2013

Effectiveness and Representativeness of Justice System Institutions in Mexico’s Transition to Democracy

Julio Ríos-Figueroa

Available at: https://works.bepress.com/julio_rios/12/
Contents

List of Figures and Tables ix
Acknowledgments xi
List of Contributors xiii

PART I
Introduction

Introduction: The Representativeness–Effectiveness Dilemma 3
MOIRA B. MACKINNON AND LUDOVICO FEOLI

PART II
Congress

1 Reflections on the Effectiveness and Representativeness of the Chilean Congress 21
EDUARDO ALEMÁN

2 Argentina’s Unrepresentative and Unaccountable Congress under the Kirchners 40
MARK B. JONES AND JUAN PABLO MICOZZI

3 Effectiveness and Representation: Effects on Federal Deputies’ Career Choice and Reelection 75
LUCIO RENNO AND CARLOS PEREIRA

4 Representation and Decision-Making in the Mexican Congress 91
MARÍA AMPARO CASAR

5 Congress in Action: Representativeness and Effectiveness in Chile and Argentina (1900–1930) 111
MOIRA B. MACKINNON
Figures and Tables

Figures
1.1 The effectiveness of congress as a lawmaking institution, 2002–2008 23
1.2 The performance of members of congress: (a) Percentage responding “poorly” or “very poorly.” (b) Percentage responding “well” and “very well” minus “poorly” and “very poorly.” 25
1.3 Tenure in the Chilean Chamber of Deputies 28
1.4 Self-identification among Chilean Voters 38
4.1 Chamber of Deputies (1946–1976) president’s party versus opposition 93
4.2 Chamber of Deputies (1976–2009) president’s party versus opposition 93
4.3 Senate 1970–2006 president’s party versus opposition 94
4.4 Distribution of committee chairman’s Ordinary Commissions Chamber of Deputies 95
4.5 Bill initiators Chamber of Deputies (1982–2009) 98
4.6 All-party coalitions (floor voting), Chamber of Deputies (1997–2009) 100
4.7 Three major parties’ coalitions (floor voting) executive versus all others Chamber of Deputies (1997–2009) 101
4.8 Constitutional bills 1982–1997 versus minority governments 101
4.9 Perceptions regarding the representativeness of legislators 108

Tables
1.1 Time in Session in Seven Latin American Countries 27
1.2 Electoral Rules and Representativeness 35
Acknowledgments

This volume emerged from a symposium held at the Center for Inter-American Policy and Research (CIPR), Tulane University, on March 24, 2011, organized by Moira B. MacKinnon. Our scholarly interests are very much invested in the process of democratization in Latin America and the symposium was an invitation to examine how the variables of representativeness and effectiveness—two central dimensions of democracy and democratization—interact within and between specific spheres of democratic regimes.

We would like to thank the Center for Inter-American Policy and Research (CIPR) at Tulane University for providing funding for the meeting, and the Stone Center for Latin American Studies at Tulane University for providing a venue and general support, particularly through its director, Thomas F. Reese, and his staff. We would also like to thank CIPR staff members Angela Reed, for logistical support during the conference, and Kelly Jones, for her help with preparing the manuscript for publication.

We are also grateful to the two anonymous reviewers for their comments. Finally, we thank our authors, political scientists, legal scholars and sociologists, who agreed to address the questions we proposed on representativeness and effectiveness and apply them to their countries of study.
6 Effectiveness and Accessibility of Justice System Institutions in Mexico’s Transition to Democracy

Julio Rios-Figueroa

The hegemonic party regime that characterized Mexico for most of the 20th century led to a protracted transition to democracy driven by a series of political reforms that combined with a series of socioeconomic changes. The gradual melting down of an authoritarian regime has shaped the institutional architecture of the justice system, which after more than a decade of democratic governance still exhibits traits from the authoritarian past. In particular, the Mexican justice system has a pyramidal architecture in which the president of the Republic and the Supreme Court exert considerable influence over the functioning of the whole justice system: the former through its control of the Public Prosecutor’s Office (Ministerio Público) and the latter through its control of the administration of the judiciary and its concentrated power of constitutional review.

The argument of this chapter is that the institutional architecture of the Mexican justice system is related to low levels of access to justice for Mexican citizens and to mixed results in terms of effectiveness. In particular, the Public Prosecutor’s Office has not been effective in prosecuting crimes and promoting respect for the law. And while the Supreme Court has been an effective arbiter of political disputes, its role in the protection of individual rights has been much less successful. A new set of recent and ongoing reforms to the justice system, however, may impact accessibility to justice and effectiveness in the protection of rights in unprecedented ways.

