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The Changing Political and Constitutional Roles of the Mexican Supreme Court: Jurisprudence on Military Jurisdiction, 1917-2012

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Resumen: En este artículo se propone un marco teórico para estudiar el comportamiento judicial en relación a la cuestión militar, tanto desde una perspectiva legal como política. La investigación centra la atención en la jurisprudencia sobre el alcance de la jurisdicción militar de la Suprema Corte de Justicia de la Nación (SCJN) de México entre los años 1917 y 2012. Este tema es relativamente limitado, pero constituye una ventana privilegiada para observar la naturaleza dual (legal y política) de la SCJN, dado que captura las respuestas legales ofrecidas ante una materia altamente política, así como los modos en los que el diseño constitucional de las instituciones judiciales ha afectado la jurisprudencia de esta Corte. Se argumenta que el papel de la SCJN en relación al tema analizado se divide en tres períodos marcados por importantes cambios en los roles constitucionales y políticos de la justicia, y que éstos conducen a tres respuestas diferentes a la cuestión legal del alcance adecuado de la jurisdicción militar. Basado en el análisis legal y político, se argumenta que de 1917 a 1934 los jueces de la Suprema Corte de Justicia de la Nación jugaron un rol de árbitros; de 1934 a 1994 de partidarios del régimen; y de 1994 a 2012 jugaron en gran medida el rol de intérpretes de la Constitución en la cuestión de la jurisdicción militar.

Palabras clave: teoría constitucional, jueces constitucionales, *judicial politics,* relaciones cívico-militares, Suprema Corte de México.

Abstract: We propose a theoretical framework based on the concept of role that enables analyses of judicial behavior from the legal and political perspectives simultaneously. We focus on the Mexican Supreme Court's jurisprudence on the scope of the military jurisdiction from 1917 to 2012. This topic is a relatively small but privileged window from which to observe the dual legal/political nature of the Supreme Court because it captures the legal responses that it has given on a highly political question, as well as the ways in which the constitutional design of judicial institutions has affected the court's jurisprudence. We argue that our account is divided into three broad periods marked by important changes in the Justices' constitutional and political roles that lead to three different responses to the legal question regarding the proper scope of the military jurisdiction. Based on the legal and political analysis, we argue that from 1917 to 1934 the Supreme Court Justices' played the role of adjudicators; from 1934 to 1994 they played the role of regime supporters; and from 1994 to 2012 they largely played the role of constitutional interpreters in the question of military jurisdiction.

Key words: constitutional theory, constitutional adjudication, judicial politics, civil-military relations, supreme court of México.

I. Introduction

The last decade has seen an important increase in the number of scholars and studies interested in the Mexican Supreme Court. Moreover, in contrast to a not very distant past, these studies come from diverse disciplines in the social sciences and not almost exclusively from the legal scholarship. For starters, there are now a series of richly descriptive empirical studies that unveil important issues and processes such as how the Justices are elected and how they decide cases (Elizondo and Magaloni 2010), how many and what type of cases the Supreme Court decides (Bustillos 2009a),[1] and how many and what type of cases the Supreme Court decides through specific instruments of constitutional review such as the action of constitutionality (López-Ayllón and Valladares 2009), and the constitutional controversy (Hernández 2011).

There are also a series of political science studies aimed at explaining the behavior of the Supreme Court judges that emphasize the effects of different kinds of non-legal constraints on the Justice's decisions. In this vein, for instance, it has been shown that Supreme Court judges began leveling the electoral playing field soon after the 1994 reform (Finkel 2003), that divided government in 1997 increased the likelihood of decisions against the PRI (Ríos-Figueroa 2007), and that party turnover in the executive power in 2000 also increased the likelihood of decisions of unconstitutionality (Sánchez *et al.* 2011). It has also been shown that since 1995 the Supreme Court actively seeks the support of public opinion in order to build its power and authority to increment the likelihood of compliance with its decisions (Staton 2004, 2010). Perhaps the central lesson of this scholarship is that the Supreme Court is a sophisticated (i.e., strategic) political actor that has concentrated its efforts on arbitrating political conflicts downplaying its role as protector of fundamental rights (Ansolabehere 2010; Sánchez *et al.* 2011; Helmke and Rios-Figueroa 2011).

In part as a response to the shortcomings of political science work on the Supreme Court, and in part because of the increasing importance of the Court's jurisprudence for policies and politics, legal scholars have begun to produce systematic jurisprudential lines

[1] The Mexican Supreme Court itself has produced a database of its decisions that is accessible through the internet (@lex); it can be reached at http://www2.scjn.gob.mx/alex/

on specific topics. This novel (for Mexico) work has produced specialized jurisprudential knowledge in areas such as criminal due process rights (Magaloni and Ibarra 2008), the taxing capacity of the state and the just imposition of fiscal burdens (Elizondo and Pérez de Acha 2006), federalism (Caballero 2013), separation of powers (Carbonell and Salazar 2006: ch. 6), the scope and limits of sexual and reproductive freedom (Madrazo and Vela 2011), and other theoretical analysis such as whether the Supreme Court uses a gender perspective when deciding certain civil matters (Pou 2010). In terms of judicial behavior, perhaps the central lesson of these studies is that the Court is building quite slowly, and in disparate and not always consistent ways, its understanding on the basic rules of the political game and on the effective protection of fundamental rights.[2]

In sum, scholarship on the Mexican Supreme Court has made considerable progress in the last two decades.[3] However, while we now have social science and legal analyses on the Court these two perspectives remain isolated. Because the Supreme Court is a key legal and political actor, we believe that it has to be analyzed from these two perspectives simultaneously. Moreover, we believe that each of these perspectives tends to embrace a misleading assumption that needs to be abandoned to account for the evolution and the determinants of judicial behavior in Mexico.

On the one hand, while most social science studies on the Supreme Court focuses on the last two decades it is important to recognize that the Court has always been a key actor in Mexico's political life, and that its role has changed through time and across issues.[4] Moreover, to understand the changing roles of the Court it is crucial to analyze its decisions and legal responses to specific political problems, something that social science studies usually don't do in depth.

[2] An underlying, and not always explicit, explanation for the unsteady and incoherent jurisprudential construction is the traditional legal training, and socially conservative ideology of some of the Justices. Sánchez *et al.* (2011) show some evidence on the existence of these two dimensions, traditional legal training and conservative ideology, based on the frequency of voting coalitions in non-unanimous Supreme Court decisions.

[3] For a review on socio-legal scholarship on Mexico, including the Supreme Court and other topics see Rios-Figueroa (2012).

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

On the other hand, contrary to what an important part of the legal scholarship implies, it is important to recognize that the decisions of the Supreme Court are often influenced by extra-legal factors and that these can be systematically accounted for. In this paper we argue that the Justices are motivated both by their constitutional and by their political roles. Because they are neither the Montesquieuan "mouth of the law", nor purely Maquiavelian power seekers, we need a theoretical framework that enables an account that combines the political and legal perspectives.

