

THE MEXICAN SUPREME COURT AS A PROTECTOR OF HUMAN RIGHTS

Alberto Abad SUÁREZ ÁVILA*

ABSTRACT. This article studies the behavior of Mexico's Federal Supreme Court (Suprema Corte de Justicia de la Nación) (SCJN) regarding human rights during its Ninth Epoch (1995-2011). According to the empirical data obtained, after a twelve-year period (1995-2006) of inactivity in this area, the SCJN recently (2007-11) has begun to gradually take action. The change is evident in three aspects: a) the increased use and reinterpretation of its powers in Amparo proceedings; b) the increased use, interpretation and regulation of Powers of Investigation for serious violations of individual guarantees (abrogated in 2011), and; c) the inclusion of deliberative elements in preparing proceedings on grounds of unconstitutionality (Acción de Inconstitucionalidad). The change in the SCJN's behavior towards human rights since 2007 is explained by the institutional independence it has gained in the fragmented political system in assuming the role of arbitrator in important conflicts between political actors. The SCJN has also developed strategies that legitimate its greater involvement in protecting human rights before the political system and society. In general, the political system under which the Court acts has not reacted to provoke a reversal of this tendency in favor of human rights. In the 16-year period studied here, the incremental change in the SCJN's behavior is observed along with its evolution from a weak court with marginal participation into a court that has won its independence before political power and is currently looking for greater participation in protecting human rights.

KEY WORDS: Human rights, Mexican Supreme Court, institutional change, court behavior, juicio de amparo, acción de inconstitucionalidad, facultad de investigación.

RESUMEN. El presente artículo estudia el comportamiento de la Suprema Corte de Justicia de la Nación respecto de los derechos humanos durante la Novena Época. La evidencia empírica obtenida muestra que después de un periodo de doce años (1995-2006) en el que la SCJN fue inactiva al respecto, reciente-

* Doctoral candidate at the Institute of Legal Research of UNAM. His dissertation proposal won the SCJN's prize "Los caminos de la justicia en México 1810-1910-2010". He has been visiting scholar at the Institute of Governmental Studies at the University of California, Berkeley. His research interest include constitutional law, democratization, human rights and judicial behavior.

mente (2007-2011) modificó incrementalmente su comportamiento. El cambio es evidente en tres aspectos: a) el incremento en el uso y reinterpretación de sus facultades en el juicio de amparo; b) el incremento en el uso, interpretación y regulación de la facultad de investigación de violaciones graves de las garantías individuales (derogada en 2011), y c) la inclusión de elementos deliberativos en la integración de la acción de inconstitucionalidad. La modificación en el comportamiento de la SCJN con respecto de los derechos humanos que comienza en 2007 es explicada mediante factores como la independencia institucional que ha ganado en el sistema político fragmentado a través de su papel como árbitro de conflictos relevantes entre actores políticos durante la Novena Época. Adicionalmente, la SCJN ha desarrollado estrategias de legitimación frente a la sociedad y el poder político para apoyar un mayor involucramiento en la protección de los derechos humanos. En general, el sistema político en el que actúa la SCJN no ha reaccionado lo suficientemente represivo al incremento en su participación en los derechos humanos para detener esta tendencia. El cambio incremental en el comportamiento de la SCJN es observado junto con su desarrollo de una Corte débil con una participación marginal en la materia, a una Corte que ha ganado independencia ante el poder político y que actualmente está en la búsqueda de mayor participación en la protección de los derechos humanos.

PALABRAS CLAVE: *Derechos humanos, Suprema Corte de Justicia de la Nación, cambio incremental, comportamiento, juicio de amparo, acción de inconstitucionalidad, facultad de investigación.*

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I. INTRODUCTION

The *Ninth Epoch* of the SCJN started in 1995 with expectations that the Court would play a critical role in protecting human rights in Mexico, hand in hand with the perception of democratic change at the end of the 20th century.¹

¹ For some years the relationship between building democracy in Mexico and the existence of a constitutional jurisdiction that protects human rights has been studied. *See, e.g.*, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA (SCJN, 2008). *See also* Guillermo O'Donnell, *The Judiciary and the Rule of Law*, 1 J. DEM. 25 (2000). The author has pointed out that the democratic expansion in Latin America have been accompanied by the idea of electoral democracy, but display deficiencies when it comes to the legal State and

During the *Partido Revolucionario Institucional* (PRI) [Institutional Revolutionary Party] regime, the SCJN was part of the authoritarian tradition in the exercise of power, far removed from protecting human rights and limited from doing so by its very institutional design.² The *Amparo* trial, a historical measure of protection embodied in the Constitution, was limited by its legal standing and *inter partes* clauses, thus minimizing, the impact of the SCJN jurisdictional work. In addition, the technicality of the Court's work distanced broad sectors of society from using it.³ The SCJN participated in building the PRI's presidential system. It operated as a weak court in the face of the the political power, a situation which decreased any participation it could have had in protecting human rights through its constitutional jurisdiction.⁴

The idea of an in-depth study of the SCJN's character as a court that protects human rights is inspired in the work of some judicial powers and constitutional courts in consolidated democracies, as well as in the global expansion process of a new constitutionalism that promotes greater judicial intervention by the courts in the political field of countries in transition to democracy.⁵

the validity of rights, and therefore do not fulfill the requirements of democracy. He points out that for the idea of democracy to be restricted to the electoral, citizens would require the effective exercise of their civil and political rights in order for the political process to be adequate.

² The PRI (Institutional Revolutionary Party) governed for seventy-one years, from 1929, when the precursor to the party was created, until 2000, when it lost the presidency to the long-standing opposition party, the PAN (National Action Party). During this period parties other than PRI were allowed to compete. See Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, in TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 180-207 (Cambridge, 2008).

³ ARTURO ZALDÍVAR LELO DE LARREA, *HACIA UNA NUEVA LEY DE AMPARO*, XXI-XXIII (Porrúa, 3rd ed., 2010).

