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THE ROLE OF CONSTITUTIONAL COURTS IN NEW DEMOCRACIES. An empirical analysis of the judicial review in Mexico (1995-2006)

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Abstract

This paper aims to analyze the results from an empirical study about judicial review in Mexico from 1995 to 2006, during the democratization process, in the light of the concept of deliberative democracy. Thus, it is divided into three parts. Part One gives some background about the historical, political and legal context in the Mexican case. Part Two shows the findings of the quantitative analysis about the Constitutional Controversies and Actions of Unconstitutionality settled by the Mexican Supreme Court of Justice for the last period of the authoritarian regime (1995-2000) and the first government of an opposition party (2000-2006). The last part is devoted to the discussion of the findings, as well as the discussion about the role of constitutional courts in new democracies from a deliberative point of view; how constitutional courts can contribute to settle democracy through their –deliberative- judgments.

Key words

Judicial review; Constitutional Courts; New Democracies; Deliberative Democracy; Mexican Supreme Court of Justice; Actions of Unconstitutionality; Constitutional Controversies; Judicialization of Politics.

THE ROLE OF CONSTITUTIONAL COURTS IN NEW DEMOCRACIES. AN EMPIRICAL ANALYSIS OF THE JUDICIAL REVIEW IN MEXICO 1995-2006.

The empirical study about the judicial review in Mexico consists in the analysis of the actions of unconstitutionality and the constitutional controversies[1] settled by the Mexican Supreme Court of Justice (hereafter SCJN, for its acronym in Spanish, or the Court) in order to know: Who goes before the Court? Who are the main petitioners? What kind of cases do they bring before the Court? What has been the answer of the Court to them? And in which cases the Court has declared that a law and/or an act are unconstitutional?

The model developed by Siri Gloppen[2] was a stimulus to design our own model. We use the following variables for the analysis of judicial review in Mexico: *voice*, it refers to who goes before the Court in actions of unconstitutionality and in constitutional controversies. In other words, who is the *voice* of constitutional judicial review in Mexico? *Responsiveness*, it refers to the willingness of the SCJN to listen to the *voices* that go before the Court. In other words, what kind of cases did the Court accept, reject or provide a resolution for, without examining the merits of the case. *Attitude*, it refers to the position that the Court takes regarding other branches. In order words, in which cases the Court decides if a law or an act is constitutional or unconstitutional.

Using these variables we measured the behavior of SCJN during the period 1995-2006 – which consists of two important stages of the most recent political history of Mexico: the last period of the authoritarian regime (1995-2000) and the first government of an

[1] The Mexican Constitution states checks & balances system. This system consists of seven legal mechanisms, five of which are resolved in the judicial field. These legal mechanisms are: *Amparo*, constitutional controversies, actions of unconstitutionality, jurisdictional proceedings to protect the electoral rights of citizens to vote and to be voted, as well as the constitutional review in electoral issues, impeachment proceedings, the proceedings to protect human rights before the Ombudsman, and the exclusive faculty of the Mexican Court to investigate a fact or facts constituting a serious violation to any constitutional right. However this study is delimited to constitutional controversies and actions of unconstitutionality.

[2] According to Siri Gloppen, *voice* concerns to the ability of marginalized groups to voice effectively their claims or have them voiced on their behalf. Court *responsiveness* refers to the willingness of the Courts to respond to the concerns of marginalized groups. *Capability* refers to judges' ability to give legal effect to social (and other) rights in ways that significantly affect the situation of marginalized groups, while *compliance* concerns to the extent to which these judgments are politically authoritative, and whether the political branches comply with them and implement and reflect them in legislation policies. Gloppen Siri, "Courts and Social Transformation: An Analytical Framework" in Roberto Gargarella, Pilar Domingo and Theunis Roux, *Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor?*, Ashgate, Hampshire, 2006, pp. 36-37.

opposition party (2000-2006). We applied these variables to 1,371 cases, 254 of them actions of unconstitutionality and 1,117 of them constitutional controversies. It is important to mention that during the period 1995 to 2006, the SCJN resolved 316 cases regarding actions of unconstitutionality and 1,119 cases of constitutional controversies. The difference between resolved cases and analyzed cases is due to the number of cases in which we had access to the full text of the judgments. The judgments are available (only in Spanish) at the web page of the Court www.scjn.gob.mx through the link "*Consulta de Expedientes*".