We propose a theoretical framework that enables analyses of judicial behavior from these two perspectives simultaneously. This theoretical framework is grounded on the concept of role. Our empirical research has a diachronic structure, which is characteristic of jurisprudential lines (López Medina 2009) and also particularly fruitful to show the interaction of political and legal aspects of judicial behavior. We focus on a single issue: the Supreme Court's jurisprudence on the scope of the military jurisdiction from 1917 to 2012. As we will show, this is a relatively small but privileged window from which to observe the dual legal/political nature of the Supreme Court because it captures the legal responses that it has given on a highly political question, as well as the ways in which the constitutional design of judicial institutions has affected the court's jurisprudence.

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

1) From 1917 to 1934: In this period the Supreme Court Justices' constitutional and political roles were largely those of adjudicators, and therefore, their jurisprudence regarding military jurisdiction basically applied the quite restrictive scope established in Article 13 of the Mexican Constitution.

2) From 1934 to 1994: In this period the Justices' constitutional and political roles were those of regime supporters and their jurisprudence regarding military jurisdiction upheld the wider scope established in the Code of Military Justice over the narrower scope established in constitutional Article 13, protecting in this way the interests of the military and the regime elite.

3) From 1994 to 2012: In this period the constitutional and political roles of the Supreme Court Justices have had important transformations enabling them to function at times as constitutional interpreters, in the question of military jurisdiction. On military jurisdiction, this role crystalized with the jurisprudence starting in 2009.

The reminder of the paper is divided into five parts. In the first, we discuss the concepts of roles (constitutional and political) and we give a brief introduction to the issue of military jurisdiction. The second, third, and fourth parts deal with each one of the three periods we have just described. In particular in each part, we first present the constitutional and political roles of the Supreme Court in order to then discuss its jurisprudence on the scope of the military jurisdiction. The fifth part briefly concludes.

II. Roles and the Military Jurisdiction

This section has two objectives. Frist, we give a theoretical account of the notion of role, and in particular of constitutional and political roles. Then, we give a brief introduction to the military jurisdiction question. In the following section we give empirical content to this theoretical framework. In particular, we present in detail the Supreme Court Justices' role in each of the three periods we have identified, and its correspondent behavior vis-à-vis the military jurisdiction (i.e. its jurisprudence in these cases).

II. 1. "Roles"

The notion of role is fundamental in many disciplines from linguistics to computer science, from cognitive to social sciences. In particular, several notions of "judicial roles" have been used in legal and social science studies on courts. Broadly speaking, we can differentiate two different conceptualizations of "judicial role". The first one, manly used in social science studies, refers to the Court's function or task in a particular political system or in a particular time such as during a democratic transition (e.g. Kapiszewski et al 2013; Ginsburg 2012). Under this notion the collective agent who plays the "role" is the Court. This notion is helpful to describe how the Court as an institutional agent interacts with other institutional agents such as the Executive and the Legislative powers, or with other political actors such as the authoritarian and democratic forces in a critical

juncture. This notion is therefore often used as the dependent variable in studies that aim to explain why a given Court played such and such function in a certain period. Often this conceptualization is loosely used and not explicitly and analytically defined. While helpful it presents some theoretical problems due to the collective agency it presupposes and to the functional ex post accounts that enables.

The second notion of judicial role is refers to the self-conception of individual judges own task, i.e. the beliefs judges have over their function. This notion is often used as an independent variable to give account of judicial decisions (e.g. Hilbink 2007). This conceptualization can of course also be used as the dependent variables in historical studies that ask "why judges conceive their function as they do?", or simply "how specific justices conceive their own task?" (e.g. Pozas-Loyo 2012b). This notion is also helpful but it has problems such as establishing a clear method to capture these often elusive self-conceptions, as well as other difficulties common to ideational accounts in general.

The conceptualization of "role" we use here shares the usefulness of the other two notions but it also evades some of their problems. In particular, it has an explicit and analytically clear definition, the agents who play the roles are individuals, and the full description of roles is provided by norms that are common knowledge in the political context analyzed (Pozas-Loyo 2012). While this paper is merely descriptive, it is important to note that this notion of role can be used as independent variable in explanatory studies. Let us then now present the conceptualization of role we use.

The central characteristic of roles is that agents or objects can play them. "Role" can broadly be defined as an abstract description of an agent's or object's expected function (Zambonelli *et al.* 2003, see Masolo *et al.* 2004) due to its position in a set of relations (see Davis and Barret 2002). The main feature of roles is therefore, that roles are different from their players. The following three features of the relation between roles and their incumbents are important for our account:

a) An entity can play different roles at the same time.

In this way an individual can be a Supreme Court Justice, a member of a hegemonic political party, the father of several children, etc. As we will see, this fact is important to

understand the ways in which roles can motivate individuals, and give shape to their behaviors, since the motivations of a given role, say the constitutional role of Supreme Court Justice, can be either trumped or reinforced by the motivations of another role, say the political role of member of a hegemonic party (see Pozas-Loyo 2012).

b) Roles have a relational nature

Roles are not essential properties; they are relational phenomena. In other words they are phenomena that emerge from relations. Hence, roles imply patterns of relationships (Boella et.al. 2006: 5). The powers of the individuals who play roles are not a property of those individuals, they are powers that derive from the specific set of relations that individual acquires when invested with the corresponding role. For instance, Justice José Ramón Cossío's power to vote on the constitutionality of a law is not a property intrinsic to José Ramón Cossío as an individual, but dependent and posterior to his playing the role of member of the Mexican Supreme Court.

c) Roles do not depend on their specific players

Roles can be played by different entities at the same time (e.g. member of parliament) or consecutively (e.g. president of the US) (see Marsolo et.al. 2004). While they do need a player to be expressed, they do not need any specific player. This characteristic fits nicely with the impersonality of institutions and constitutionalism, and therefore is one of the reasons they are wonderful categories to account for institutions, social, legal and political, and their influence on behavior.

II. 2. Constitutional and political roles: a definition

Political and constitutional roles are part of a subtype of roles called "statuses". A status is a role that carries prohibitions, rights and permissions (Knoke and Kuklinski 1982: 19). The complete description of an individual status function is the set of powers, prohibitions, rights and permissions the specific status function has (Searle 2010: 102). For instance, the set of powers, prohibitions, permissions, and requirements Supreme Court Justices have in Mexico's political system is a complete description of the status of

being a member of the Mexican Supreme Court. This description is given by the deontic powers contained in the Mexican Constitution and in unwritten political norms.

It is important to note that this notion of Supreme Court Justice role or status function should be divided into its constituent parts, that is the constitutional role on the one hand and the political role on the other. This analytic separation makes sense since the deontic powers of these roles can oppose or reinforce each other and therefore separating them would enable us to account for the de jure-de facto interaction and its consequence for constitutional efficacy (see Pozas-Loyo 2012). Note that even if the constitutional and political roles are separated their deontic powers are not likely to be fully consistent since constitutional and political norms are far from being free of contradictions.