⁴ José Ramón Cossío has dealt with law's involvement in the PRI presidential system, highlighting the characteristics of the legal phenomenon of the time. See JOSÉ RAMÓN COSSÍO DIAZ, *CAMBIO SOCIAL Y CAMBIO JURÍDICO* (Miguel Ángel Porrúa, 2001). Beatriz Magaloni reviews the SCJN and the judicial power's participation during the PRI presidential period, concluding that the judicial power had an "limited constitutional space" in order to keep it weak in the face of political power. See Magaloni, *supra* note 2.

⁵ See Martin Shapiro, *Courts in Authoritarian Regimes*, in TOM GINSBURG & TAMIR MOUSTAFA, *RULE BY LAW* 327 (Cambridge, 2008) ("[T]he religion of human rights that has dramatically swept the world for the last half-century leads its believers to push for effective courts everywhere. No doubt in large part due to the American experience and its readings and mis-readings by others, courts, and in particular constitutional courts, have come to be seen by many as the premier protector of human rights. Given that many of the students of courts, and of constitutional law in particular, are themselves true believers in the rights religion, or at least keen observers of it, they necessarily find themselves moving from the study of an American exceptionalism to the study of a hope-for worldwide phenomenon."). With respect to the expansion of judicial power in the world, see THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate and Torbjörn Vallinder eds., NYU Press, 1995); CARLO GUARNIERI & PATRIZIA PEDERZOLA, *LOS JUECES Y LA POLÍTICA* (Miguel Ángel Ruiz Anzúa trans., Taurus, 1997); RAN HIRSCHL, *TOWARDS JURISTOCRACY* (Harvard, 2004)

After World War II, a new constitutionalism emerged in Europe and North America to allow the courts to become involved in the protection of individuals' human rights began to be part of the courts' activities.⁶ After the end of the bipolar world and a growing globalized, economy institutional designs from developed democracies gave way for a constitutionalism to be reborn in Latin America, based on the idea of building up democracy in the region, as well as in other regions such as Africa, Eastern Europe and Southeast Asia.⁷ Under this new constitutionalism, the role of the courts regains relevance in contexts where the role of the courts had historically been negligible. By the end of the 20th century, new constitutions or reforms to existing ones modified the institutional design of the judicial branches in Latin America with the purpose of giving this branch a new identity in the transition from authoritarian regimes to democracies.⁸ The institutional restructuring in these countries has been successful to varying degrees: in Latin America, the cases of Costa Rica and Colombia have been the most lauded while those of Brazil, Chile and Mexico have been among the least prominent.⁹

Institutional restructuring in Mexico went through various stages in the late 20th century. The new constitutional design was not successful in modifying the formal rules of constitutional jurisdiction so as to give the SCJN more authority in protecting human rights.¹⁰ Although normative modifica-

⁶ Mauro Cappelletti suggests that the development of constitutional jurisdiction of human rights in the United States occurs at the same time as among contemporary democracies which arose after the World War II, such as Austria, Japan, Italy and Germany, because it is only in post-war reflection that the topic gains validity in the world, even in the North American nation. See MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 85 (Oxford, 1989).

⁷ According to Tom Ginsburg, the so-called third democratizing wave in the world has brought: (a) at least a process of constitutional review, and (b) specific jurisdiction for at least one court over these processes. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 98-100 (Cambridge, 2003).

⁸ For a general panorama of institutional redesign in Latin America, see Patricio Navia & Julio Ríos Figueroa, *The Constitutional Adjudication Mosaic in Latin America*, 38 COMP. POL. STUD. 189 (2005).

⁹ On the Latin American experience of institutional redesign of judicial powers, see EN BUSCA DE UNA JUSTICIA DISTINTA: EXPERIENCIAS DE REFORMA EN AMÉRICA LATINA (Luis Pásara ed., UNAM, 2004); RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM (Pilar Domingo and Rachel Sieder eds., Institute of Latin American Studies, 2001); SIRI GLOPPEN ET AL., COURTS AND POWER IN LATIN AMERICA AND AFRICA (2010); MARÍA DEL REFUGIO GONZÁLEZ & SERGIO LÓPEZ AYLLÓN, TRANSICIONES Y DISEÑOS INSTITUCIONALES (UNAM, 2000); and COURTS IN LATIN AMERICA (Gretchen Helmke & Julio Ríos Figueroa, eds., Cambridge, 2011).

¹⁰ For an analysis of the process of Mexican institutional redesign, see HÉCTOR FIX-FIERRO, LA REFORMA JUDICIAL MEXICANA: ¿DE DÓNDE VIENE? ¿HACIA DÓNDE VA? (UNAM, 2002); HÉCTOR FIX-ZAMUDIO & JOSÉ RAMÓN COSSÍO DÍAZ, EL PODER JUDICIAL EN EL ORDENAMIENTO MEXICANO (Fondo de Cultura Económica, 2003); JOSÉ A. CABALLERO ET AL., LIBRO BLANCO DE LA REFORMA JUDICIAL EN MÉXICO (SCJN, 2006).

tions were made in favor of greater protection of human rights, such as the introduction of the abstract proceedings on grounds of unconstitutionality (*acción abstracta de inconstitucionalidad*),¹¹ restructuring the SCJN and Ministers new jurisdictional guarantees, these changes proved insufficient. In terms of *Amparo* proceedings, the historical means used to protect human rights in Mexico, the formulas for accrediting legal standing and *interpartes* were preserved although broad sectors of society do not have Access to this means of protection. In addition, the authority of the SCJN in *Amparo* proceedings was reduced, and transferred to the *Tribunales Colegiados de Circuito*.¹² Finally, with the creation of the *Comisión Nacional de los Derechos Humanos* as the constitutional organization for protecting human rights in Mexico, above and beyond what the SCJN could realize.¹³

With the aforementioned exception of the introduction of the abstract proceedings on grounds of unconstitutionality, the institution redesign in the late 20th century did not give the SCJN with the ideal formal rules needed to create an identity for itself as protector of human rights. The expectations of this occurring depended on the assumption that the new Ninth Epoch SCJN Ministers would take a stance as fundamental rights activists. In order to do so the SCJN would have had to contest its traditionally weak role in the Mexican political system and decide to *take up the baton* of human rights protection, and thus, extend the narrow limits of the institutional design of its constitutional jurisdiction.¹⁴

¹¹ JOAQUÍN BRAGE CAMAZANO, *LA ACCIÓN ABSTRACTA DE INCONSTITUCIONALIDAD* (UNAM, 2000).