For the discussion we found that the concept of deliberative democracy suits best for this paper. According to Michel Walzer,[3] deliberative democracy is a rational process of weighing the available data, considering alternative possibilities, arguing about relevance and worthiness, and then choosing about the best policy or person. Moreover, in terms of Carlos S. Nino,[4] the consensus reached after an exercise of collective discussion must have some reliability as to the knowledge of moral truths. Put plainly, deliberative democracy could be defined as a system in which the opinion of the majority is restricted to the opinion of those who have been involved in a policy.

I. Historical and political context and legal framework

The ambition that led the Mexican Revolution in 1921 was to establish a democratic state. What happened after 1921 was quite the opposite. Mexico fell under the authoritarian regime of the *Partido Revolucionario Institucional* (Revolutionary Institutional Party, hereafter PRI), which held power from 1921 until 2000. The success of the authoritarian regime was the foundation of some institutions that gave legitimacy to authoritarian acts coming from the State. During the PRI regime, the opposition parties, the unions and the economic and social policies were controlled by the PRI. Abroad however, Mexico had the appearance of prosperity, democracy and modernity.[5]

[3] See Bächtinger André and Steiner Jürg, Introduction, *Acta politica*, International Journal of Political Science, Volume 40 Number 2, July 2005, Palgrave Macmillan, p. 153.
[4] Nino, Carlos S., *The Constitution of Deliberative Democracy*, New Haven, Yale University Press, 1996, p. 143.
[5] The Presidents Miguel de la Madrid (1982-1988) and Carlos Salinas de Gortari (1988-1994), changed the economic policy, giving Mexico the appearance of modernity at international level. They started to subscribe international economic agreements and to open the economy to international markets. This meant the establishment of the neoliberal policy. In words of Fudge & Owens, the Neoliberalism favors limitations on the exercise of political power for egalitarian purposes and calls for deregulation,

The authoritarian regime was based on two central institutions: the official party (PRI) and the President. The PRI had control over the electoral system. There were periodic elections, although there was not a real contender, thus guaranteeing the PRI constant victory. The President had control over the whole political system.[6] The Mexican President's extraordinary range of powers included the capacity to reform the Constitution by proposing amendments unchallenged by the Congress; he designated his own successor; he nominated most of the congressional candidates of his party; he removed mayors, governors, and members of the Congress from their posts; he designated members of his cabinet and removed them at will; and he filled the judicial branch with his appointees.[7] Moreover, the executive had a strong role in the judiciary; it was very well known that during the PRI regime, the judicial branch – as well as the legislative branch – was subdued. Thus, the judicial branch was not recognized as a legal arbiter.[8]

The establishment of judicial review in Mexico took place in 1995; as a result, the Mexican Supreme Court of Justice became a Constitutional Court.[9] It is important to highlight that this fact took place in the middle of relevant social, political and economical events. On January 1st, 1994, Mexico signed the North American Free Trade Agreement (NAFTA) alongside USA and Canada. Meanwhile, in the southern province of Chiapas, the *Ejército Zapatista de Liberación Nacional* (EZLN) started a rebellion demanding the rights of indigenous people and against the dictatorship.[10] In March 1994, Luis Donaldo Colosio (PRI Presidential candidate) and Franciso Ruiz Masseiu (PRI General Secretary) were assassinated. And last but not least, the 1994

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privatization, supply-side rather than demand-side macro-economic measures, and a withering away of the welfare state. It is closely associated with national economic agreements, such as free trade agreements (FTAs), which 'serve as a restructuring tool or, put differently, as a conditioning institutional framework that promotes and consolidates neoliberal restructuring". See Judy Fudge and Rosemary Owens, *Precarious Work, Women and the New Economy: The Challenge of Legal Norms*, Oxford, Hart, 2006, p. 5.