We can now provide clear definitions of constitutional and political roles. "A constitutional role is a status function whose complete description can be obtained by the organic provisions of a given codified constitution" (Pozas-Loyo 2012: 42). In the instance that concerns us here, the complete set of powers, requirements, prohibitions, and permissions that the Mexican Constitution grants to the Supreme Court Justices. A political role is the status function whose complete description can be obtained in the unwritten norms of the political system. For instance, as we will discuss in detail later, the expected political and constitutional functions that Supreme Court Justices played after the constitutional amendments of 1928, 1934, and 1944 qua participants of the hegemonic party system during the PRI era, can be broadly characterized as that of regime supporters and its full descriptions were contained in the Constitutional text and in the regime's unwritten norms.

II. 3. Military Jurisdiction

The military jurisdiction, *fuero militar* in Spanish, has traditionally been justified on the grounds that members of the Armed Forces require a separate body of law, prosecutors, and courts that take into account the specifics of their job in order to give institutional stability and legal security to its members. Even though this justification has merit, in places with a history of military interventions, military participation in public security within national borders, and executive dominance, military jurisdiction gave way to

impunity and arbitrariness. In particular, military jurisdiction became a blank check for members of the armed forces who committed crimes that had nothing to do with their specialized mission and a vehicle for repressing political opponents. In those places, members of the armed forces and executives got used to a very wide scope of military jurisdiction and usually resist attempts to reduce it, judicially or otherwise. As we will see, Mexico is not an exemption.

In this paper, we focus on the scope of the military jurisdiction that is essentially an answer to the question: who can be judged in military courts, and under what circumstances?[5] Judicial answers can be placed, in general terms, within seven categories ordered from the widest to the narrowest scope of military jurisdiction: (i) military personnel and civilians, under any circumstance; (ii) military personnel and civilians, only during emergency situations; (iii) only military personnel, under any circumstance; (iv) only military personnel, only when crimes were committed during service; (v) only military personnel, only when strictly military crimes are involved; (vi) not even the military personnel when crimes against humanity and human rights violations are involved; (vii) nobody never, that is the military jurisdiction is abolished.[6]

Article 13 of the Mexican Constitution of 1917 establishes and delimits military jurisdiction. It clearly states that:

Article 13.- […] The military jurisdiction will deal with military crimes and offenses to the military discipline. The military tribunals never, and for no reason, will extend their jurisdiction to persons that do not belong to the armed forces. When a civilian is involved in a military crime or an offense to the military discipline the case will be decided in the correspondent ordinary court (emphasis added).

[5] This is the kind of factual question requiring a legal answer that Diego López Medina (2009: 154) calls a "constitutional scenario".

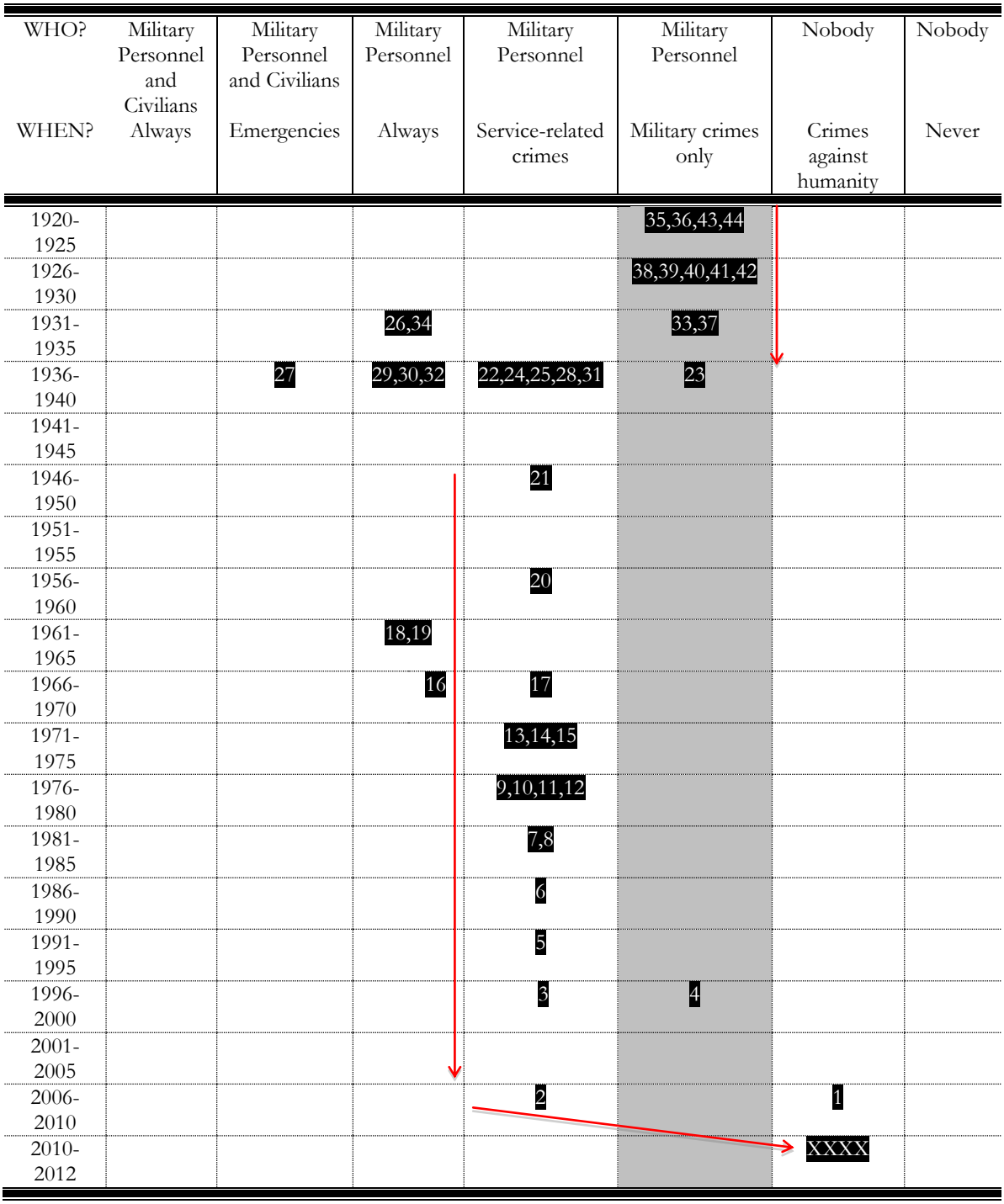
[6] While the extreme situations are theoretical possibilities that don't take place as such in reality, there are actual cases that are closer to those extremes. For instance, Chile under the military regime expanded the scope of the military jurisdiction to include many ordinary crimes (Bovino 1998). On the other end, there are cases such as Costa Rica where the army itself was abolished, and also cases like France or Germany that have disappeared the military jurisdiction within their borders and accepted it only in cases of war abroad or aboard military ships (Pedroza 2011). Notice that in the intermediate categories where only military personnel can appear before military courts the difference is that in (iii) any type of crime, as long as it was committed by a member of the armed forces, is admitted in military courts; in (iv) only service-related crimes are admitted thus limiting not the type of crimes but the circumstance under which they take place; and in (vi) only military crimes such as cowardice, insubordination, or treason are admitted in military courts.