The chapter is divided into three parts. In the first, I briefly discuss the concepts of representativeness and effectiveness as applied to justice system institutions. In the second, I show how the series of successive reforms (or lack thereof) to two key justice system institutions in Mexico (the Supreme Court and the Public Prosecutor’s Office) has produced a system that works relatively well for politicians but definitely not as well for ordinary citizens. In the last part, as a form of conclusion, I discuss a set of recent and ongoing reforms that may drastically alter the shape of the Mexican justice system by considerably expanding access to justice.
REPRESENTATIVENESS AND EFFECTIVENESS IN JUSTICE SYSTEM INSTITUTIONS

Accessibility as a Surrogate of Representativeness in Justice System Institutions

The concept of representation can be understood in different ways, making the debate on whether a government is more or less "representative" ultimately dependent upon the underlying concept (Pitkin 1972). Nonetheless, when applied to governments the term representative necessarily implies election, the "central institution of representative government" (Martin 1997, 7). Of course, variation in electoral systems can make governments more or less representative (Powell 2000) but in every case elections are central. It follows that using the concept of representation to analyze justice system institutions implies gauging the pros and cons of electing judges, prosecutors and other officials that populate these institutions.

The long-standing view of the judiciary as a coequal participant, with the executive and legislative branches of government, in the system of checks and balances emphasizes that judges should be relatively independent—from both the elected branches and the passions of the electorate—to effectively prevent the arbitrary exercise of power. The judiciary, in the famous Hamiltonian formulation, has "neither force nor will, but merely judgment," and this judgment is better exercised in accordance with the Constitution (that contains the will of the people) when institutional features such as a long tenure, salary protections, and appointment procedures assure that courts are "an intermediate body" between the people and its elected representatives (cfr. Hamilton et al. 2001, 496). Hamilton warned that if the function of protecting rights and enforcing the Constitution was left "to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity" (Hamilton et al. 2001, 498).

In general, therefore, based on the influential Hamiltonian perspective, justice system institutions in most countries are designed to be not representative—that is, not directly elected by the people. As previously mentioned, whether direct popular election of high court judges would make them "representatives of the people" is a matter of a debate that ultimately hinges upon the underlying concept of representation, and upon the peculiarities of the electoral system chosen to elect the judges. For the purposes of this chapter, suffice it to say that most countries fill the offices of their justice system institutions through different appointment methods that very rarely involve direct elections, and in this sense, in general, these institutions are designed to be not representative (see, for example, Malleson and Russell 2006).

There are relevant exceptions where high court judges (and other officials such as prosecutors) are directly elected, such as some states of the United States and Bolivia.1 Critics of judicial elections point to, among other things, the potential undermining of judges' neutrality produced by political campaigning, a process in which judges either receive support in hopes of certain type of future decisions or where judges actually render certain types of decisions in search of future support. The second of these fears correspond to the old Hamiltonian warning and there is some evidence that it is well founded: elected judges in Pennsylvania tend to give longer sentences for similar crimes as the Election Day approaches (Huber and Gordon 2004).

Defenders of judicial elections, in turn, claim that if judges are to nullify laws enacted by directly elected representatives then they also should be directly elected. Some scholars echo this argument and, while not explicitly defending direct elections of judges, do consider that decisions made by directly elected representatives are under certain circumstances superior than those made by indirectly elected judges (see Waldron 2006). In addition, other arguments point out that direct elections provide an easier means to get ride of bad judges. In the U.S. case, a recent defense of judicial elections systematically challenged the empirical accuracy of some of the critics' warnings, in particular regarding the effects of judicial partisanship on turn-out and the effect of campaign contributions on judicial election outcomes (Bonneau and Hall 2009). In general, one of the main arguments in favor of electing judges is that this mechanism would bring them, and the justice system, closer to the interests, feelings and needs of the citizens, which is the ultimate guiding principle in a democracy.

