999). But also important in terms of setting the normative agenda – in this case of rights protection and rights-based development.

The judicialisation of politics and state-society relations may be a feature of modern states, and its particular form will be the result of the interaction between short-term political strategies and calculations, and long-term structural processes of institutional and state-building, constellation and development of social forces, and international and global dynamics. The impact of the judicialisation of politics on rule of law is equally varied. Under certain conditions it can improve horizontal accountability and limits on power. It can also reflect effect legal empowerment of society vis-à-vis the power holders. On the other hand, especially in young democracies where rule of law is weak, the judicialisation of politics can very rapidly spiral into a process of politicisation of the judiciary with detrimental effects for the credibility of rule of law.

The Judicialisation of Politics in Mexico

The Mexican case presents an interesting example of a democratising context in which the judicial branch, at least at the level of the Supreme Court, has become a prominent political actor. At the level of “horizontal accountability” mechanisms of institutional

¹¹ Domingo (2004).

limits on political power, there is little doubt that the Supreme Court has come to represent an increasingly more effective branch in terms of judicial review and constitutional control within the political system. This marks an historical break in a political tradition in which the Supreme Court rarely challenged the executive, and was perceived as both an ineffective and corrupt branch within the political system. Not only has there been in recent years a “judicialisation of politics” at the level of the relationship between the political branches, but moreover, there is general consensus in the literature that this amounts to a meaningful delegation of power by the executive to the Supreme Court.

The activation of effective mechanisms of judicial checks and balances on political power has gone hand in hand with a relatively high level of abidance with court rulings, even when these seemed politically inconvenient for the ruling party.¹² These changes at the level of the Supreme Court might well indicate important progress in the direction of rule of law construction. However, this has not been paralleled by similar developments within the administration of justice more broadly at both lower levels of the federal system of justice, and more so at the level of state judiciaries. The following section will examine reasons which explain the advances made in terms of better “horizontal accountability” as a result of the judicialisation of politics with important consequences for some aspects of rule of law. These are by no means inconsequential. However, rule of law construction is a complex multi-layered process, which moreover, is not irreversible. It is possible for illiberal enclaves, which may constitute a large proportion of state-society relations, and of political behaviour immune to legal scrutiny, to coexist with new legal spaces in which both judges and politicians may be beginning to accept the constraints of constitutional probity. The paper will signal the advances that have been made, notably at the level of the Supreme Court and “horizontal accountability” relations, and also draw attention to those areas where rule of law is far from achieved.

The Traditional Role of Mexican judiciary

The 1990s saw a qualitative shift in the relationship between the Supreme Court and the executive.¹³ A traditionally passive and politically subservient role of the judicial branch in relation to the executive was rooted in constitutional process of 19th century state-building in Mexico. Two characteristics of the political role of the judicial branch were consolidated by the end of the 19th century. The principle of non-intervention by the judicial branch in electoral, and more broadly in political conflict was firmly established, after some debate on the dangers of the dictatorship of the judges (Moctezuma Barragán, 1994). The other important legacy of 19th century constitutionalism was the consolidation of the *amparo* suit as the principal form of judicial review, which remains to date the main mechanism for individual rights protection against illegal acts or unconstitutional laws and decisions by government.

¹² Staton (2002) develops an interesting study on the differences in law-abidance by the ruling parties between federal government, more vulnerable to the costs in terms of not accepting court rulings than local or state governments where the tradition of impunity is harder to overturn, and the costs of disobedience are perceived as less damaging. Ultimately, though, even at this level it is becoming harder to resist implementing Supreme Court rulings.

¹³ In recent years there has been a burgeoning literature on the changing political role of the judicial branch in Mexico, which mostly agrees on the importance of the transformation of the supreme court in the 1990s. See

Throughout the revolutionary period despite a brief interlude of relative independence between 1917-1928¹⁴ the judicial branch maintained a subordinate and compliant role vis-a vis the executive. In the context of dominant party rule, the supreme court played an important role in providing the political system a far from negligible degree to juridical and constitutional legitimation. Overall in matters that were politically sensitive the court strove either to keep a low profile, or to support the general policies directives that came from the executive. In this regard, the judicial branch contributed to the effect of political stability structured around a nominal constitutional discourse and practice of regular elections and presidential turn-over that constituted the *pax priista* of dominant party rule. The judiciary was an important part of the structures that gave credence to a state of legality of sorts.