It is apparent that the scope of the military jurisdiction is defined very narrowly in the Constitution. During the debates of the constituent assembly in 1916 some deputies even proposed to eliminate the military jurisdiction altogether (González Oropeza 2006: 190). Article 13 remains the same today as it was in 1917, which makes it one of the few relevant articles that have not been changed in the more than four hundred amendments that the constitution has suffered. However, whereas Article 13 has remained constant Supreme Court jurisprudence on the scope of military jurisdiction has fluctuated in important ways.

Figure 1 shows a summary of the jurisprudential lines on military jurisdiction in Mexico, according to the previous seven responses. There are several pieces of information in Figure 1. First, the shaded cells represent what Article 13 of the Constitution establishes as the proper scope of military jurisdiction.[7] Second, each number represents a jurisprudential thesis, cited with the same number in the references section of this paper, ordered from the most recent (# 1, the "Radilla opinion" not actually a thesis) to the oldest thesis in our sample (# 44). Note that the "XXXs" at the bottom represent the cases on military jurisdiction decided by the Supreme Court in the summer of 2012. Third, the arrows show the general patterns of constitutional jurisprudence: from 1920 to 1934 when the Court held a narrow scope of military jurisdiction quite consistent with Article 13; from 1940 to around 2005 when, the Court established a wider scope of military jurisdiction; and from 2005 to 2012 when apparently the court is moving towards narrowing the scope of military jurisdiction. It is worth noting the period of 1934 to 1940 when there were interesting constitutional debates over the proper scope of military jurisdiction that are reflected in inconsistent jurisprudence.

[7] See the text of Article 13 in pp. 12-13 below. It is important to note here that the scope of military jurisdiction is different but related to another key issue: the degree of autonomy of the military justice vis-á-vis the ordinary jurisdiction. The degree of autonomy refers to the way in which the judicial process takes place within the military jurisdiction, for instance, the duration of proceedings, the composition of the military courts, or the determination of their punishments. Notice that the autonomy and scope of military jurisdiction are related but different questions. For instance, even in cases that clearly fall under the competence of military courts (such as a case of insubordination or desertion) it is important to determine autonomy issues such as whether the presiding judge can be an active member of the army because there may be concerns that his being active, and usually superior in rank, will violate the principle of neutrality of the judge. In this paper, we focus on the question of the scope of military jurisdiction.

Figure 1. *Scope of Military Jurisdiction in Mexico: Who Can Be Judged in Military Courts, and When?*



NOTE: White numbers refer to court cases cited in the references section. White XXXXs refer to the series of cases decided during the summer of 2012. The solid arrows refer to jurisprudential general patterns. The shaded cells indicate the scope of military jurisdiction according to the Article 13 of the Mexican Constitution Article.

In the reminder of the paper, we present a diachronic analysis of the legal development of the scope of military jurisdiction divided into three periods. During each period, we analyze the general political circumstances and how they were reflected in civil-military

relations, and we discuss the constitutional basis of military jurisdiction. We then give account of the Supreme Court's constitutional-political role focusing on the institutional mechanisms for appointment, tenure, removal, and constitutional review powers of the judges and their political deontic powers. We then proceed to analyze the corresponding Supreme Court's jurisprudential line on the scope of military jurisdiction.

III. Supreme Court Justices as Adjudicators: 1917-1934

III. 1. Political context and civil-military relations

After years of armed conflict, the Constitutional Congress that convened in Querétaro produced the Constitution that since February 5, 1917 is Mexico's fundamental law. Even though the enactment of the Constitution signals the victory of one of the three main revolutionary factions with the appointment of Venustiano Carranza as president under the new rules of the game, the political scene until 1920 was marked by the successive elimination of the revolutionary leaders –Zapata, Villa, and Carranza himself who was assassinated on May of that year. A kind of more regular politics after the "armed phase" of the revolution is said to start with the administrations of Generals Álvaro Obregón (December 1, 1920 to December 1, 1924), and Plutarco Elías Calles (1924-1928).

During the 1920s, however, the multiplicity of political forces continuously threatened to derail the already precarious post-revolutionary regime. In this context, the main threat to the Obregón administration came from within his own group, with the rebellion of General De La Huerta that was successfully repressed in 1923. This paved the way for the election of Calles who presided over a period when other rebellions were crushed and the Constitution was amended to allow for the reelection of Obregón in 1928, assassinated that same year. To channel the diversity of political forces, and in the shadow of the assassination of the president elect, General Calles pushed for the creation of an umbrella political organization under the name of National Revolutionary Party (PNR, 1929), which will become the main vehicle for politics and governance for the following seventy years.

To the extent to which the Revolution provided a common ground for both civilian and military elites, it contributed indirectly to shape and delimits the role of the armed forces (Serrano 1995: 428). Indeed, Obregón and Calles initiated a series of reforms intended to reduce the size and budget of the armed forces as well as to make them more professional. Both purged the armed forces of rivals, or perceived rivals, by retiring hundreds of generals, eliminating others, and bribing the rest. They also cut the budget of the armed forces almost in half, but at the same time created the Commission of Military Studies (1926) and the Superior School of War (Diez and Nichols 2006: 6-8).[8]

III. 2. The Justices' Constitutional and Political Roles: Adjudicators

According to the original Constitution of 1917, Supreme Court judges were elected by a simple majority of the total members of both houses of Congress out of a list composed of one candidate submitted by each state legislature (Art. 96), enjoyed life tenure (i.e. "during good behavior") (Art. 94),[9] and could be eventually removed only if a simple majority of the house of deputies initiated an impeachment process (Art. 109). The Supreme Court was at the top of the judicial power, not only in jurisdictional terms through constitutional interpretation and as a court of cassation, but also because it was in charge of the appointment of lower court federal judges (Art. 97).

Regarding the instruments for constitutional review, the Constitution of 1917 included the *amparo* suit, an instrument to protect constitutional rights from government violations with *inter partes* effects, and created the constitutional controversy, an instrument to adjudicate conflicts of constitutional competence between branches and levels of government (Arts. 103, 105-107). In sum, the constitution established an independent Supreme Court with powers to decide over the governmental infringement of individual rights, as well as to become the arbiter of political conflicts.[10] This constitutional role was

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

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

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

not threatened by inconsistent deontic powers coming from their political role since, as we already explained, the political arena was highly fractionalized.

III. 3. Jurisprudence on Military Jurisdiction

When the armed phase of the Mexican Revolution ended in 1920 and some kind of regular politics started to operate under a vigorous multiparty system, cases on military jurisdiction began to arrive at the Mexican Supreme Court. And the Court consistently upheld, in line with Article 13, a narrow scope of military jurisdiction. For instance, in a *tesis de jurisprudencia*[11] of 1924, the Court argued that "[…] it is not enough that a crime has been committed by a member of the armed forces, because if it does not affect military discipline or the armed forces honor, or it was not committed during military service, it cannot fall under the jurisdiction of military tribunals" (# 39).