In this chapter, I side with the long-standing view that justice system institutions should not be representative, in the sense of not directly elected, mainly because of the advantages for judicial decision-making derived from distancing judges both from the government and from the people. However, it is clear from the arguments in favor of judicial elections that judges and justice system officials should not be too removed from the concerns of the ordinary citizens. This is particularly true in civil-law countries where young would-be judges join the judicial system right after law school and start climbing up the hierarchical-bureaucratic apparatus for a number of years, oftentimes producing a corps of civil servants more concerned with their corporation than with providing just relief to ordinary citizens (Damask 1986).

In particular, I argue that accessibility to the justice system can accomplish the function of bringing the justice system institutions closer to the citizens' concerns.2 The more accessible the justice system, the more permeable such system would be to societal values and to the concerns of ordinary citizens. Accessibility of the justice system is determined by several factors including the legal possibilities for channeling disputes to the courts, the availability of lawyers or of technical assistance at a low or no cost for people with scarce resources, and the rights and opportunities for victims to participate in the prosecution of crimes [see Guarnieri and Pederzoli 1999, 91]. The remainder of the chapter provides a broad assessment of the degree of accessibility of Mexican justice system institutions considering these factors.
The Mexican Supreme Court

Processors’ Office

The Supreme Court is the highest court in Mexico. It is composed of 12 justices, who are appointed by the President of the country and confirmed by the Senate. The Supreme Court has the power to interpret the Constitution and to declare laws and executive acts unconstitutional. It also has the power to hear cases that are appealed from lower courts and to hear cases that are brought directly to it.

The Mexican judicial system is established by the Constitution of 1977, which established a federal judiciary, divided into federal and local courts. The Supreme Court is the highest court in the federal judiciary and is responsible for interpreting federal laws.

The Supreme Court’s decisions are final and cannot be appealed. The court’s decisions are binding on all lower courts and on the government. The court is also responsible for resolving disputes between states and for interpreting the Constitution.

Effectiveness in Justice System Institutions

The Supreme Court is responsible for ensuring that the Mexican judicial system is effective and efficient. It does this by providing guidelines and regulations for the operation of the system, by monitoring the functioning of the courts, and by hearing appeals from lower courts.

The Supreme Court also plays a role in education and training of judges and other court personnel. It provides seminars and workshops, and it publishes guidelines and manuals for the operation of the courts.

The Supreme Court is also responsible for ensuring that the judicial system is accessible to all citizens. It does this by providing assistance to those who cannot afford legal representation, and by ensuring that the courts are accessible to those who live in remote areas.

The Supreme Court is an independent institution, and its decisions are not subject to political influence. It is also subject to oversight by the Congress and the judiciary.

The Supreme Court is headed by the Chief Justice, who is appointed by the President of the country and confirmed by the Senate. The Chief Justice is responsible for the administration of the court and for ensuring that its decisions are fair and impartial.

The Supreme Court’s decisions are final and cannot be appealed. The court’s decisions are binding on all lower courts and on the government. The court is also responsible for resolving disputes between states and for interpreting the Constitution.

Effectiveness in Justice System Institutions

The Supreme Court is responsible for ensuring that the Mexican judicial system is effective and efficient. It does this by providing guidelines and regulations for the operation of the system, by monitoring the functioning of the courts, and by hearing appeals from lower courts.

The Supreme Court also plays a role in education and training of judges and other court personnel. It provides seminars and workshops, and it publishes guidelines and manuals for the operation of the courts.

The Supreme Court is also responsible for ensuring that the judicial system is accessible to all citizens. It does this by providing assistance to those who cannot afford legal representation, and by ensuring that the courts are accessible to those who live in remote areas.

The Supreme Court is an independent institution, and its decisions are not subject to political influence. It is also subject to oversight by the Congress and the judiciary.

The Supreme Court is headed by the Chief Justice, who is appointed by the President of the country and confirmed by the Senate. The Chief Justice is responsible for the administration of the court and for ensuring that its decisions are fair and impartial.

The Supreme Court’s decisions are final and cannot be appealed. The court’s decisions are binding on all lower courts and on the government. The court is also responsible for resolving disputes between states and for interpreting the Constitution.

Effectiveness in Justice System Institutions

The Supreme Court is responsible for ensuring that the Mexican judicial system is effective and efficient. It does this by providing guidelines and regulations for the operation of the system, by monitoring the functioning of the courts, and by hearing appeals from lower courts.

The Supreme Court also plays a role in education and training of judges and other court personnel. It provides seminars and workshops, and it publishes guidelines and manuals for the operation of the courts.