Regime legitimacy until the 1980s in large measure rested on the system's capacity to draw on a political discourse of inclusive and redistributive state corporatism. The redefinition of the Mexican state following a succession of economic crisis and the beginnings of economic and political liberalisation lead to a gradual reconfiguration of the discourse language of regime legitimacy around a more explicit discourse of liberal rule of law and rights. These developments were hardly linear or unequivocal – nor did they represent sincere commitments to improving rule of law on behalf of the political elites. The drawn out nature of the transition process towards a more credible polyarchy was precisely characterised by contradictory processes of political liberalisation (acceptance of opposition electoral victories, gradual reform of the electoral system, reform of the judiciary) alongside the persistence of old practices of fraud, politically instigated violence and rights violations, and enclaves of authoritarian practices, in which impunity and being above the law remained the norm. The transition process, though, and the incorporation of a language of liberal democracy would pave the way for the a regime discourse which would be more consonant with notions of limited government and more effective separation of powers.

The 1994 constitutional reforms at the start of the Zedillo presidency, which altered the standing of the judiciary in relation to the executive, were in line with these changes.

Judicial reform and changing legal structures

The constitutional reforms of 1994 and 1996 have proven to be crucial turning points in the political history of the judicial branch. Much has been written on their merits and shortcomings.¹⁵ I will merely outline their main features components in as far as they have contributed to a systemic alteration in the workings of horizontal accountability mechanisms.

The 1994 reform increased judicial independence from the executive through a new appointments system of the Supreme Court which now requires a two thirds majority support vote of the senate from a list of candidates presented president. This replaces a system of appointment of presidential appointment subject to majority vote of ratification by the Senate. The Supreme Court's review powers were substantially altered through the re-enforcement of its "constitutional controversies" faculty, by which it rules on conflicts which arise between different levels of the public administration and government, and through the creation of the "constitutionality

¹⁴ (Cardenas Gracia, 1996: 173),

¹⁵ Berreucos, 2002, and 2003; Fix-Fierro and Lopez Ayllon, 2000; Fix-Fierro, 2000; Fix-Fierro, 1999; Domingo, 2000; Arteaga Nava, 1995, Vargas, 1996, amongst others.

action” by which at the behest of a third of the legislatures at federal or state level, the court can rule on the constitutionality of a law. The latter is particularly novel due to the general effect of the court ruling in terms of annulling the law.¹⁶ Greater budgetary autonomy was granted. A judicial council was created which would be in charge of the administration of the judiciary, including court management, appointments, promotion and internal disciplinary action.

The 1996 constitutional reform extended the review powers of the judiciary to electoral matters. It fully incorporated the electoral tribunal into the judicial branch, and extended the Supreme Courts review powers on the some electoral disputes.¹⁷ The number of electoral disputes brought before the Federal Electoral Tribunal attests to the marked level of judicial activism that has taken off in this area. Between 1996 and 2000, 11,906 disputes were brought before the electoral tribunal (Berruecos, 2003:808). Moreover, the Supreme Court has increasingly dealt with cases concerning the constitutionality of electoral laws (Finkel, 2003). Breaking with a long-standing tradition of non-intervention of the courts in electoral disputes, this is an area in which the judicialisation of politics has become most evident. The earlier cases were marked with great controversy, in part due to the novelty of resolving electoral disputes in the courts, but also in part due to the still prevalent suspicion that the Supreme Court would rule according to political criteria. Several issues are worth noting.

Firstly the displacement of the practice of “negotiating” electoral results by on in which disputes can credibly be resolved by legal means. A second development has been the growing acceptance by political opponents that there is much to be gained by resorting to the courts. In view of the number of success stories in electoral disputes in favour of political opposition to the PRI, not only has this granted credibility to the legal process as a “fair” mechanism, but moreover, this in turn has made it more difficult for the ruling party (now the PAN) to disregard judicial rulings on electoral matters. In no small way this has contributed to the image of the Supreme Court and the electoral tribunal acting with political autonomy from the executive (at federal and state levels). Given the history of fraudulent practices that characterised Mexican electoral processes in the past, the judicialisation of politics in this respect has signified an important step towards rule of law construction.