During those years, the Court also clearly stated that when a civilian is implicated in a crime committed with military officials, "[…] the same civil tribunal should decide the case, so that it is not split in two courts" (# 42), presumably responding to the litigant´s request that the military official should be judged in a military court and the civilian in a civil court (cf. Cossío 2010). The Supreme Court's narrow interpretation of the scope of military jurisdiction, in line with Article 13, was upheld until 1933-1934 (see #33, and #35-44). These decisions were not welcomed by members of the armed forces that, as shown in the jurisprudential theses, required more autonomy from the political process and, in particular, more autonomy for military justice. As we will see, this area of law was not the only one in which the Supreme Court was making decisions that were against the interests of the "revolutionary family".

[11] Jurisprudential theses (*tesis de jurisprudencia*) are authoritative interpretations of the constitution emitted by the Mexican Supreme Court. The theses are extracted from decisions on specific cases, and they constitute the relevant and obligatory interpretative guidelines of the constitution in certain topics. Jurisprudential theses are short, law-like paragraphs or sentences, free from both the facts of the case and the legal reasoning that made the judges reach that interpretation. This weird system of jurisprudence has its roots in Mexico´s hybrid legal system, in place since the XIX Century, which combines features from the anglo saxon common law and the European civil law systems (see López Medina 2009, 2011).

IV. The Supreme Court Justices' as Regime Supporters: 1934-1994

IV. 1. Political context and civil-military relations

From 1928 to 1934 Plutarco Elías Calles became the *Jefe Máximo de la Revolución*, the leader of the newly founded PNR who pulled the political strings behind the presidential seat. Things changed when General Lázaro Cárdenas, selected by Calles as the PNR candidate to the presidency and elected in 1934, maneuvered to expatriate Calles and expel the *callistas* from his government. During the administration of General Lázaro Cárdenas (1934-1940), the party successfully integrated the army, the organized workers, and the organized peasants into its structure and changed its name to *Partido de la Revolución Mexicana* (PRM, 1936). The PRM gradually became the single most important political machine in the country within which most decisions regarding "who gets what, when, and why" were made. A decade later, the party became hegemonic and changed its name to *Partido Revolucionario Institucional* (PRI, 1946), the same year that the first civilian president, Miguel Alemán, was elected.

Cárdenas' incorporation of the organized peasants, workers, and the armed forces within the PRM secured the stability for the nascent regime but, at the same time, reduced the relative power of the army. Despite the resistance of the armed forces (Serrano 1995: 433), Cárdenas went further and introduced other changes to discipline them such as dividing the Ministry of War and Navy into two autonomous defense ministries (the Ministry of Defense, which included the Army and the Air Force, and the Ministry of the Navy), enacting legislation barring serving officers from participating in any political activity, continuing earlier efforts aimed at the professionalization of the forces (Diez and Nichols 2006: 9).[12] In sum, by the end of the Cárdenas administration, "the Mexican armed forces had been weakened and brought under the control of the national party." (Diez and Nichols 2006: 9).

In exchange of loyalty to the PRM, as well as to the Revolution and to the Revolutionary family, the armed forces got an important degree of autonomy in both legal and real terms with regard to internal functioning, training, and promotions, along with a high

[12] At the same time, Cárdenas passed the Law of National Military Service establishing compulsory basic military training for 18-year-old males, which strengthens the armed forces.

level of discretion in making expenditures. The exchange of loyalty for autonomy is, in essence, what scholars refer to as the "civil-military pact" (e.g. Diez and Nichols 2006: 10; Serrano 1995: 433). While the basis of the pact was established under Cárdenas, it was further developed and sustained in successive administrations. A cornerstone of this development was the election of Miguel Alemán (1946-1952) as the first civilian president of the PRI.

Civilian supremacy, however, did not imply that the armed forces lost political influence but rather that it was channeled through more subtle mechanisms, and often behind the scenes (Ronfeldt 1976, cited in Serrano 1995: 435). In fact, while the president of the republic is a civilian since 1946, the president of the PRI was a member of the armed forces until 1964, when Carlos A. Madrazo was elected.[13] Moreover, since 1940 and until 1994 "the presence of at least one military officer serving as a Supreme Court justice was a constant" (Caballero 2010: 157-8).[14] Military officers have also held several seats in Congress since 1940 (Diez 2008).

The armed forces were a key actor in securing internal political order during the "golden years" of the PRI regime. Importantly, the armed forces intervened at the behest of civilian authorities and always on a temporary basis. This was the case in 1958 when they were tasked to suppress a railroad workers' strike, in 1968 when they were asked to intervene against a student movement, and indeed throughout the 1960s when they were ordered to put down guerrilla uprisings, especially in the southern state of Guerrero (Diez and Nichols 2006: 10). As we will detail in the next section, the basic exchange of loyalty for autonomy of the civil-military pact remains until today, but with some important changes produced by the increase in non-traditional tasks performed by the military since the 1970s but especially since the 1980s (Serrano 1995; Diez 2008 and 2012).

[13] The presidents of the PRI in that period were Generals Sánchez Taboada (1946-1952); Gabriel Leyva Velázquez (1952-56); Agustín Olachea (1956-1958); and Alfonso Corona del Rosal (1958-1964). Carlos A. Madrazo (1964-65) was the first civilian president of the PRI.

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

IV. 2. The Justices' Role: Regime Supporters

The constitutional and political roles of the Mexican Supreme Court were drastically changed with the emergence of the hegemonic party and the constitutional and political changes that it brought with it. As we will see, these changes completely transformed the Court's deontic powers.

From the aftermath of the Mexican Revolution, circa 1920, until the consolidation of the hegemonic party regime, three important reforms –that took place in 1928, 1934, and 1944– altered the constitutional role of Mexican Justices. These amendments basically affected the appointment and tenure of Supreme Court judges, and they had as one of their main goals to subordinate the Supreme Court to the dynamics of the one-party system. Moreover, they can be understood as a reaction to independent Supreme Court decisions during the 1920s that, according to the government, were delaying the implementation of the revolutionary program regarding, for instance, the expropriation and re-distribution of land (see Marván 2010: 309-311; James 2006). The Supreme Court decisions on military jurisdiction were also producing reactions from the armed forces, which were also being disciplined and weakened by president Cárdenas.

In 1928 a constitutional amendment augmented the number of Supreme Court judges from eleven to sixteen and modified their method of appointment: instead of exclusive congressional appointment by a two thirds vote, the reform gave the president the right to propose a candidate, subject to senate ratification. In 1934 another amendment again increased the number of judges to twenty one and transformed the original life tenure of Justices into a six-year tenure coincident with the presidential administration. Ten years later, in 1944, life tenure was restored with an interesting caveat: the President of the Republic could initiate proceedings to remove a judge who exhibited "bad behavior", and as we will see, when the tenure was restored the political side of the Justices' role had already changed in a way that guaranteed that they were no longer a threat to the interests of the party.