The Supreme Court is also responsible for ensuring that the judicial system is accessible to all citizens. It does this by providing assistance to those who cannot afford legal representation, and by ensuring that the courts are accessible to those who live in remote areas.

The Supreme Court is an independent institution, and its decisions are not subject to political influence. It is also subject to oversight by the Congress and the judiciary.

The Supreme Court is headed by the Chief Justice, who is appointed by the President of the country and confirmed by the Senate. The Chief Justice is responsible for the administration of the court and for ensuring that its decisions are fair and impartial.

The Supreme Court’s decisions are final and cannot be appealed. The court’s decisions are binding on all lower courts and on the government. The court is also responsible for resolving disputes between states and for interpreting the Constitution.

Effectiveness in Justice System Institutions

The Supreme Court is responsible for ensuring that the Mexican judicial system is effective and efficient. It does this by providing guidelines and regulations for the operation of the system, by monitoring the functioning of the courts, and by hearing appeals from lower courts.

The Supreme Court also plays a role in education and training of judges and other court personnel. It provides seminars and workshops, and it publishes guidelines and manuals for the operation of the courts.

The Supreme Court is also responsible for ensuring that the judicial system is accessible to all citizens. It does this by providing assistance to those who cannot afford legal representation, and by ensuring that the courts are accessible to those who live in remote areas.

The Supreme Court is an independent institution, and its decisions are not subject to political influence. It is also subject to oversight by the Congress and the judiciary.

The Supreme Court is headed by the Chief Justice, who is appointed by the President of the country and confirmed by the Senate. The Chief Justice is responsible for the administration of the court and for ensuring that its decisions are fair and impartial.

The Supreme Court’s decisions are final and cannot be appealed. The court’s decisions are binding on all lower courts and on the government. The court is also responsible for resolving disputes between states and for interpreting the Constitution.

Effectiveness in Justice System Institutions

The Supreme Court is responsible for ensuring that the Mexican judicial system is effective and efficient. It does this by providing guidelines and regulations for the operation of the system, by monitoring the functioning of the courts, and by hearing appeals from lower courts.

The Supreme Court also plays a role in education and training of judges and other court personnel. It provides seminars and workshops, and it publishes guidelines and manuals for the operation of the courts.

The Supreme Court is also responsible for ensuring that the judicial system is accessible to all citizens. It does this by providing assistance to those who cannot afford legal representation, and by ensuring that the courts are accessible to those who live in remote areas.

The Supreme Court is an independent institution, and its decisions are not subject to political influence. It is also subject to oversight by the Congress and the judiciary.

The Supreme Court is headed by the Chief Justice, who is appointed by the President of the country and confirmed by the Senate. The Chief Justice is responsible for the administration of the court and for ensuring that its decisions are fair and impartial.

The Supreme Court’s decisions are final and cannot be appealed. The court’s decisions are binding on all lower courts and on the government. The court is also responsible for resolving disputes between states and for interpreting the Constitution.
subordinate the Supreme Court to the dynamics of the one-party system. These reforms can be understood as a political 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 redistribution of land (see Marván 2010, 309–311; James 2006).

In 1928, a constitutional amendment augmented the number of Supreme Court judges from 11 to 16 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 21 and transformed the original life tenure of Supreme Court judges 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.” Moreover, despite the restored life tenure the Supreme Court had already been incorporated into the dynamics of the hegemonic party regime: 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 (Magaloní 2003, 288–9; see also Caballero 2010).

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, 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, 149–52). In 1968, again to overcome the backlog, another reform decided to limit the Supreme Court’s appellate jurisdiction and to transform the collegiate circuit courts, which were doubled in number, into last courts of appeals for most cases (see Caballero 2009, 166–70).

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 the hegemonic party that, nonetheless, still had weak powers of judicial review.

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. The key reform in this transformation process 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, for example, 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. 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), and the reform granted them an effective 15-year tenure (see Sánchez, Magaloní and Magar 2011).

However, 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 because of its de facto inaccessibility for ordinary citizens because throughout the years it had become technically complex and quite expensive.

To understand why the reforms concentrated power in the Supreme Court while limiting access to citizens it is necessary to look at the motivations behind the reform of 1994: to have a neutral arbiter to solve political conflicts, a role that the executive (which had been, simultaneously, leader of the hegemonic party and president of the country) was no longer capable of carrying out successfully in a context of increasing political fragmentation. As Beatriz Magaloní has argued, multiple-party politics created incentives for President Zedillo to delegate power to the judiciary (2003, 267). As the era of hegemonic presidencialismo was fading, politicians of multiple partisan affiliations began to occupy elected offices; “the president’s leadership was challenged, first by members of different parties, and soon by his own counterparts. The president thus delegated to the Supreme Court the power to rule on constitutional issues as a means to solve this dilemma” (Magaloní 2003, 268).