[6] See Philip George, *Democracy in Latin America. Surviving Conflict and Crisis?* Polity, UK, 2003, p. 176.

[7] Weldon Jeffry, "The political sources of Presidentialism in Mexico", in *Presidentialism and Democracy in Latin America*, ed. Scott Mainwaring and Matthew Schugart, New York, Cambridge University Press, 1996.

[8] Marván Laborde, 1997, quoted by Phillip George, *op. cit*., p. 180.

[9] It is important to mention that the Court keeps its original name as Mexican Supreme Court of Justice as well as its jurisdiction as Court of Cassation. It means that the Mexican Supreme Court became a Constitutional Court *de facto.* There is not a Constitutional Court but the Mexican Supreme Court of Justice is at the same time a Constitutional Court and a Court of Cassation.

[10] For further information see *Primera Declaratoria de la Selva Lacandona*. August 2010. < http://www.nodo50.org/pchiapas/chiapas/documentos/selva.htm>

economic crisis, widely known as the Mexican peso crisis or 'Tequila Effect', was triggered by an overnight devaluation of the Mexican peso in the early days of Ernesto Zedillo's Presidency in December 1994.

Finally, in July 2000, the opposition party *Partido Acción Nacional*[11] (hereafter PAN) won the elections for the first time in the history of Mexico and is still in power. Since 2000, Mexico is considered to be in the second part of the democratization process.

Mexico's contemporary legal system emerged as a result of the 1910 Revolution and the subsequent promulgation of its Federal Constitution on February 5, 1917. Although historically influenced by the legal systems of Spain, France, and the United States, Mexico has been able to structure and maintain a distinctive legal system that incorporates truly unique Mexican components.

Mexico has adopted a mixed system of judicial review. This means that it is a hybrid between the American and European systems. Table 1 below shows the main characteristics of the judicial review system in Mexico.

Table 1

Table 1	
The model of judicial review in Mexico[12]	
Institutional structure Who has the power to engage in judicial review?	**Centralized system**. Only the Mexican Supreme Court as Constitutional Court; can exercise judicial review; other Courts are typically barred from doing so.
Timing When can judicial review occur?	***A posteriori* or *ex post***. Mexican Supreme Court can only exercise a judicial review after an act has occurred or taken effect under the established legal time limiting.
Type Can judicial review take place in the absence of a real case or controversy?	**Abstract and Concrete Review**. The Mexican Supreme Court can exercise a concrete review as well as a review in the absence of a real case or controversy.
Standing Who can initiate disputes?	The range is broad among governmental actors (including Executive holders and members of the Legislature)

[11] The PAN is one of the three main political parties in Mexico. It was founded in 1939. They consider themselves as a center-right, Christian democratic political party.

[12] We took *Table 1. Key Characteristics of Court Systems* as a model, from Epstein, Knight & Shvestova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, Law & Society Review, Volume 35, Number 1, 2001, p. 121.

The constitutional reform of December 31, 1994[13] had the intention to strengthen the SCJN as Constitutional Court and introduce judicial review. From this reform on, Mexico has had a centralized judicial review system. This means that only the SCJN can exercise a judicial review; other Courts are typically barred from doing so. The main instruments for judicial review are constitutional controversies and actions of unconstitutionality. Table 2 describes the main characteristics of these two legal instruments.

Table 2
Actions of Unconstitutionality and Constitutional Controversies. Characteristics