With the consolidation of the hegemonic party rule, Justices acquired a political role of regime supporters. It was an unwritten norm that Justices shared the interests of the party, and that being a member of the Supreme Court was only one of the many

positions among which the members of the political elite circulated. Moreover, even with the restoration of de jure life tenure, from 1944 to 1994 most presidents appointed more than 50% of justices during their terms and almost 40% of the Justices lasted less than five years, coming and going according to the presidential term (Magaloni 2003: 288-9; see also Caballero 2010). There was therefore an unwritten norm that made the tenure provision ineffective.[15]

Once the Supreme Court and the rest of the judiciary were successfully incorporated into the corporatist logic of the PRI, there was another series of reforms aimed at improving the administrative efficacy of the judiciary, both by concentrating administrative power in the Supreme Court and by expanding the number of lower federal courts, to deal with the ever increasing caseload. Two reforms are noteworthy examples of this trend. First, in 1951 a constitutional amendment approved the appointment of auxiliary judges to the Supreme Court and also created a new layer of circuit courts with the aim of reducing the highest court's caseload regarding *amparo* suits,[16] namely the cases where an individual citizen challenges a state action based on the argument that a public authority had violated her constitutionally protected rights (see Caballero 2010: 149-152). In 1968, again to overcome the backlog, another reform decided to limit the Supreme Court's appellate jurisdiction and to transform the collegial circuit courts, which were doubled in number, into last courts of appeals for most cases (see Caballero 2009: 166-170).

The culmination of the series of reforms aimed at improving the administrative efficacy of the judiciary took place in 1987 when a constitutional amendment transferred to the Supreme Court the power to control the material resources of the judiciary, including not only the budget, but also decisions over the number and jurisdiction of courts. These new capacities added to the Supreme Court's control over the appointment and promotions of lower court judges, a prerogative that the Court had enjoyed since 1917. By the end of the 1980s the Mexican Supreme Court had become a powerful administrative body very much involved with the dynamics of hegemonic party that, nonetheless, still had relatively weak powers of judicial review through the *amparo* suit.

[15] For a more detailed account of the relation between social and political roles and constitutional inefficacy see Pozas-Loyo (2012).

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

The reform of 1987, however, by limiting even further the jurisdiction of the Supreme Court to "important cases" also signals the beginning of a new series of reforms aiming at the empowerment of the Supreme Court as a constitutional tribunal. [17]

IV. 3. Jurisprudence on Military Jurisdiction

The Supreme Court´s jurisprudence on military jurisdiction nicely reflects the transformations in the constitutional and political roles of Mexican Justices, in particular their loss of independence from the government produced by the reform of 1928, and especially that of 1934. The place to start is the code of military justice enacted in 1933 that in its Article 57 not only considerably expands the list of crimes that can be decided in military courts (including, for instance, fraud, robbery, and assault) (González Oropeza 2006), but also states that military courts have jurisdiction on service-related crimes committed by military personnel are to be decided in military courts. The scope of military jurisdiction defined in Art. 57 of the code of military justice is, therefore, manifestly wider than what Art. 13 of the Constitution stipulate. What did the Mexican Supreme Court do? After resisting a bit in erratic jurisprudence from 1934 to 1940, the Court interpreted the Constitution in such a way that made the code constitutional. In other words, the Court adapted the Constitution to the code, instead of the other way around.

The erratic jurisprudence of the period 1934 to 1940 is interesting. On the one hand, the Supreme Court sustained the criteria that when military personnel and civilians are involved in a crime a civilian court should decide the case (#33, 23, 37). But by the end of the period the Court established a striking criterion: when military men and civilians are involved in a crime the former should go to military courts and the latter to civilian courts (# 25), even though this clearly violated basic due process (e.g. of equality and unity of justice) and created significant trouble in practice. The Court went further in expanding the scope of military jurisdiction when it held that civilians could be considered capable of committing military crimes (# 27), and that when civilians and military men are involved in a crime, but the civilians as the victims not as accomplices, the case goes to military courts (#26 and 34). Also, despite the fact that the Supreme

[17] There was another important reform in 1982 that takes away from the President the capacity to initiate a removal procedure of Supreme Court judges because of "bad behavior".

Court admitted the military code's expansion of military jurisdiction to service-related crimes, the Court did established some limits to what it meant to be "in service" excluding passionate crimes (# 22), and those committed by drunk officers in a bar fight (# 24).

To understand the erratic jurisprudence from 1934 to 1940 it is important to remember the political context. As Mónica Serrano puts it, "while it is true that by 1940 the possibility of army officers securing control of the party was averted with the withdrawal of the military sector, it is also clear that between 1920 and 1940s disagreements and differences regarding the selection of party candidates and institutional responsibilities continued to challenge the civil-military pact" (Serrano 1995: 433). The conflicts of competence between civilian and military courts, and the pressures that both sides exerted on the Supreme Court Justices during those years, are nicely reflected in the jurisprudence of the period. At that time, the political and constitutional roles of the Supreme Court Justices were in transition: from being quite independent judges to become functional members of the hegemonic party system since 1940.

From 1940 onwards –essentially until 2009, when an important dissenting opinion by a Supreme Court judge on military jurisdiction was published– the Mexican Supreme Court basically uphold a criteria based on the identity of the person involved in a crime: if the person belongs to the armed forces then the case belongs to military jurisdiction. The "personal-identity" criterion was somewhat attenuated by sensibly keeping out of military courts some conducts and situations that simply cannot be considered part of the military service, such as crimes committed while the officer is on vacation (# 11), or when a military officer killed the referee during a soccer game (# 12). But in some cases, the Mexican Supreme Court upheld the pure "personal-identity" criterion even in cases of rape of a woman (# 13), robbery (#18), or murder of a civilian (Mexico Case # 19). The Court explicitly invoked the "personal-identity" criterion as late as of 1991 (# 5).