The limitations of the reform of 1994 are also evident regarding the creation of the judicial council and the (eventually successful) Supreme Court
However, the basic institutional structure of the public prosecution has remained practically untouched since 1917. This institutional structure creates perverse incentives because it subordinates the public prosecution to the president of the Republic. The Mexican president freely appoints and removes the Procurador General de la República (the equivalent to the attorney general in the United States) and the Procurador, in turn, freely appoints and removes all the procuradores at lower levels. There are internal mechanisms of control, such as periodic visits and reviews, that allow officials at higher levels to monitor their subordinates, but ultimately all procuradores report to the Procurador General. At the same time, the office of the Mexican attorney general is legally very powerful, in the sense that it enjoys much discretion in the three steps that characterize the prosecutorial process: investigating, charging, and sentencing. This combination of political subordination with strong legal power has been characterized as a “strong institution with weak officials” (Zepeda Lecuona 2000, 339).

The Mexican executive has traditionally chosen the political use of prosecutorial power to exert pressure on friends and enemies alike. The popular saying para mis amigos todo, para mis enemigos la ley (“for my friends, everything—for my enemies, the law”) is particularly true regarding the Mexican Ministerio Público. A famous recent case involved former president Vicente Fox’s attempt to legally disqualify former Mexican City mayor, Andrés Manuel López Obrador, as presidential candidate for the 2006 election. But there are also cases related to corruption, the typical plot being a special prosecutor selected to investigate a high-level official who concludes that there is not sufficient evidence to charge him. The performance of the prosecutorial organ has been pointed out as the very “heart of the immunity problem” that characterizes the Mexican criminal justice system (Zepeda Lecuona 2000). In fact, the politicized Ministerio Público is one of the main factors explaining the relatively high corruption levels in Mexico (see Ríos-Figueroa 2012).

While the Mexican prosecutorial organ is relatively efficient at getting things done for the political bosses in selected cases, it is extremely inefficient for prosecuting the vast majority of criminal offences that affect common citizens. One of the problems is the relation between the prosecutors and the police. While in many countries the investigatory police usually act as a filter for minor offences and other common cases that do not merit prosecutorial revision, in Mexico the prosecutors deal with every single case, even the minor offences and cases that turn out to be not criminal but, for instance, administrative offences (Zepeda Lecuona 2000, 212). The consequence, of course, is that prosecutors have an immense caseload, and this generates processing delays. Lost files and poor attention to the citizens are the norm. This inefficiency, in turn, creates opportunities for prosecutors demanding “speed money” and citizens who are willing to pay the bribe in order to expedite their cases (or frustrated citizens who simply do not bother to either report crimes or collaborate with investigations). Needless to say, both the investigatory police and the prosecutors not only do not feel dignified but some of them actually acknowledge that their job is to produce a “file of lies” instead of searching for the legal truth in the cases before them (see Azaola and Ruiz 2009).

The strange (and dysfunctional, for a young democracy) combination of perverse incentives and huge legal power for the Public Prosecutor makes sense once we take into account that it was the cornerstone of the coercive power of the authoritarian PRI regime for most of the 20th century. As Ana Laura Magaloní explains, in the context of the authoritarian regime, the task of the Ministerio Público was not to conduct a professional investigation of a crime but instead to hide the arbitrariness of the police to detain people and to obtain confessions (Magaloní 2010, 15). The capacity to unleash the force of a legal prosecution on a political enemy served as the proverbial stick that the Mexican executive wielded to coordinate behavior according to its interests. The successive presidents under the PRI regime did use this capacity, even against prominent members of the political and entrepreneurial elite who “step out of the bounds” informally established by their administrations.

The judge, once the Ministerio Público presented these cases to him, merely checked if the file contained the legal requisites, declared the defendant guilty, and then proceeded to sentencing. As mentioned in the previous section, because the Supreme Court had been successfully incorporated into the dynamics of the hegemonic party regime, it did not serve as a check to the prosecutors and very rarely overturned lower judges’ decisions, validating their corrupt practices. For instance, in one infamous decision the Mexican Supreme Court decided that confessions extracted by prosecutors with the use of physical force (i.e., torture) were accepted as evidence in a trial as long as there were other pieces of evidence that corroborated the confession.