	Actions of Unconstitutionality	Constitutional Controversies
Definition	They are trials before the SCJN, by which one can submit a contradiction between a general legal provision (law, decree, regulation or international treaty) on the one hand, and the Constitution on the other hand, with the objective to invalidate the law or the treaty if it is unconstitutional. It is an abstract revision of the Constitution without a concrete case.	They are trials before the SCJN, in the case of disputes arising between branches (Executive, Legislative or Judicial) or levels of government (Federal, Local, Municipal and Federal District) as well as in the case that an authority encroaches on the sovereignty or on the jurisdiction of another authority. It is necessary the existence of a concrete case.
Parties		
Petitioner	A minority in parliament, the General Attorney or a political party.	The Federation, the States, the Municipalities, the Federal District and/or their branches –Executive, Legislative or Judicial- through a public servant.
Respondent	The legislative or executive authority that enacted the general legal provision or treaty.	The authority that executed or enacted the act and/or the law.
General Attorney	The General Attorney always acts as a social representative, except when acting as the plaintiff in actions of unconstitutionality.	
Effects of the judgments	The resolution issued by the SCJN declaring null and void a general legal provision, shall have general binding effects, when approved by the vote of a majority of at least eight Justices.	Only in some cases the resolution issued by the SCJN declaring null and void a general legal provision, shall have general binding effects, when approved by the vote of a majority or at least eight Justices. General binding effects occur in disputes between: Federation vs. States or Municipalities, States vs. Municipalities, Federal Executive Branch vs. Congress, Branches of the same State/Federal District regarding the laws executed or enacted by them.

SOURCE: Own elaboration according to Mexican Constitution and Act Regulating Sections I and II of Article 105 of the Mexican Constitution. Year 2009.

[13] Ernesto Zedillo (the last PRI President 1994-2000) sent a law bill related to judicial review to the Congress as the first act of his government. The Congress approved it immediately. Thus, the constitutional reform of December 31th 1994 came into force the day after its publication in the Official Journal of the Federation (Mexico).

II. The status of judicial review in Mexico: a comparative analysis of the variables *voice, responsiveness* and *attitude* during the period of transition: 1995 to 2006.

The objective of this section is to compare and to contrast the findings among the variables *voice*, *responsiveness* and *attitude* applied to the collected data regarding to the last period of PRI's regime (1995-2000) with the first government of the PAN (2001-2006). Tables 3 and 4 summarize the findings of the comparative analysis of the variables in both periods. Table 3 shows the findings in actions of unconstitutionality, while Table 4 shows them in constitutional controversies.

Table 3
Actions of Unconstitutionality
Comparative analysis of the variables *voice, responsiveness* and *attitude*

Variables	PRI Period	PAN Period
Voice	- Political parties - Absence of the General Attorney. - Low representation of PRI.	- Political parties - The General Attorney became the second political actor to go before the Court.
Responsiveness	Unconstitutional resolutions among the political parties and Local Congresses are proportional.	- Considerable amount of resolutions in favor of the General Attorney in which the Court has issued the general legal provision unconstitutional. - It is possible to identify a new dynamic inside the Plenary in the Court since it has had new appointments. It means the increase of cases in which the Court analyzes the merits of the case.
	It seems a fair period for the political parties regarding the resolutions of the Court.	
Attitude	Both periods are characterized by judicial policy of declaring unconstitutional laws from the local level rather than the laws from the Federal level.	

SOURCE: Own elaboration with data from the Mexican Court judgments. Year 2009.

During the period 1995 to 2006, 42% of the actions of unconstitutionality were brought before the Court by the main opposition parties, PAN and *Partido de la Revolución Democrática* (hereafter PRD). PAN and PRD represent the second and third political force in Mexico. They are the only two parties that have achieved reaching power in some states and in some Municipalities.

We also found that the local legislative minorities are the third petitioner in actions of unconstitutionality during the period 1995 to 2006. However four states (Yucatán, Aguascalientes, Chihuahua and Nuevo León) concentrate 34% of the cases brought before the Court, while the other 66% of the cases is divided by 28 states (with percentages between 2% and 5%). It is important to say that these states were governed by PRI until 1997 when PAN started to govern. However, PRI regained the power in the mean time. These are samples of the political and institutional battle for power among the parties at the judicial field.