V. The Supreme Court Justices as Constitutional Interpreters: 1994-2012

V. 1. Political context and civil-military relations

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

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

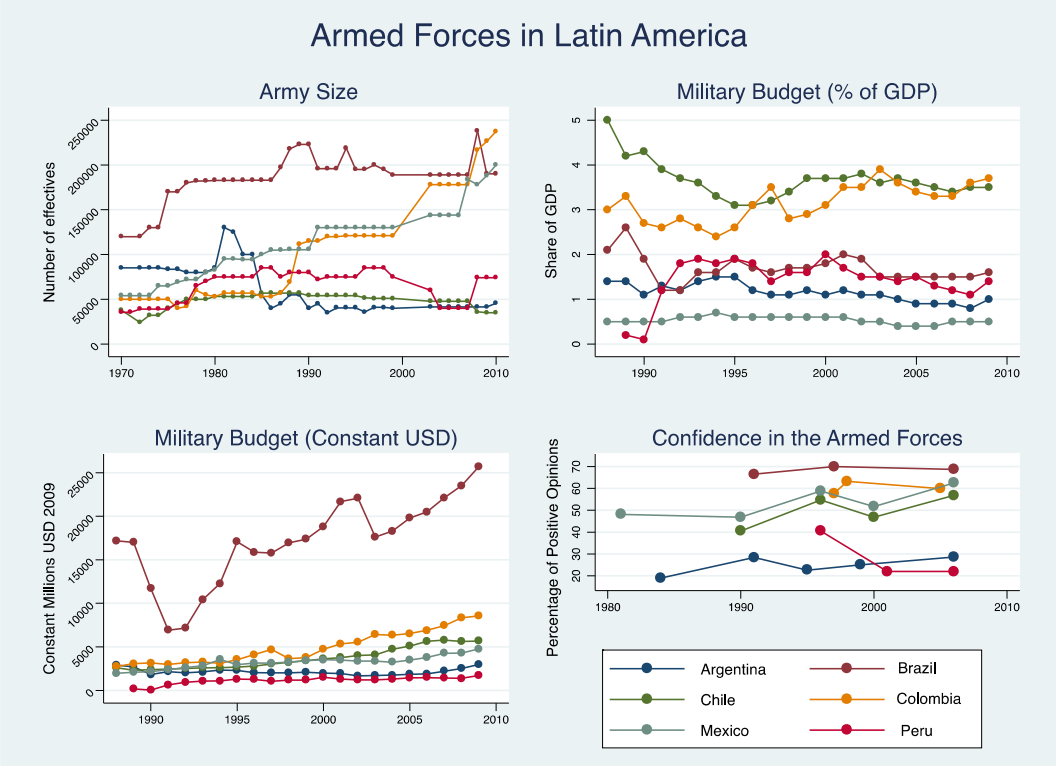
The military's involvement in combatting drug trafficking has proved particularly consequential. This involvement started in the 1970s, but accelerated in the late 1980s under the Salinas administration (1988-1994), after he declared drug trafficking to be an issue of national security, and continued to grow under presidents Zedillo (1994-2000) and Fox (2000-2006). Under the administration of Calderón (2006-2012) it acquired tragic proportions. It is possible to trace a parallel increment in the involvement of the armed forces in policy-making, in particular regarding public security: Since the Zedillo

administration, for example, "the Drug Control Planning Center (CENDRO), the Federal Preventative Police (PFP) and the National Institute to Combat Drugs have been headed by military officers, and the Center for National Security and Intelligence—Mexico's intelligence agency—increasingly has been run by the military" (Diez and Nichols 2006: 33). Perhaps the clearest example of the increased penetration of the armed forces into the civil branches of government was the appointment in 2000 of Brigadier General Rafael Macedo de la Concha to be Attorney General, the first time in Mexico's history that a military officer has ever served in that office.

The increased involvement of the military in the antinarcotics campaign has also had a huge cost in terms of human rights violations especially under the Calderón administration. From 1999 until 2004 the National Human Rights Commission received 1,069 complaints of abuses perpetrated by the armed forces. In 2008 the number of complaints was 1,231 and during the first six months of 2009 the CNHD received more than two thousand complaints against the army (figures cited in Diez 2012). The Interamerican Court of Human Rights has also decided against Mexico in cases where the army is involved in human rights violations, most famously in the Radilla case. In any event, the involvement of the armed forces in the "war against drugs" as well as other non-traditional activities has been accompanied by increments mostly in size, budget, and influence in policy-making, but also by very mild reductions in terms of political autonomy.

Figure 2 displays differences in armed forces´ size, budget (absolute and relative), and legitimacy, in six Latin American countries including Mexico. The growth in size of the Mexican armed forces since 1970 is constant and impressive, comparable only to that of Colombia. Increments in budget for the military in Mexico, however, are modest in absolute terms and practically null in relative terms (as % of GDP), while the same is not true for Colombia or Brazil that exhibit important increments in this regard. Figure 2 also supports the widely held view that the Mexican armed forces enjoy considerable public support: by 2007 less than 30% of people had confidence in the military in Argentina and Peru, but the percentage at least doubles for Brazil, Colombia, Chile, and Mexico.

Figure II. *Armed Forces in Latin America*



Autonomy for the armed forces in Mexico, however, has remained at relatively high levels. For instance, while Argentina and Brazil have civilians exercise some ministerial and budgetary control over the military, this is practically absent in Mexico (Sotomayor 2007). Uruguay has also made considerable progress in this regard (Fitch 1998: 41). In Mexico, the armed forces have continued to operate with significant autonomy and weak legislative oversight, especially in the areas of promotions, a process in which civilians have not inserted themselves, and the allocation of the internal military budget, a process that is still not determined by civilians, despite the prerogatives of the Senate and Deputies in each one of these areas, respectively (Diez 2008, 2012). In this regard, it is noteworthy that a restriction for the autonomy, in particular limiting the scope of military jurisdiction, came from the decisions by the Supreme Court in 2010, and especially those made during the summer of 2012, as we will see now.

v. 2. The Justices' constitutional and political roles: enabling constitutional interpretation

The key constitutional reform in this period took place in 1994 when the Supreme Court was delegated considerable powers of judicial review and its membership was reduced and renewed in order to increase its legitimacy and independence *vis-à-vis* the other branches of government (see, e.g., Fix-Fierro 2003). The 1994 reform substantially increased the judicial review powers of the Mexican Supreme Court by creating instruments of both concrete and abstract control with the possibility of generating *erga omnes* effects and it granted Justices an effective fifteen-year tenure. These changes transformed the constitutional role of Mexican Justices given them new and powerful deontic capacities and, as we will see, gave them the possibility of becoming at times constitutional interpreters.

Moreover, most of the judges proposed in 1995 by the president and confirmed by the Senate were the product of consensus between at least two political parties, the PRI and the right-leaning PAN (*Partido Acción Nacional*) (Magaloni *et al.* 2011). This and the other political transformations of the party system mentioned above transformed the political role of Justices: little by little many of the unwritten political norms of the PRI era became ineffective, and new political norms of a multiparty system have started to emerge.

It is important to mention that access to the two new instruments of constitutional review created or strengthened in 1994 (the action of unconstitutionality and the constitutional controversy, respectively) was allowed only to political authorities such as political parties, the representatives of the three branches of government, or a legislative minority. Ordinary citizens do not have standing to use these instruments, and this is also true for most autonomous organs such as the Federal Electoral Institute (IFE) or the Federal Institute of Transparency and Information (IFAI). Moreover, the other instrument for constitutional review, the *amparo* suit, was not only weak mainly because of its limited, *inter-partes*, effects, but also its de facto inaccessibility for ordinary citizens because throughout the years it had become technically complex and quite expensive.

It is also noteworthy that the reform of 1994 also created a judicial council that was delegated the enormous administrative power formerly enjoyed by the Supreme Court,

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

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

In sum, since 1999 the justice system concentrates a lot of power on the Supreme Court, an institution that dominates the system combining functions of constitutional tribunal, last court of appeals, court of cassation, and administrator. Nowadays the Constitution gives Justices the possibility of becoming true constitutional interpreters: their instruments of judicial review, their relatively high independence, their power to attract cases deemed "transcendent and important", and their capacity to oversee lower courts jurisprudence and to resolve conflicts of interpretation open this door.