¹² On the deficiencies of institutional redesign in providing an ideal framework for the protection of human rights by the SCJN, see Domingo Pilar, *Rule of Law, Citizenship and Access to Justice in Mexico*, 15 MEXICAN STUDIES/ESTUDIOS MEXICANOS 151 (1999); Ana Laura Magaloni & Arturo Zaldívar, *El ciudadano olvidado*, 342 NEXOS 36 (June 2006); Ana Laura Magaloni, *¿Por qué la Suprema Corte no ha sido instrumento para los derechos fundamentales?*, in *LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO* (UNAM, 2009). Regarding the competences' transfer to the *Tribunales Colegiados de Circuito*, see Raúl Mejía, *Acuerdos generales de la Suprema Corte de Justicia de la Nación. Una aproximación sistemática*, in 3 BOLETÍN ELECTRÓNICO DEL INSTITUTO TECNOLÓGICO AUTÓNOMO DE MÉXICO (2004), http://boletin.itam.mx/detalleArticulo.php?id_articulo=67.

¹³ On the political system's preference for assigning the *Comisión Nacional de los Derechos Humanos* the constitutional protection of human rights, see JOHN M. ACKERMAN, *ORGANISMOS AUTÓNOMOS Y DEMOCRACIA. EL CASO DE MÉXICO* (Siglo XXI Editores-UNAM, 2007); MIGUEL CARBONELL, *LOS DERECHOS FUNDAMENTALES EN MÉXICO* (2004); JOSÉ DE JESÚS GUDIÑO PELAYO, *EL ESTADO CONTRA SÍ MISMO* (CNDH-UNAM, 2001).

¹⁴ This expression is used by Ana Laura Magaloni and Arturo Zaldívar, *supra* note 12. ["For that matter, it is of paramount importance for the country that the Supreme Court takes the baton of the citizen's rights and freedoms and then starts and arranges the public debate around the values that the democracy (and, therefore the Constitution) protects. Having done that, the Court would perform a leading roll on the construction of a substantive democracy."] (trans.)

In autumn 2007 little could be said in favor of the idea of the court taking on the above role. With the exception of two or three isolated events, the SCJN had remained at a distance from this issue. The new Ninth Epoch Ministers were not very interested in having greater participation in the matter during the first 12 years of its operation (1995-2006).¹⁵

SCJN participation in protecting human rights in the constitutional proceedings envisaged by the Constitution, such as *Amparo* trial, abstract proceedings on grounds of unconstitutionality and the power of investigation were restricted. With the use of its power to send *Amparo* trials to the lower judicial organs, the possibilities of its active intervention in establishing jurisprudence on human rights were limited, given that it practically transferred this function to the lower courts.¹⁶ In addition, the use of its authority to assert jurisdiction, a means for choosing the important issues to resolve in *Amparo* trials.¹⁷ Regarding the power of investigation, a non-judicial power that was in article 97 of the Constitution until it was removed by a constitutional reform in 2011, the Court drew up jurisprudence establishing complete freedom of choice admitting cases, rejecting all citizen requests to exercise this power arguing inadmissibility of the petition presented by individuals, and using this power on making use of the faculty in only two occasions.¹⁸ Only in case 003/1996 did the SCJN truly intervene by using the power granted it by Article 97, by the express will of then President Ernesto Zedillo.

As for proceedings on grounds of unconstitutionality, which probably aroused greater expectations, the subjects who in principle could legitimately utilize it, made such infrequent use of it that its impact was limited.¹⁹ More-

¹⁵ There is consensus among the consulted and interviewed authors on the deficiency of the SCJN's labor with respect to the protection of human rights. See *supra* note 12.

¹⁶ See Ana Laura Magaloni, *supra* note 12.

¹⁷ In accordance with the information obtained from SCJN databases, from 1996 to 2006 an average of 25 cases of *atracción* were argued in the *Pleno* and in the First and Second Courtrooms. From 2007 to 2010 an average of 107 cases were argued in the same organs. Database elaborated with information available at, <http://www2.scjn.gob.mx/expedientes/>.

¹⁸ *Plenaria* P. XLIX/96 opinion help building this idea, being the interpretative mean of support in deciding to reject the requests from civil organizations. See Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court] *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo LXVI, Abril de 1996, Tesis P. XLIX/96, III. Between 1995 and 2006 only two requests were admitted. The first was presented by then-president Ernesto Zedillo, on serious violations of individual guarantees in Aguas Blancas, Gro. Expediente Facultad de Investigación 003/1996. The second was presented by the Congress of the Union, on the serious violations of the individual guarantees of journalist Lydia Cacho, Expediente Facultad de Investigación 002/2006. Only in the first case was judgment passed confirming the existence of serious violations.