Table 4
Constitutional Controversies
Comparative analysis of the variables *voice, responsiveness* and *attitude*

Variables	PRI Period	PAN Period
Voice	The Municipalities and the States are the main petitioners. Oaxaca is the State with the largest number of Municipalities that go before the Court.	- The Federation started to appear before the Court as well as Federal District. Moreover, some other actors without legitimacy started to appear before the Court, seeking for a 'fair arbitrator'. - Increase of the number of disputes brought before the Court. - In 2001 the Municipalities of the whole country brought before the Court 330 constitutional controversies against the constitutional reform in indigenous issues.[14]
Responsiveness	In both periods it is possible to observe that the Court did not analyze the merits of the case when the Municipality was the petitioner. It is important to highlight that, during the PRI period the Court ceased the proceedings of the case while, during the PAN period the Court declared the case inadmissible.	
Attitude	- In the case of these 330 constitutional controversies against the indigenous reform, the Court held the inadmissibility by virtue that the SCJN does not have jurisdiction for revising the acts of the Constituent Assembly. -In both periods the Court analyzed the merits of the case when the Federation is the petitioner. However, when a law and/or an act from the Federal level are at stake, the Court held the inadmissibility of these cases, as in the case of indigenous reform controversies. - Both periods are characterized by judicial policy of declaring laws unconstitutional from the Local level rather than laws from the Federal level.	

SOURCE: Own elaboration with data from the Mexican Court judgments. Year 2009.

[14] Since 1992 the Mexican Constitution recognizes that the Mexican nation has a pluralistic composition based originally on its indigenous communities. However, these rights were never enforced at the juridical level. It means that the Regulating Act never was enacted. This attitude from the government through the indigenous communities rights triggered the emergence of *Ejército Zapatista de Liberación Nacional* (EZLN) in Chiapas on December 1st; 1994.

As we can observe that in both periods there are some similarities among the variables in constitutional controversies as well as in actions of unconstitutionality. However, we found some facts that draw attention. In the case of actions of unconstitutionality, the Court analyzed the merits of the case in 67% of the cases and declared local laws as well as electoral local laws unconstitutional. While in the case of constitutional controversies, the Court avoided analyzing the merits of the case in 65% of the cases and declared laws and/or acts from the local level as unconstitutional. Tables 5 and 6 show these findings.

Table 5
Responsiveness of the Court. Actions of Unconstitutionality

Petitioner	**Cases**	**Analyzing the merits of the case**	**%**	**Not analyzing the merits of the case**	**%**
Political Parties	106	74	70	32	30
General Attorney	64	45	70	19	30
Local legislative minorities	62	40	65	22	35
Federal District	11	9	82	2	18
Deputies	8	1	13	7	88
Senators	2	1	50	1	50
Others	1	1	100		0
TOTAL	**254**	**171**	**67%**	**83**	**33%**

SOURCE: Own elaboration with data from the Mexican Court judgments. Year 2009.

Table 6
Responsiveness of the Court. Constitutional Controversies

Petitioner	Cases	Analyzing the merits of the case	%	Not analyzing the merits of the case	%	Voluntary dismissal by petitioner	%	No data	%
States	138	61	44	72	52	3	2	2	1
Federation	27	21	78	6	22		0		0
Municipalities	896	268	30	604	67	20	2	4	0
Federal District	30	8	27	22	73		0		0
Without data	3		0	3	100		0	1	33
Others	23		0	23	100		0		0
TOTAL	**1117**	**358**	**32%**	**730**	**65%**	**23**	**2%**	**7**	**1%**

SOURCE: Own elaboration with data from the Mexican Court judgments. Year 2009.

Moreover it is important to highlight the fact that citizens are not able to go before the Court through actions of unconstitutionality. There is no possibility for citizens to appear themselves before the Court if they consider that a law from the executive or legislative branches could be unconstitutional.

Finally, we found that during the first 11 years of the SCJN as a Constitutional Court, 1.6%[15] of the cases were declared unconstitutional.

III. Discussion: The findings in the Mexican case and the debate about the role of Constitutional Courts in new democracies from a deliberative point of view.

About the findings in the Mexican case, it is possible to assert that the behavior of the Court could be interpreted as some kind of deference regarding the Executive Branch as well as some kind of caution to declare as unconstitutional a federal law that come from the Congress.

One of the reasons that could explain this behavior of the Court is the institutional inertia imposed by the authoritarian regime. It is important to take into account that in 1997, the PRI, for the second time, lost the majority in the House of Deputies. Thus, since 1997 a new dynamic in the Congress exists. Bills are presented from a wide range of political affiliations.[16] This pluralism inside the Congress has led to the appearance of other political actors before the Court. As a result of this dynamic, the Court is deciding issues that were formerly decided in the Executive or Legislative fields. Thus, the Mexican Supreme Court has become another political actor. Through its judgments the Court has consequently turned it into a policy-maker.