Ministerio Público in Mexico: The Long Shadow of the Past

The performance of the public prosecutors has not changed with the transition to democracy. The arbitrariness and the rights violations committed by the police and the prosecutors are still common, and the judges continue to validate them. Interestingly, the judiciary has not been capable of building its authority and independence vis-à-vis the Ministerio Público (Magaloní 2010, 18). One figure tells it all: in Mexico only 25% of all crimes are reported to the police, and the bulk of the detainees are captured in fraganti not after an investigation. Now, of those crimes reported, only 4.5% are investigated and of those, only 1.6% are taken before a judge (Zepeda Lecuona 2004, 398). However, if a case reaches a judge it is almost sure that the judge will declare the defendant guilty. In Mexico City, the percentage of guilty sentences between 1997 and 2008 is never less than 85%, and in 2007 it was 93% (Magaloní 2010, 19). That is to say, judges validate in almost all cases the work of the prosecutors even though they know the ways in which the prosecutors usually proceed. It was not until 2006 that the Supreme Court in a series of decisions started to consistently uphold the
Criminal Process Reform

In July 2008, an ambitious constitutional reform to the Criminal Procedure Law was approved. It was the most significant constitutional reform in Mexico to date. It was a comprehensive reform that aimed to modernize the criminal justice system, reduce crime rates, and protect human rights. The reform was passed in the Congress of the Union and went into effect on January 1, 2010.

The new law aimed to ensure the right to a fair trial, the protection of human rights, and the efficiency of the criminal justice system. It introduced new mechanisms to prevent torture and other ill-treatment,加强了检察院在审判过程中的作用, and made it easier for defendants to obtain access to legal representation. The law also established new procedures for the detention of suspects and improved the conditions of detention.

The reform also introduced new measures to improve the effectiveness of the judiciary, such as the creation of a new criminal court system and the establishment of a new system for the selection of judges. It also made it easier for victims of crime to access justice, including the establishment of a new system for the compensation of victims.

The Criminal Process Reform was a landmark reform that aimed to modernize the criminal justice system in Mexico and improve the protection of human rights. It was a significant step forward in the fight against crime and the protection of human rights in Mexico.
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 29 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.

Rights Revolution in the Horizon?

Whether these recent reforms actually produce a 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 large part because of ease of access to justice in the former country and the lack thereof in the latter.

However, there are at least three 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. Second, as this chapter has argued, the institutional structure of the judiciary is currently poorly designed to meet an important increase in judicial activity. On the one hand, the Supreme Court concentrates too many jurisdictional and administrative functions, which makes it inefficient. On the other hand, the public prosecutors still work under perverse incentives that favor their loyalty to the executive and not to the citizens and the law. It is unclear to what extent the reforms can have positive effects if this basic institutional architecture remains unchanged. A third 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 creatively use the new amparo, judges welcome the flow of cases and arguments, but the prosecutorial and police practices do not improve, then a “juridical perfect storm” may be on the horizon.18

To conclude, let me focus on the third of the challenges. This chapter has argued that one of the sources of the ineffectiveness of the Public Prosecutor’s Office, in both its functions of check-and-balance tool and rights protector, in Mexico is the perverse set of incentives created by the institutional architecture of the procurement of justice. The “perfect storm” may well be the outcome if this institutional architecture is not modified. Regarding the Supreme Court, a virtuous combination of the recent reforms to the amparo suit and the human rights regime will have as an effect an important increment in accessibility to justice in Mexico and, as argued in the previous paragraph, an increase in effectiveness in the court’s role of rights protector. However, a vicious combination may bring not only ineffectiveness in rights protection but also perhaps an increase in inefficiency regarding the processing of an increasing numbers of cases and petitions. In contrast to climate conditions, for good or for bad, whether a perfect storm or clear skies dominate the horizon in Mexican politics will depend on the decisions of political actors.