Judicial activism of the Supreme Court of the 1990s has not been limited to electoral disputes. The 1994 reforms unleashed a process of redefinition of the workings of judicial review more broadly throughout the political system.

Through the mechanism of constitutional controversies, in which the Supreme Court has undertaken to rule in polemical disputes between different levels of municipal, state and federal government. Berruecos (2002) lucid study reveals, firstly, that opposition parties, somewhat under the initiative of the PAN, were quick to catch on to the potential benefits of resorting to this legal to challenge PRI governments at the state and federal level on perceived encroachments of jurisdictional boundaries between the different levels of government. In this sense, legal mobilisation was discovered as a useful means of asserting jurisdictional boundaries which in the past had been more nebulous and subject to political negotiation. Secondly, judicial rulings have indicated a willingness by the Supreme Court to act independently of the executive branch. This in turn has re-enforced the perceived usefulness of this legal space by political opponents.

¹⁶ . The impact of this new review power was somewhat diminished by several qualifications: firstly the requirement that rulings require eight out of eleven vote; and secondly by the time limit that was established for members of congress to mobilise and present a constitutional challenge before the court.

¹⁷ See Berruecos (2003) and Finkel (2003) for in-depth analyses of the political impact of the 1996 reform.

Political parties have thus found a Supreme Court which has shown itself to be receptive and active. Thirdly, the dramatic increase in the numbers of constitutional controversies that have been taken up in the 1990s has led to the Supreme Court becoming a key actor in the complex redefinition of federalism that is part of Mexico's political transition towards democratic rule.¹⁸

Judicial activism at the level of the supreme court has extended to areas in which in the past it preferred to keep a low profile. IN addition to dealing with constitutional controversies, and its new powers of constitutional control through the "constitutional action" suit, the high tribunal is ruling audaciously in a wide range of matters, using the traditional review power of the amparo suit. Judicial rulings have included decisions on tax laws, the constitutional definition of trade union membership, the constitutionality of the interest rates on interest rates that banks sought to charge after the 1994 economic crisis, the constitutional jurisdiction of which level of government can decide on implementing summer time, controversial extradition rulings, the constitutionality of the indigenous law, and the FOBAPROA case, to name but a few.¹⁹ The rulings have not been free of controversy, and in many cases criticism. However, what seems to have emerged through the heightened public profile of the Supreme Court, is also some degree of public and political acceptance that it seeks to distance itself from its politically dependent reputation, and to take its role of constitutional guardian seriously.

From the perspective of political parties in Mexico, the Supreme Court has become an institutional actor that needs to be reckoned with. As the Supreme Court acquires greater legitimacy and public credibility, as well as a more prominent public presence, the costs of not complying with its rulings become higher for governing groups.²⁰ In this sense, horizontal accountability mechanisms appear to be kicking in an unprecedented manner in terms of judicial review. The growing credibility of the court makes it harder for reluctant political actors to undermine it, to co-opt it as in the past, or to ignore it. Moreover, once its public and independent presence has been assimilated into the political imagination, then resorting to legal strategies has also become a useful – and normal – tool to be used by diverse political actors for advancing certain political interests.

It is evident that the judicialisation of politics has gone hand in hand also with the transformation of the Supreme Court's own self-perception. Since 1994 the Supreme Court has engaged in a self-conscious effort to carve out for itself a new role in a rapidly changing political environment and to distance itself from its politically subservient past. The change has taken place at two levels. Firstly the court has sought to reaffirm its new sense of political independence. Secondly, it has chosen to promote judicial activism in areas where in the past it sought obscurity from the public limelight. The high tribunal has undergone more than a cosmetic change in seeking to revamp its image.²¹ It has engaged in an enterprising public relations campaign which has included amongst other things, developing a new public face through advertisements, publishing an array of books and pamphlets on its democratic function

¹⁸ Between 1917 and 1994 only 55 constitutional controversies were brought before the court. Between 1994 and 1998, 144 controversies were submitted. Between 1998-2000 140 cases were presented. In 2001 alone, 300 cases were submitted, in connection with the controversial indigenous law. See Berruecos (2002) for a detailed study of this aspect of judicialisation of politics.