However, as we have said, access to constitutional litigation is still very restrictive and Justices are also the head of the administration of material and human resources of the whole judiciary (indirectly, via its influence over the judicial council). These features of the Justices' constitutional role and the difficult and long-lasting process of shaping a new political role for a multiparty system have arguably delayed the efficacy of the role of constitutional interpreter. In the issue of the scope of military jurisdiction, constitutional interpretation began to crystalize in 2009 as we will now see.

V. 3. Jurisprudence on military jurisdiction

The political changes in 1997, when for the first time in decades the PRI lost a majority in the Chamber of Deputies, and 2000 when the PRI lost for the first time in seventy-one years the executive power, have had some effects on Mexican Supreme Court decisions (e.g. Rios-Figueroa 1997; Sánchez *et al.* 2011). However, regarding military jurisdiction the Court mostly kept a deferential silence, with the exception of some mild restrictions on what is considered military crimes for military jurisdiction (Mexico Cases #2, 3). During more than a decade after the reform of 1994, the most important decisions of the Mexican Supreme Court regarding military justice were a handful of jurisprudential theses on the autonomy of the military jurisdiction on procedural matters, and a consequential 1996 decision where the Court upheld the constitutionality of military participation in matters of internal public security (Carbonell 2002; Pedroza 2011).

Things began to change in 2009 when Justice José Ramón Cossío published an important dissenting opinion in a case known as "Reynalda Morales". The case is named after the woman who filed an *amparo* suit against a lower court that granted jurisdiction to a military tribunal over a case related to her husband's death by military officers. The Mexican Supreme Court dismissed the *amparo* arguing that Ms. Morales lacked the "juridical interest" in this case required to file an *amparo* suit. Justice Cossío published a dissenting opinion in which he basically argues for the unconstitutionality of Article 57 of the code of military justice and proposes a radical jurisprudential change on military jurisdiction. The importance of this dissenting opinion lies in the fact of its close resemblance with a recent opinion by the Mexican Supreme Court (# 1), where the scope of military jurisdiction is interpreted in very narrow terms (the so-called "Radilla Opinion"). Interestingly, in Radilla the Mexican Supreme Court merely issued an opinion

agreeing with the holding by the Interamerican Court of Human Rights (ICHR) that pointed to, among other things, the unconstitutionality of Article 57 of the code of military justice.

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

The first interesting point is that, in contrast to holding in Radilla, the Supreme Court did not argue that Bonfilio's relative lacked "juridical interest" and thus did not dismissed the *amparo* (although a couple of Justices argued that it should have been dismissed on those procedural grounds). Moreover, the court granted the *amparo* and decided that Bonfilio's case should be decided by a regular criminal court. But perhaps more importantly, in its decision the court declared unconstitutional parts of Article 57 of the Code of Military Justice, as it had already established in the Radilla opinion but this time with a real case with jurisprudential value. The Bonfilio case, therefore, closes a long history that started during the 1930s when the Supreme Court almost magically interpreted the Constitution in light of the Code of Military Justice.

Interestingly, during April and July of 2011, that is to say in between the Radilla and the Bonfilio cases yet another couple of important constitutional reforms that directly affect the Supreme Court were approved in Mexico. The first reform transforms the human rights regime in the country. First, it expands the catalogue of justiciable rights: the reform introduces in the constitution the term "human rights" instead of "individual guarantees", which is not merely a linguistic change because whereas "individual guarantees" are located in the first 29 articles of the constitution "human rights" can be found anywhere in the constitution or in international treaties.

While the reform of human rights is important in itself, its potential was considerably augmented by the simultaneous reform of the *Amparo* suit: the individual instrument of constitutional complaints that is the main legal tool for rights protection in Mexico. This reform expands the accessibility, scope, and applicability of the *amparo*. Contrary to the old *amparo* that was accessible only for someone with a "juridical interest" in a case (someone directly affected by a public authority), the new *amparo* will be accessible for anyone with a "legitimate interest", and it will be useful for filing so-called *acciones colectivas*, which are similar to class actions. Contrary to the old *amparo* that was only useful for challenging governmental acts allegedly violating one of the "constitutional guarantees" present in the first twenty nine articles of the constitution, the new *amparo* will be useful for challenging government acts that violate any human right recognized by the constitution or by international treaties. Last but not least, contrary to the old *amparo* that produced only *inter partes* effects, decisions in at least some new *amparo* cases will be applicable to greater number of people.

The Supreme Court in the Bonfilio case clearly was influenced by the human rights and the *amparo* reforms. Whether these recent reforms actually produce a broader "rights revolution" in the country remains to be seen. On the one hand, some studies have documented a prudent but consistent change since about 2005 in the jurisprudence of the Mexican Supreme Court favoring the protection of, for instance, the right to privacy, some criminal due process rights, and the right to health (e.g. Madrazo and Vela 2011; Pou 2011; Magaloni and Ibarra 2008). Moreover, at least in theoretical terms the reforms have the potential to produce a surge in rights litigation and a transformation of the judicial landscape: studies on Costa Rica and Colombia (e.g. Wilson and Rodríguez Cordero, 2006) argue that expanding access produces a rights revolution even in countries lacking a strong "support structure" (Epp 1998). Karina Ansolabehere (2009) has found that the Colombian Constitutional Court is much more active protecting rights than the Mexican Supreme Court in great part because of ease of access to justice in the former country and its difficulty in the latter.

However, there are at least two notes for caution. First, the effects of the reforms will depend on how creatively and extensively litigants use the new *amparo* and how expansively judges interpret the "legitimate interest" standing in these suits. Of course, both the litigants' and the judges' decisions will be shaped by the governmental reactions to the potential judicialization of previously "political" issues. The Bonfilio case is a good

start, but the doctrine on standing is still being developed. A second note of caution is that the recent reforms can combine in virtuous or vicious ways. If lawyers use creatively the new *amparo*, the judges welcome the new flow of cases and human rights arguments, and the criminal process reform starts to generate better prosecutorial and police practices then there will be motives to celebrate. But if, for instance, lawyers use creatively the new *amparo*, judges welcome the flow of cases and arguments, but the prosecutorial, police, and the armed forces' practices do not improve then a "juridical perfect storm" may be in the horizon.

VI. Conclusion

We argued that the dual legal/political nature of the Supreme Court should be analyzed, to the extent possible, from the perspective of the legal scholarship and the perspective of the social sciences simultaneously. We proposed a theoretical framework, grounded on the notion of role, which enables this type of accounts. We defined and used the notions of "constitutional role" and of "political role". Our empirical research had a diachronic structure, and we focused on a single issue: the Supreme Court's jurisprudence on the scope of the military jurisdiction from 1917 to 2012. Our analysis identified three periods in which the Justices' political and constitutional roles changed in an important way, as did their response to the military jurisdiction question. We chose this question because it is a relatively small but privileged window from which to observe the dual legal/political nature of the Supreme Court.

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