¹⁹ According to the information obtained from SCJN databases, from 1996 to 2006 an average of 26 Acciones de Inconstitucionalidad were discussed annually in the SCJN. From 2007 to 2010 the average was 131 cases. Database created by the SCJN available at <http://www2.scjn.gob.mx/alex/diagramaAcciones.aspx>.

over, the Ministers assumed a declarative attitude in which the possibility of arguing abstract constitutionality was limited to the discussions held in Plenary Session, without providing deliberative means for the society to participate in the grand discussions.²⁰

Up until 2006, the attitude the SCJN displayed in its use of constitutional jurisdiction does not provide evidence of a role as protector of human rights in Mexico. The expectations of an increase in the SCJN behavior toward human rights, already limited by an inadequate institutional redesign, were unfulfilled because the SCJN did not take up the baton of the protection of human rights, maintaining an inactive position in the use and expansion of its constitutional faculties. In addition to the inadequate institutional redesign, the history of being a weak court within the political system influenced the SCJN's not claiming new prominence in the subject from 1995 to 2006.

II. THE INCREMENTAL CHANGE IN SCJN BEHAVIOR TOWARD HUMAN RIGHTS

It is only beginning in 2007 that the SCJN began to change its behavior regarding the constitutional jurisdiction of human rights and has continue to move in the direction it holds today. More than a decade after the *Ninth Epoch* was opened, the SCJN began to show intentions to incrementally change its attitude.

Douglas North's notion of institutional change is central to this article. According to North, human interaction is governed by an institutional framework that serves to reduce the uncertainty of everyday life.²¹ The institutional framework is made up of two types of institutions: informal ones, which evolve over time, such as language; and formal ones, which are created, such as Constitutions, laws, and settlements. Every part of the social phenomenon appears to be limited by and organized within an institutional framework. Organizations evolve from the institutional framework as bodies conceived by a group of individuals for the purpose of maximizing objectives or goals within the context of opportunity of opportunity provided by the societal institutional framework.²² For North, organizations in turn, through their work pursuing objectives, change the institutional structure incrementally. The latter is called institutional change. The author points out that institutional change is a complicated process because the institutional change could be produced by changes in informal and/or formal institutions. The institution-

²⁰ See Francisco Alberto Ibarra Palafox, *La Suprema Corte de Justicia y consolidación democrática en México*, in LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO (UNAM, 2009).

²¹ See Douglas North's concept of institutional change is used here. DOUGLASS NORTH, INSTITUCIONES, CAMBIO INSTITUCIONAL Y DESEMPEÑO ECONÓMICO (Fondo de Cultura Económica, 1997).

²² See *id.* at 8.

al is usually incremental and not discontinuous because customs, traditions and behaviors are resistant to the change as the formal rules do.²³

Taking these elements of North's theory into account, the difficulty of generating rapid changes in the SCJN on the protection of human rights by the SCJN is clear, given that institutional frameworks tend to change incrementally even with attempts to do so intensively. This situation is aggravated by the fact that the protection of human rights was not a clearly established objective when the formal structure was redesigned at the end of the 20th century. Thus, in principle, it can be supposed that —as long as there are no major modifications in the informal institutions which, along with institutional design, make its institutional structure— the Court's work in this area is stable compared to previous periods. For the SCJN to assume a stronger role in this, protection of human rights must become an institutional objective, insofar as possible within the institutional structure, and the political system needs to grant the Court institutional autonomy. As many of the authors cited here have pointed out, did not occur.

How can the behavioral change in the work of the SCJN between 2007 and 2011 compared to that of the previous twelve years be detected? The results of the empirical research undertaken demonstrate that three proceedings for the protection of fundamental rights mark the way in which the SCJN has changed its behavior: (a) The increased use and reinterpretation of its powers in *Juicio de Amparo*; (b) The inclusion of deliberative elements in assembling proceedings on grounds of unconstitutionality, and (c) The increased use, interpretation and regulation of power of investigation proceedings (derogated in 2011). As to (a) the increased use, interpretation and regulation of, from 2007 to 2011 four investigative commissions on serious violations of individual guarantees were launched, in contrast with only two between 1995 to 2006. The SCJN redefined its power as an *ordinary* one, ending the jurisprudential stigma of *extraordinary* power which it had carried since the 1940s. Since the reinterpretation of the power the SCJN increased the number of times the power was used.²⁴ In addition, the court regulated the power via *Acuerdo General*, in the absence of legislative regulation, in order to establish parameters regarding its use and scope as well as criteria so it may serve for discussing and defining human rights and the legal regulatory systems.²⁵

²³ See *id.* at 17.

²⁴ See Dictamen que valora la investigación constitucional realizada por la Comisión designada en el expediente 3/2006 integrado con motivo de la solicitud formulada por el ministro Genaro David Góngora Pimentel, para investigar violaciones graves de garantías individuales, Suprema Corte de Justicia de la Nación [S.C.J.N.], 6 de Febrero de 2007 (Mex.).

²⁵ See Acuerdo General número 16/2007, del Pleno de la Suprema Corte de Justicia de la Nación, en el que se establecen las Reglas a que deberán sujetarse las Comisiones de Investigación que se formen con motivo del ejercicio de la facultad consignada en el artículo 97, párrafo segundo, de la Constitución Política de los Estados Unidos Mexicanos [General Agreement 16/2007], Diario Oficial de la Federación [D.O.], 27 de Agosto de 2007 (Mex.).

By bringing this power which had been practically forgotten since the 1940s, the SCJN has investigated some serious violations of individual guarantees that have occurred during the last four years. One explanation of this change in the use of this power is the fact that most petitions for investigation reviewed by the SCJN have been presented under the scope of human rights. In the PRI era the use of the *power of investigation* was rejected because it involved the capability of the SCJN to review electoral matters, against the political principle that the judicial power should be apart from political issues.²⁶ Another reason for this increase is that the subjects with legal standing, among them the SCJN's own ministers, finally started to make use of their constitutional power to request the creation of an investigative Commission.