NOTES

1. The first direct elections of high court judges in Bolivia took place on October 16, 2011.
2. The so-called political appointment of high court judges (i.e., involving the participation of the executive, the legislative and sometimes other organizations such as the universities or the administrative courts) also serves this function.
3. These are arguably the two main roles for high court judges but certainly not the only ones. For instance, they are also in charge of securing to the greatest extent possible the uniformity of decisions made throughout the judiciary. They thus authoritatively solve the disagreements that occur regarding the interpretation of the laws when courts reach different outcomes in similar cases.
4. Note that to avoid the “jurisprudential confusion” created by expanding access (as Couso warns in his chapter in this volume), high courts should be given discretion to select only some cases to decide (some sort of certiorari power) and rules for making jurisprudence sticky should be created (some sort of stare decisis doctrine).
5. This is a sketch of an interesting and much more complex story. See the chapters and references in Marván (2010).
6. 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.
7. The 1994 reform added to the amparo suit an instrument of constitutional review that can be used by any citizen to protect against state violations of individual rights, the so-called action of unconstitutionality and the constitutional controversy. Constitutional controversies involve problems between different levels and branches of government, both vertical and horizontal. Therefore,
any dispute between a state and the federal government or the executive and the legislative, generally with regard to attributions, can be brought before the Supreme Court. State governors, municipal presidents, the three powers of the Union and the three powers of any state can refer constitutional controversies to the Supreme Court (Mexican Constitution, Article 105). Standing in constitutional controversies is thus restricted to public authorities representing the institution whose functions are allegedly encroached. Actions of unconstitutionality are instruments of abstract review that involve cases where there is a contradiction between a general rule or an executive order and the Mexican Constitution. Standing in actions of unconstitutionality in Mexico is also restricted to public authorities (Article 105, Mexican Constitution).

8. The exception is the National Commission of Human Rights, CNDH, but only since 2006.

9. The corporatist logic within the judiciary reached its summit in 1993, when a former Supreme Court judge was convicted on corruption charges in a case in which circuit judges had liberated a defendant charged with the rape and murder of a little girl after their “mentor” on the court asked them to do so in exchange for a sum of money paid by the defendant.

10. There is not much systematic information on the performance of the judicial council.Scattered data published in some analyses and by the council itself suggest that the subordination of the council to the Supreme Court in 1999 had immediate consequences. For instance, regarding the selection and appointment of lower court judges, Fix-Fierro (2003, 288) reports that between 1995 and 1998 the council decided not to ratify nine district and two circuit court judges. Interestingly, in 1999 the council appointed forty new district court judges, 90% of which were clerks of Supreme Court Judges (González Compeán and Bauer 2002, 235). In contrast, there seems to be no noticeable change regarding the sanctioning and destitution of lower court judges. On the one hand, between 1995 and 1998 only two judges were fired (Fix-Fierro 2003, 235). On the other hand, data from the council show that the number of judges sanctioned (sanctions go from a private warning to destitution) has been declining dramatically and that the number of judges fired goes from a low 8 in 2003 (there is no data prior to 2003 in the webpage of the council) to a super low 1 in 2008. It is not clear what explains the decline in sanctions of judges, but one hypothesis is that the subordination of the council to the Supreme Court produces more leniencies as it used to be the case before 1994.

11. The “support structure” refers to the existence of a network of lawyers, NGOs and individuals who either litigate or contribute to finance litigation in favor of rights (Epp 1998, 2–3).

12. This reform will be further discussed in the second section of this chapter. The institutions in charge of securing public safety (e.g. the police, the secretary of public security, the investigative police) have also undergone important transformations (Bergman 2007). Many of these reforms are still in implementation phase at the time of this writing.

13. Since 1994 the executive choice of Procurador General has to be approved by the Senate, but the president still freely removes her.

14. Interestingly, different Latin American countries claim the original authorship of this popular saying. In Mexico, there is debate as to whether the author was Benito Juárez or Porfirio Díaz. But Brazilians claim authorship by Getulio Vargas, Argentines by Juan Domingo Perón and Peruvians by Oscar Benavides. And very probably this is only a partial list.


16. For instance, in a series of cases the Court has ruled that prosecutorial accusations based on hearsay, illegally obtained evidence and other questionable practices are simply not allowed and thus insufficient for convicting the suspects. In a 2011 decision the Court decided to limit the scope of the military jurisdiction, complying in this way with a ruling against the Mexican State by the Interamerican Court of Human Rights.

17. This “faculty of investigation” used to be part of the Supreme Court functions. Mexican Supreme Court Justice José Ramón Cossío has warned about this possibility. See El Universal, July 13, 2011: http://www.eluniversal.com.mx/editoriales/53725.html.