Although, there is an institutional arbiter for the disputes, it is possible to perceive some remains from the authoritarian regime in which the inertia to obey, and not to question the decisions of the President were usual. We observe this in the fact that the Court during its first 11 years as Constitutional Court declared unconstitutional 1.6% of the (analyzed) cases as well as in the fact that the Court avoided the analysis of the merits of the case when federal laws and/or acts are involved.

[15] This percentage is the result of the next arithmetical addition: 6 cases out of 254 actions of unconstitutionality plus 16 out of 1,117 constitutional controversies; makes 22 cases divided into 1,371 (which is the total of revised cases).

[16] This information is available at the web page of the Mexican Congress. August 2010. <http://gaceta.diputados.gob.mx/Gaceta/Iniciativas/57/gp57_a1primero.html>

Other reason could be legal technicalities. According to Epstein *et al.*,[17] the role of constitutional courts in their systems could be characterized as constrained or unconstrained actors. If we contrast this opinion with the findings of this study it is possible to assert that the Mexican Supreme Court has been acting as a constrained constitutional court.

This qualification could be found in the legal framework of the judicial review system. We found some technicalities that make it difficult to declare a general legal provision as unconstitutional: a) regarding the actions of unconstitutionality: Article 105, of the Mexican Constitution states that the Court can only declare unconstitutionality if the resolution is approved by a majority of at least eight Justices, b) regarding the constitutional controversies: Article 105, section I of the Mexican Constitution only restricts the declaration of unconstitutionality to disputes between the Federation *vs.* States or Municipalities, States *vs.* Municipalities, Federal Executive Branch *vs.* Congress or two Branches of the same State/Federal District regarding the laws executed or enacted by them. This kind of resolution has to be approved by a majority of at least eight Justices.

According to Beatriz Magaloni,[18] the constitutional reform of 1994 – designed by the PRI – established this restricted legal framework in order to protect future PRI interests in case it lost power after the reform. Thus, they designed this model of Constitutional Court in order to maintain control over governmental policies.

Other reason could be that the Court has been focused in the establishment and maintenance of its autonomy and its independence. At the same time, the Court has been concerned about keeping its institutional stability. Clearly, this has meant staying on the sidelines regarding the enforcement of human and social-economic rights of the petitioners or, in terms of this work, to not have the *disposition* to listen to the *voices*.

In the words of Epstein, *et al.*,[19] in the initial stages of the transition to a constitutional

[17] Epstein Lee, *et al*., *op. cit*., p. 123;
[18] Magaloni Beatriz, "Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico" in Ginsburg Tom y Tamir Moustafa (editors), *Rule by Law: The politics of Courts in Authoritarian Regimes*, Cambridge, USA, 2008, pp. 199-200.
[19] Epstein et. al., *op. cit*., pp. 155-156.

democracy if the legitimacy of the constitutional court is low, as it will commonly be the case, the Court is caught in an uncomfortable dilemma. At a time when the emerging democracy is most in need of a way to resolve basic constitutional questions – such as issues about the distribution of authority among the branches of government – the constitutional court is least able to do so effectively.

Let the findings in the Mexican case serve as example to set the discussion about the proper role of constitutional courts in new democracies. How constitutional courts could help to settle deliberative democracy? Democracy consolidation depends on many variables where each of them has a greater impact compared with the judicial review; however, it is necessary not to overestimate the constitutional court responsibility as Dieter Nohlen[20] has pointed out.

We consider that if constitutional courts assume a deliberative attitude through its judgments they could start to change the policy-making dynamics. The concept of deliberative democracy is wide enough to be expanded towards the tasks of constitutional courts. This implies a deliberative understanding of democracy and consequently a shift of its judgments into more deliberative documents.