Redefining the nature of the power of investigation was achieved with case 003/2006 and was maintained for cases 001/2007 and 001/2009, thus allowing the SCJN to create criteria of admission for the cases. Redefining the concept of seriousness, which began with case 003/1996, continued to be developed in cases 002/2006, 003/2006, 001/2007 and 001/2009. The fact that the seriousness of the facts is no longer measured by national interest, but rather by criteria like the effects on the community or the agreement among authorities to violate rights, has given way to the study of new cases. The abstract study of human rights of the use public force and the surrogacy of public services of childcare that has been used in the cases 003/2006, 001/2007, and 001/2009, showed a new purpose achieved by the power of investigation in the protection of human rights. This emerges from the analysis of concrete facts as well as the abstract legal issues. With this work the SCJN managed not only to modify its criteria, which it had already done on previous occasions, but also to repeatedly use the new criteria in its work on gathering proceedings according to Article 97 of the Constitution, and generate new jurisprudence to govern all its work. Accompanying the change in behavior toward the power of investigation, we find the SCJN's decision to establish certain rules for carrying out its investigations and, along with it, overcoming one of the greatest historical limits to its labor, the lack of regulation. With General Agreement 16/2007 the SCJN was able to consolidate the last three Comissions according to certain requirements and protocols, that make it easier to understand its work, find the core substance of the argument, and identify the scope of its work.

Unfortunately, the power of investigation that the Court used over the past four years, was derogated from the Constitution in June 2011. The evolution seen in the use and interpretation of the power was dramatically stopped by the action of the Congress, leaving the impression that something else could have happened in the protection of human rights if the power of investigations would have remained granted to the SCJN in the Constitution.

²⁶ See Jorge Carpizo, *Nuevas reflexiones sobre la función de investigación de la Suprema Corte a 35 años de distancia*, in 13 CUESTIONES CONSTITUCIONALES 4 (2005).

As for (b), the inclusion of deliberative elements in preparing proceedings on grounds of unconstitutionality, tools such as public trials,²⁷ broadcasting sessions on live television,²⁸ making information of the proceedings available on its online portal,²⁹ and the use of *amici curiae* have been incorporated to support certain Court rulings.³⁰ The proceedings on grounds of unconstitutionality that deal with cases of family, sexual and reproductive rights in Mexico have provided means to further elaborate on discussions of most polemical cases, thus allowing the participation of social, political and academic organizations that do not have legal standing in trials.³¹ These elements allow the SCJN to move toward a deliberative model in discussions on abstract constitutionality, an aspect that has been highlighted by an important sector of academics as it contributes to making and allowing the Court to legitimize its decisions before society in cases that cause greater controversy.³²

The Proceedings of Grounds of Unconstitutionality Case No. 146/2007 and its Consolidated Case No. 147/2007 is of particular interest. In this case, on August 28, 2008, the Mexican SCJN ruled that the reform to the Mexico City Penal Code approved by the Mexico City Legislative Assembly (ALDF) and the Mexico City Health Law, published in the Mexico City Official Gazette on April 26, 2007, decriminalizing abortion during the first twelve weeks of pregnancy in Mexico City and instructing public health institutions in Mexico City to provide related medical services and counseling, was valid.³³

The decision was made after more than fifteen months of deliberation that involved live broadcasts of the sessions discussing the issue, the participation of more than eighty social organizations and public officials at the hearings, consulting experts, stances taken by every political party with national and

²⁷ See Acuerdo General número 2/2008, de diez de marzo de dos mil ocho, del Pleno de la Suprema Corte de Justicia de la Nación en el que se establecen los lineamientos para la celebración de audiencias relacionadas con asuntos cuyo tema se estime relevante, de interés jurídico o de importancia nacional [General Agreement 2/2008], Diario Oficial de la Federación [D.O.], 2 de Abril de 2008 (Mex.).

²⁸ Reglamento Interior de la Suprema Corte de Justicia de la Nación, Diario Oficial de la Federación [D.O.], 1 de Abril de 2008 (Mex.), art. 141.

²⁹ Specifically, the Internet microsite for the Acción Inconstitucionalidad 146/2007 and its addendum 147/2007, relative to the decriminalization of abortion in the Distrito Federal, available at <http://www.scjn.gob.mx/Micrositios/AbortoForoSCJN/Paginas/IndiceAborto.aspx>.

³⁰ See JOSÉ ANTONIO CABALLERO JUÁREZ ET AL., *supra* note 10.

³¹ In order to achieve better communication with society on these topics, the SCJN created two interior offices: *La Dirección General de Planeación de lo Jurídico* and *La Coordinación General del Programa de Equidad de Género*.

³² See Ibarra Palafox, *supra* note 20.

³³ Engrose de la sentencia definitiva de la Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007, Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court] [Unconstitutionality Case no. 146/2007 and its Consolidated Case no. 147/2007], Agosto de 2008, available at <http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/07001460.019.doc>.

local representation, permanent media follow-up of the discussions and the creation of a microsite on the court's webpage, which served as an interface for communication with the general public.³⁴ This trial brought much attention to the SCJN. The very nature of the case made it stand out from all of the trials that fill the Court's agenda.³⁵ The diverse interest of the actors who took part in the debate placed the Court in a delicate situation. The intervention of government, educational, and religious institutions, the mass media and civil organizations in a proceeding conducted by the SCJN gives an idea of how much women's rights issues can be discussed in Mexico today. The case of proceedings on grounds of unconstitutionality on decriminalizing abortion in Mexico City is the most representative yet of the constitutional jurisdiction of human rights that involves women's rights.

Regarding (c) the increased use and reinterpretation of its powers in *Amparo* proceedings, the number of cases the SCJN has drawn from lower courts has multiplied, and the types of cases have diversified, principally between 2008 and 2010. By means of this faculty, the SCJN has accumulated a large quantity of *amparos*. The First Chamber (*Primera Sala*) of the SCJN, has drawn a number of cases that allows them to define issues regarding human rights, particularly those related to due process and other criminal law issues.³⁶ Another key aspect is that, the First Chamber handles a variety of cases that allow to define human rights issues by modifying the criteria held regarding the rule of interest and origin of jurisdiction established by Article 107, fractions V and VIII.³⁷ Finally the Court has construed some of its power in order to uphold the criteria of having the power to review a constitutional reform.³⁸ Although these events are a positive step in the Court's behavior

³⁴ The electronic record of these events can be consulted at <http://informa.scjn.gob.mx/inicio.html>.