¹⁹ See Fix-Fierro and Lopez Ayllon, (2001), Staton, (2002 and 2003), Berruecos, 2002, and 2003, among others.

²⁰ See Staton (2002) for a suggestive analysis of the costs of non-compliance with court rulings in a context of changing political rules.

²¹ Staton (2003)

and its rulings, issuing press releases ruin unprecedented large quantities.²² The danger here is that with this perceived process of judicialisation of politics that this new judicial activism of the high tribunal has unleashed may come the charge of a politicised judiciary, as in the Argentine case. So far it would appear that at the level of the supreme court, despite some notable moments of political tension caused by its rulings, on the whole what seems to be asserting itself is the achievement of an image of independent adjudication.

Thus, institutional change has in the Mexican case in no small way contributed to a process of judicialisation of politics at the level of the relationship between the Supreme Court and the executive branch. The high tribunal has become an effective and credible forum of resolution of a range of political and social conflicts. IN terms of rule of law construction, it has added considerably to the mechanisms of judicial oversight and constitutional checks and balances within the political system. Nonetheless it is important to stress that these changes are most prominent at the level of the Supreme Court. At lower levels of the judicial system and especially in state judiciaries, these changes are not visible in any significant manner – with some notable exceptions. In this respect, the societal mechanisms of exercising legal accountability have not been strengthened in the same degree. This may respond in part to the nature of the transition process which in Mexico has been far more gradual and top-down. But also it is in the Mexican case in part the consequence of the fact that judicial reforms have especially been instituted at the level of the Supreme Court and far less so at the lower levels of the judicial hierarchy, (notwithstanding the impact of the Judicial Council as it gradually comes into its own).

Judicialisation of politics and regime change

This undisputable process of judicialisation of politics, and the manner in which its has developed – with the unprecedented, and somewhat historically unexpected establishment of a relatively politically independent judicial branch - has clearly signified in the Mexican case that the ruling parties (first the PRI and now the PAN) have ultimately accepted delegating political decision making power to the judicial branch, and the consequences of judicial oversight and limited government in ways which were far removed from the old PRI political system. How has effective limited government come into effect amidst a political tradition of impunity and judicial improbity?

The 1994 reforms with which Zedillo inaugurated his presidency unleashed a process of institutional re-accommodation which was re-enforced by changing political circumstances and a new constellation of political forces around more competitive and pluralist party competition. The reforms might not have been prompted by a genuine commitment to strengthening rule of law, but nonetheless signalled a policy response a number of factors in 1994. Firstly, it typified a practice off beginning presidential terms on the promise of combating corruption and the lack of rule of law. In previous

²² See Staton (2003) for an in depth analysis and assessment of the Supreme Court's public relations exercise, and the degree to which it has improved both its public standing, and its political leverage in being able to influence future judicial reform initiatives. Staton makes the important point that despite this invigorated effort by the court to become an political actor not only in judicial matters but also in legislative processes has not really resulted in significantly better prospects of determining the legislative agenda in regard to judicial reform. Nonetheless, these efforts, carried out especially under the Supreme Court presidency of

presidential administrations similar gestures had been made, such as the spectacular arrest of corrupt public officers. Moreover, the political violence and image impunity that had characterised the final months of the Salinas administration provided a form of latent pressure on the new government to make amends in the form of some kind of political or legislative gesture. The far-reaching consequences of the reform were probably not foreseen at the time of their passage, although at some level they may also have reflected Zedillo's personal penchant for pushing towards more substantive political reform, as well as the need to respond to the crisis of political legitimacy that had gripped the country since the Zapatista rebellion, and the political assassinations of 1994.²³

The Zedillo administration was characterised by a deepening of the political trends towards greater political party competition and pluralism. The PRI lost its congressional majority in 1997 and then in 2000, it lost the presidency. The changing political landscape against which the 1994 reforms had been carried out would contribute to changing the incentive structures for both the behaviour of supreme court members, and political actors with regard to the newly empowered judicial branch. Attitudinal changes within the high court, were in some ways prompted not only by the reforms, but by the growing awareness of a changed political climate in which the judiciary's political role was open, along with other institutions, to redefinition as the PRI was losing its hegemonic position.