Roberto Gargarella[21] points out that, even if *prima facie* the dialogic model could be seen as something far away from the law field, it is true that some of the most renowned contemporary Courts have been adopting the deliberative approach in their judgments, explicitly or implicitly. Such is the case of constitutional courts in India, South Africa, Hungary and Colombia. Scott and Macklem,[22] hold that the Constitutional Court in India is stressing the cooperative dialogue between the Judicial branch, on the one hand, and the Executive and Legislative branches on the other hand. This is an example of a broad interpretation of the traditional Separation of Powers principle. How the Constitutional Court in India has been stressing the dialogue? Through setting directives for the Executive branch as well as through suggesting flexible guidelines that are promoting dialogue between the Court and political actors.

[20] Nohlen Dieter, "Jurisdicción Constitucional y Consolidación de la Democracia", in Suprema Corte de Justicia de la Nación, *Tribunales Constitucionales y Democracia*, México, 2008, p. 30.
[21] See Gargarella Roberto, "Un papel renovado para la Corte Suprema. Democracia e interpretación judicial de la Constitución" in *Tribunales Constitucionales y Democracia*, Suprema Corte de Justicia de la Nación, México, p. 424.
[22] Ibid.

The case of the Colombian Court is also interesting. According to Scott and Macklem, the Colombian Constitutional Court has been promoting the creation of new mechanisms for dialogue; such as a round table with the possibility for the convergence of different actors like the government, businessmen, as well as group of citizens whose interests have been affected. Furthermore, in politically relevant cases the Court has settled some guidelines resolutions in order to favor the dialogue among political actors. In the words of Uprimny Yepes,[23] the Colombian Court has gained respect and prestige from social groups that are very critical about the government. This has been possible because access to justice is simple and inexpensive. Thus, some social groups have opted to go before the Court rather than turn to mass mobilization, avoiding the risks that it implies.

However, it is important to take into account the other side of the coin. After reviewing some literature about the constitutional courts it is possible to identify how the heart of the theoretical problem of the judicial review, known as counter-majoritarian difficulty, has been the focus of many theoretical and empirical investigations. The concern with respect to the phenomenon of judges making public policies that previously had been or that, in the opinion of most, ought to be made by legislative and executive officials appears to be on the increase.[24]

Thus the judicialization of politics is considered, for better or for worse, as one of the most significant trends in the late twentieth and early twenty-first- century government. Moreover, it is possible to observe this tendency among international and supranational courts to act as constitutional courts.[25]

According to Hirschl,[26] over the last few decades the world has witnessed a profound transfer of power from representative institutions to judiciaries, whether domestic or

[23] See Uprimny Yepes Rodrigo, *The Judicial Protection of Social Rights by the Colombian Constitutional Court: Cases and Debates*, August 2010, http://dejusticia.org/interna.php?id_tipo_publicacion=2&id_publicacion=361

[24] Tate C. Neal and Vallinder Torbjörn (editors), *The Global Expansion of Judicial Power*, New York University Press, New York, 1995, p. 2.

[25] Tate C. Neal and Vallinder Torbjörn, *op. cit.*, p. 5; Adams, Maurice and van der Schyff, Gerhard, "Political Theory Put to the Test: Comparative Law and the Origins of Judicial Constitutional Review," *Global Juris*, Vol. 10: ISS. 2 (Topics), Article 8, 2010, p. 2 and Hirschl Ran, "The judicialization of politics" in *The Oxford Handbook of Law and Politics*, Edited by Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira, Oxford University Press, Oxford, 2008, pp. 119-138.

[26] Hirschl Ran, "The judicialization of politics" *op. cit.*, p. 138.

supranational. He asserts that the judicialization of politics has extended well beyond the now "standard" judicialization of policy-making to encompass questions of pure politics –electoral processes and its outcomes, restorative justice, regime legitimacy, executive prerogatives, collective identity, and nation-building. These developments reflect the demise of the "political question" doctrine, and mark a transition to what he has termed "juristocracy".

Adams & Van der Schyff [27] explain that when essential societal issues cannot be resolved or addressed via the regular political channels, because of a structural political deadlock in parliament (or executive), other bodies (e.g. courts) will be empowered to cut the knots. However, to extend the competences (powers) of these bodies (constitutional courts) is then the direct result of a weak or chronically ineffectual political system.