³⁵ Guillermo Ortiz Mayagoitia, *Apertura del Primer Periodo de Sesiones de 2008*, in GUILLERMO ORTIZ MAYAGOITIA, CONFERENCIAS DE LOS MINISTROS DE LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN 2008 (SCJN, 2009).

³⁶ For example, in 1996, the *Primera Sala* discussed jurisdiction over fourteen cases, the *Segunda Sala* three, and the *Pleno* none, for a total of seventeen cases. In 2001 the *Primera Sala* discussed three, the Second Court seven, and the *Pleno* four for a total of fourteen cases. By 2008 the figure rose to 68 cases in the *Primera Sala*, 36 in the *Segunda Sala* and 26 in the *Pleno* for a total of 130 cases. By 2009 the total figure is equal to 129 cases taken. For the first eight months of 2010 the number of cases undertaken was 125. Statistics elaborated with the data available at <http://www2.scjn.gob.mx/expedientes/>.

³⁷ The First Chamber has taken jurisdiction over cases dealing with gender equality in Social Security, the requirement of no pre-existing conditions for the use of Social Security the *amparo* for the tzotzil Indians for the right to criminal defense in their language, the identity protection for trans sexuals, religious freedom, among others. Information available at www.scjn.gob.mx.

³⁸ *Revisión de Amparo 139/2009-1*. With regard to this matter, see generally Pedro Salazar, *Una Corte, una jueza y un réquiem para la reforma constitucional electoral*, in LORENZO CÓRDOVA & PEDRO SALAZAR, DEMOCRACIA SIN GARANTES. LAS AUTORIDADES VS. LA REFORMA ELECTORAL 29-

toward greater participation in human rights protection, they show only negligible advance in the SCJN's unresolved agenda in the matter of *amparo*, which continues to lag far behind.

These events indicate a gradual change in the SCJN's attitude toward the human rights protection. The change began by intensifying its activities in the constitutional jurisdiction of human rights, by actively using its powers and by attempting to extend its limited institutional design. The semblance conveyed is that of SCJN that, aware of the difficulty of its institutional design and institutional history as a weak court, yields actions by which it attempts to reinterpret and enhance its participation in this matter. These events challenge the designs of the political system's prominent actors to suppress the appropriate means for defending human rights, and confront its own institutional history of maintaining itself within the narrow limits the political power has imposed on it. A response to this change in behavior, as well as its description, raises the need to find an explanation for this change, which is one of the most important aim of this paper.

III. HOW CAN THE RECENT CHANGES IN THE SCJN'S BEHAVIOR BE EXPLAINED?

Several factors can help the SCJN's change in behavior regarding human rights protection. For example, internal events, such as the arrival of new ministers, help trace the advent of new ideas and strategies in the SCJN, that pay more attention to human rights.³⁹ An increased budget for hiring and training new personnel leads to assume the SCJN works more professionally and, has therefore redefined the Court's internal objectives.⁴⁰ Transparency and social communication policies show greater SCJN's awareness of its social context, and lead it to pay more attention to accountability and its contact with its surroundings. Creating public policy planning offices has made it possible for the SCJN to make decisions based on studies compiled by professionalized areas with specialists in diverse branches of knowledge.⁴¹

In addition to all of this, changes in Mexican society have created a cultural context in which the SCJN's defense of human rights in Mexico has gone from an "expectation" to a "demand." Little by little, elements that

58 (UNAM, 2010); Julio Ríos Figueroa & Andrea Pozas, *¿Puede ser inconstitucional una enmienda constitucional?*, 370 NEXOS 134 (Oct. 2008).

³⁹ With respect to the importance of the arrival of new Ministers to the modification of the SCJN's behavior, see Beatriz Magaloni *et al.*, *Activists vs. Legalists: The Mexican Supreme Court and its Ideological Battles*, in *COURTS IN LATIN AMERICA* (Cambridge University Press, 2011).

⁴⁰ On this topic, see FIX-FIERRO, *supra* note 10; CABALLERO ET AL., *supra* note 10.

⁴¹ See the with respect to the objectives and mission of the *Dirección General de Planeación de lo Jurídico* and the *Coordinación del Programa de Equidad de Género*. SCJN. MANUAL GENERAL DE ORGANIZACIÓN DE LA SCJN (2008).

have a greater impact on the SCJN's internal process are emerging. The international context of the defense of human rights has made possible the growth of civil society organizations, as well as the success of certain issues in advancing a political agenda in Mexico, thanks to financial support and human resources.⁴² The growth of the public and private legal profession has also served to generate points of reference for the SCJN, whether by means of criticism of work done, methodological proposals and even litigation established for the defense of certain topics within the SCJN's jurisdiction.⁴³ The attention that the media pays to the SCJN is, on its own, a factor that puts the court in the "public eye," and means that the Ministers' labor is constantly being analyzed, criticized and observed not only by academic specialists, but also by the general public.⁴⁴

Factors that are both internal and external to the SCJN assist in creating a change in the Court's behavior toward human rights, obligating the SCJN to pay attention to the topic and seek to integrate it into its daily functions.⁴⁵ One of the most important issues that explains a tendency toward greater participation in the arena of human rights is the building up of institutional independence in the political system as a precondition for the SCJN's increased participation in these activities⁴⁶. This starting point makes it possible to observe the SCJN's behavioral change regarding with respect to its participation in the jurisdiction of human rights can be attributed to the autonomy it has gained due to its efficient fulfillment of its role as arbiter between prominent political actors (1995-2011). Its performance in settling constitutional controversies, has given it greater independence from public powers and political parties, distancing itself from the shadow of the presidential figure that pursued the Court during the PRI presidential regime.⁴⁷

⁴² See Jorge Carpizo, *Tendencias actuales del constitucionalismo en América Latina*, in TENDENCIAS DEL CONSTITUCIONALISMO EN AMÉRICA LATINA (Miguel Carbonell *et al.*, eds., UNAM, 2009).