For contending political parties, the opportunities generated by new judicial review powers in the context of greater political competition increased the incentives to invoke the judiciary as arbiter of political conflicts which in the past had typically been resolved through political negotiation with central government. To some extent this was spearheaded by the PAN at the level of municipal and state government, as constitutional controversies were registered with increasing enthusiasm.²⁴ Clearly sustained recourse to legal strategies requires that they yield positive results. The judicialisation of politics in the 1990s combined not only a greater willingness by emerging political parties to confide in the resolution capabilities of the court in their favour, but also a degree of receptiveness and over-time proven autonomy by the court in their rulings as well as an empowered judicial branch by the 1994 and later 1996 reforms.

That the Supreme Court now regularly rules on a wide range of political, social and economic issues is no longer the exception, but rather the rule.

Changing social context

While the judicialisation of politics has led to an important reconfiguration of relations between powers, and the beginnings of more effective means of horizontal accountability, there has been less of a sense of societal appropriation of legal strategies as a way of advancing rights claims or a broader sense of "societal accountability" based on legal mobilisation – with a few notable examples.²⁵

²³ It is worth noting that the questionable way in which the members of the new supreme court were appointed signalled a last minute attempt to regain control of a judicial reform which risked altering relations between the judicial and executive branch

²⁴ Berruecos (2002).

²⁵ The mobilisation of the Barzon social movement in defence of small scale borrowers unable to pay back interests on interests

Mexican society, in part in reflection of patterns of urbanisation and modernisation, has become more demanding of rule of law and rights protection.²⁶ This is all the more so with the collapse of old structures of state corporatism and a weakened discourse of redistributive inclusion in the revolutionary project. Political and liberalisation promotes a discourse of rights which has become incorporated into the public aspiration towards democratic citizenship. It is, albeit, important to stress that how citizenship and its related rights are defined in Mexican society is far from homogenous, all the more so in view of indigenous demands of recognition of community forms of justice.

The societal discovery of a rights language has in part been prompted also by a growing NGO mobilisation around issues of human rights violations, past and present, with as yet little judicial effect. The establishment of the Comisión Nacional de Derechos Humanos in 1992, with all the caveats regarding its workings especially in the early days, has further advanced a discourse of rights and rule of law against which the judicialisation of politics is taking place. These attitudinal changes are important in signalling a gradual discovery of the law by societal actors as a useful means of advancing rights claims. Overall though, the judicisation of politics has been less the result of legal mobilisation from below, than from political parties making use of the new judicial review powers in the Mexican case. This is in contrast to the Argentine case where the judicialisation of politics to a large extent was driven by the human rights trials in the 1980s. The less evident presence of judicialisation of politics in Mexico as initiated by societal actors in part may reflect the top-down nature of the slow transition process.

One consequence of the transition process towards polyarchy has been the gradual opening of the system to international legal structures and norms. Mexico's increased commitments to international and regional treaties has rendered the state's more liable to international norms and standards on due process and rights. Human rights activism has incorporated to good effect recourse to the Inter-American system of rights protection with some impact on government actions. Not enough, though, to save the life of Digna Ochoa, a human rights activist who had received repeated life threats.

While Mexico's social context has changed considerably, as have societal expectations about democratic rule, public opinion holds the justice system in low esteem. Judicialisation of politics in the upper echelons of the judicial branch has not translated into better justice administration, or a more trustworthy court system. The modernizing process of certain aspects of the judiciary has not repeated itself at all levels of the judicial hierarchy. Human rights reports by such organisations as Amnesty International and Human Rights Watch continue to point to deplorable basic human rights conditions in the criminal justice system.

Conclusion

Fundamental changes at some levels of the judicial function of rights protection and limited government co-exist with deeply embedded illiberal structures of justice administration. Unsurprisingly a complex overlapping of processes of change with continuities from the past that project themselves into the future. Progress in all spheres of justice administration is difficult to achieve, but the sum of changing institutions,

²⁶ Fix-Fierro (2004).

perceptions and opportunities for legal mobilisation in the direction of rights protection should not be underestimated. In some respects, Mexico has been experiencing a important break with the old system of dominant party rule in which there was rule *by* law, but rule of law was far more the exception to than it is today. At the level of horizontal accountability mechanisms, the judicialisation of politics is resulting in improved forms of limited government, which is no mean achievement in the context of Mexico's drawn out transition process.

(PROVISIONAL DRAFT)