In the same way Marian Ahumada[28] considers that constitutional democracy by the Judiciary has been seen as a pragmatic solution in order to provide legitimacy into a non-perfect democratic government, which at the end is a limited democracy. The risk to opt for a democracy led by the Judiciary is that at the end it could drive towards the distrust of the democracy.

Being this the state of the art, we coincide with Michael Züm and Edgar Grande[29] who consider that the broader challenge for the theory and practice of democracy is to redesign the mechanisms for the decision making process. This redesign has to combine majoritarian procedures as well as structures for the continuous collective negotiation between citizens and interest groups. These authors are convinced that part of the problem is the idealization of the majoritarian models of representative Democracy. They suggest adapting the practice of representation from a consociational point of view to build a set of institutional and efficient checks and balances.

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[27] Adams & Van der Schyff, "Political Theory Put to the Test: Comparative Law and the Origins of Judicial Constitutional Review" *op. cit.*, p. 30.

[28] Ahumada Marian, "Tribunales Constitucionales y Democracias Desconfiadas" en *Confianza y Derecho en América Latina*, Marcelo Bergman y Carlos Rosenkrantz (coordinadores), Fondo de Cultura Económica/CIDE, México, 2009, p. 252.

[29] See, Pauly Louis W., *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*, in a paper prepared for the Carnegie Council on Ethics and International Affairs, New York, February, 2000, p. 10-13.

In the Mexican case it is a very complex task by virtue of the cultural and ideological authoritarian background. For instance, nowadays bargaining among the political parties has a negative connotation among Mexicans. The survey about the Concord and the Discord among the Mexicans -*Encuesta sobre la Discordia y la Concordia Entre los Mexicanos*-[30] carried out in 2009, reveals that 1 of 3 Mexicans think a politician who seeks agreement among the political parties is one who is lacking in leadership or one who has betrayed his principles.

Nevertheless, we want to stress that from a deliberative perspective, constitutional courts could contribute to generate new dynamics in the social and political order through deliberative judgments. According to Francisco Ibarra Palafox,[31] the deliberative nature of the judgments lies in the chance that their arguments and legal reasoning could be located in spaces of the public discussion. Furthermore, in the opportunity to create awareness among the citizens, and at the same time inform them about civic and democratic values that let them participate in the process of consolidation to democracy.

A deliberative judgment has to be able to defend democratic principles and promote dialogue among political actors. Such judgments could be seen as instruments to promote dialogue as well as potentially pluralist and inclusive documents that could have a high degree of political civic education for the population in general.

Conclusion

The Mexican case has served to discuss about the role of constitutional courts in new democracies. Instead of looking at the risks, I want to focus on the opportunities. From my point of view, the Courts can be seen as potential agents of dialogue. They could promote a deliberative understanding of democracy in the democratization process, through their *deliberative judgments*.

[30] See *Nexos*, Febrero, México, 2009, p. 32.
[31] Ibarra Palafox, Francisco, "La Suprema Corte de Justicia y la Consolidación de la Democracia en México", in Ferrer Mac-Gregor, Eduardo and Zaldívar Lelo de Larrea, Arturo (editors), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho*, T. II, Tribunales Constitucionales y Democracia, UNAM-IIJ, México, 2008, pp. 776, 777, 781 to 796.

If the Courts assume their role as guardians of the constitution and the (deliberative) democracy, one can expect that they stop to substitute the legislature's will with the Courts' will. It means that a deliberative understanding of democracy from the Courts could (1) promote the dialogue among the different actors involved in the political decision-making process and, (2) increase the legitimacy of the judicial power.

As I argued above, some courts have changed the way in which they settle their judgments. They are elaborating a new vision, a more dialogic one: stating some directives to the Executive branch as well as some flexible measures that let the authorities make their decisions themselves. Therefore, we propose (1) to analyze the relationship between constitutional courts and democracy from a deliberative perspective and, (2) to identify a model that let us test the deliberative approach in the field.

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