⁴³ For important articles on the legal practice in Mexico, see DEL GOBIERNO DE LOS ABOGADOS AL IMPERIO DE LAS LEYES. ESTUDIOS SOCIOJURÍDICOS SOBRE EDUCACIÓN Y PROFESIÓN JURÍDICAS EN EL MÉXICO CONTEMPORÁNEO (Héctor Fix-Fierro ed., 2006). For a sociological analysis of the growth of educational institutions for the teaching of law, see generally Luis F. Pérez Hurtado, *An overview of Mexico's legal system of education*, 2 MEXICAN L. REV. 151 [Jan.-June 2009]. The participation of human rights clinics held by academic institutions in Mexico City such as the CIDE and the ELD represent a gap in the research, but a reality in practice.

⁴⁴ For leading proponents concerning this matter, see JAMES K. STATON, *JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO* (2010).

⁴⁵ See Julio Ríos Figueroa, *Justicia constitucional y derechos humanos en América Latina*, 3 REVISTA LATINOAMERICANA DE POLÍTICA COMPARADA 53 (Jan. 2010) (reviewing the factors that allow Latin American Courts to increase their protection to human rights).

⁴⁶ See GUARNIERI & PEDARZOLI, *supra* note 5.

⁴⁷ See generally Julio Ríos Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico*, 49 LATIN AMERICAN POL. AND SOC'Y 49 [Spring 2007]; Beatriz Magaloni & Arianna Sánchez, *An Authoritarian Enclave? The Supreme Court in Mexico's Emerging Democracy* (paper presented in the American Political Science Association, Annual Meeting, September 2, 2006);

To back this explanation, this research uses theories that explain the Court's behavior as the result of institutional design, of the political, social and economic context in which it operates, and the decision-making possibilities these factors grant the court.⁴⁸ These studies have been used to analyze various courts around the world, and reach the conclusion that the principal obstacle for a court to decide to undertake a change toward extending its constitutional jurisdiction over human rights, is the fact that the courts are weak organizations within the political system, especially in authoritarian systems, making them cautious in action and, therefore, preventing them from easily promoting change in that sphere. For a court to do so it must first obtain independence from the political system.⁴⁹

On occasion, principally in the case of a constitutional court, acquiring independence can be directly related with the Court's function in constitutional jurisdiction expressly in dealing with human rights if the institutional design is ideal for such an action, which makes for a smoother road toward the judges' taking action on the topic. However, in the case of courts like the SCJN, whose jurisdiction over the field does not appear to be the express intent of the legislature, these courts must gain independence within the system by other means before increasing their participation in human rights. Only when the court is perceived as independent is it possible to seek greater participation in the jurisdiction of human rights. Once the court has achieved sufficient independence to attempt to expand its constitutional jurisdiction over the topic of human rights, it begins to pay attention to the reaction of the political social and economic context, attempting to legitimate its jurisdictional intervention into human rights. If it receives a favorable response, it continues such participation. If it receives a negative reaction, the tribunal may moderate its ambitions or the rejection is might be such that the political power moves to restrict the court's labor via legislative action or via the repositioning of some or all of the members of the court. In order to achieve such

KARINA ANSOBEHERE, *CORTES SUPREMAS, GOBIERNO Y DEMOCRACIA EN ARGENTINA Y MÉXICO* (Fontamara, 2007); Susana Berruecos, *The Mexican Supreme Court Under New Federalism: An Analysis of the Constitutional Controversies (1995-2000)*, in *SEPARATION OF POWERS IN NEW DEMOCRACIES: FEDERALISM AND THE ROLE OF THE JUDICIAL POWER IN MEXICO*, Working paper (London School of Economics and Political Science, 2000); Alba Ruibal, *Definition of the New Institutional Role of the Supreme Court in Argentina, with Reference to the Mexican Case*, paper presented in the *Law and Society Association Annual Meeting* (Montreal, May 29-June 1, 2008).

⁴⁸ These are the neo-institutionalist studies. For neo-institutionalism as a social science method, see NORTH, *supra* note 21. Regarding this method applied to the study of courts, a good anthology is *SUPREME COURT DECISION-MAKING, NEW INSTITUTIONALIST APPROACHES* (Cornell W. Clayton & Howard Gillman eds., 1999).

⁴⁹ On this subject, see generally Matias Laryczower *et al.*, *Judicial Decision-Making in Unstable Environments*, 46 *AM. J. OF POL. SC.* 699 (2002); Lee Epstein *et al.*, *The Role of Constitutional Courts in the Establishment of Democratic Systems of Government*, 35 *LAW & SOC'Y REV.* 117; Javier Couso, *Consolidación democrática y Poder Judicial: los riesgos de la judicialización de la política*, in *SCJN, TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA* 429-57 (2008).

legitimacy in the subject, the court must use strategies of legitimation that permit it to negotiate negative reactions that might emerge from the social context and the political system.⁵⁰

One of the most illustrative examples with respect to the behavioral change of the tribunals is found in Martin Shapiro's classic article, which attempts to answer the question of when tribunals are successful in modifying public policy through their behavior.⁵¹ To do so he takes on the study of the United States Supreme Court, considered one of the most successful cases in the history of the world. The author establishes that the history of the US Court can be defined by the success it has had in helping to implant a federal system in the United States, regularly supporting national powers, but restricting them enough to conserve its validity as an arbiter in conflicts between federal and local powers.⁵² Because of what this does to relations between the Congress and the Executive, Shapiro's conclusion is that the Court has practically been a spectator in disputes between them.⁵³ Specifically with respect to human rights, he points out the topic penetrated the Court only after the World War II and had its apogee in the Warren Court, but that before that, only property rights, especially those of corporations, had been protected by the US Court. In the opinion of the author the Court has a long history protecting the interests of corporations prior to protecting the interests of unprotected sectors. His conclusion is that the US Court, through its assistance in implementing federalism, and through its historical protection of the interests of particular corporations, managed to legitimize its institutional role before being able to participate in the defense of human rights.⁵⁴

If we take Shapiro's idea as a possible explanation of contexts outside of the US Court, it is possible to explore the hypothesis that, through successful participation in diverse spheres, a court builds its institutional autonomy, which allows it to increase its participation in the protection of human rights. Bringing this to the Mexican case, it is possible to say that, before establishing an active position regarding human rights protection, the SCJN has successfully fulfilled other institutional roles that allow it to generate sufficient institutional autonomy to explore having greater participation in the protection of human rights.

By applying these ideas to the SCJN, it can be observed that at the time of institutional redesign in the late 20th century, the SCJN's position was too weak to promote changes in the constitutional jurisdiction of human rights, due to its history in the face of the presidential system and the inefficiency of the institutional redesign. With the exception of the abstract proceedings on

⁵⁰ See Martin Shapiro, *Revisión judicial en democracias desarrolladas*, *supra* note 5; Javier Couso, *La política de la revisión judicial en Chile durante la era de la transición democrática 1990-2002*, *id.* at 459-88.

⁵¹ See Shapiro, *supra* note 5, at 233-34.

⁵² See *id.* at 234-37.

⁵³ See *id.* at 237-38.

⁵⁴ See *id.* at 239-42.

grounds of unconstitutionality in which the political system's express order for the SCJN to begin to take abstract control over human rights protection is apparent, the court was not given enough tools to initiate a change toward greater participation in the matter. In this context, it is not surprising that the SCJN's role in the years after the *Ninth Epoch* was established in the protection of human rights was as poor as it had been during *PRI* presidentialism regime. As mentioned above, at this time, the Court opted to focus its work on building its identity as an arbiter of important conflicts between actors of the political system, as ordered by the Congress.

The fulfillment of this role within the context of the fragmentation of the political system has caused the SCJN to gradually distance itself from the presidential figure. In the context of political fragmentation in Mexico which was founded in 2000, the various public actors (political parties, federal and local executives and legislatures) have regularly turned to the SCJN to legally settle some of the most prominent tensions within the political system, which helps the court to construct independence from the political power, specifically from the Presidency. Along with creating independence within the political system, there are demands that the SCJN extend its intervention in the protection of human rights, an issue which Mexican society has considered unresolved in the SCJN's work and the importance and necessity of which the SCJN itself has recognized. In the last years of the *Ninth Epoch* the first signs of change in the matter were exhibited with the reinterpretation and increased use of the Court's powers and in its manner of compiling proceedings. Once the SCJN has taken its first steps toward greater intervention in the protection of human rights, sending signals to its surroundings, it is possible that the political, social and economic context might respond. Such a response conditions the SCJN to continue in this direction or, on the contrary, if it were to experience repressive actions, principally from the other branches, it would be obligated to modify its behavior. The SCJN is developing legitimization strategies to avoid such a negative reaction from the political and social system that commonly arises in the political contexts when the Courts suddenly shift to a greater participation in the field of human rights.

However, the establishment of institutional autonomy that the SCJN has fostered is explained not only by the existence of the pluralization of the political system, but also by the creation of public policies that tend to avoid a repressive reaction from the political context toward the Court's work. It is extremely important to resolve this issue because in the process of its institutional redesign, the SCJN opted not to delve much into the suitable resources for exercising human rights protection in Mexico. Thus, if the Court assumes greater participation in fundamental rights protection, the political context may either react repressively or legitimize this move.

Comparative history shows that on several occasions the political system reacts repressively to a certain extent when the courts take stronger action, especially when the Court directly challenge the ruler's public policies. One

of the most well-known cases that illustrates this point is that of the clash between US President Theodore Roosevelt and the US Supreme Court over the New Deal economic policies, which resulted in the replacement of the Court justices with ones who agreed with the president's policies, and the implementation of the new rules regarding the composition of the Supreme court. Deriving from this experience, the heightened importance the administration placed on the selection of new justices. Even today, the nomination process is closely followed by different political actors and the mass media since, presidents are disposed to sending the Senate nominees who do not represent a high risk of opposing presidential public policies and that, on the contrary, will most likely defend said policies in the future.⁵⁵

The US example is only one of many that have occurred throughout history in different parts of the world. One of the most dramatic cases took place in the first Constitutional Court of Russia. The Court was created in 1991 in the style of European constitutional courts, with power to attend to a wide range of constitutional proceedings presented by citizens and different political actors. One of the Court's powers was the abstract constitutional review of all acts of the State. The new institutional design represented a strong break with the Soviet past, in which the judicial branch was not a significant actor in the political system. In carrying out its functions, the first Constitutional Court of Russia made some decisions that annoyed the other government branches, especially the local executive branch. The reaction of the local executives to the Court's imposition of limits on their public policies by the Tribunal was one of disobedience and of disagreement with the jurisdictional function of the new body. By 1993 the discord in the political system regarding the use of the wide-reaching functions of constitutional jurisdiction that the institutional design granted the Court caused then-President Boris Yeltsin to order the suspension of its functions until a new Constitution could be drafted. The work of the first Constitutional Court of Russia was then suspended due to dissension within the system caused by the Court's exercising the wide-reaching powers bestowed by its institutional design. The life of the first Constitutional Court of Russia was very short, given the violent reactions from the political system. In 1994, with the approval of a new law, a new Constitutional Court was created, this time with a more limited institutional design. The new Court has gradually established its legitimacy by assuming the policy of avoiding direct confrontation with the political system.⁵⁶

In Latin America, there have also been violent reactions to the increase in Court's work. For example, in Argentina in 1993, then-President Menem promoted a reform by which the number of justices would increase from five to nine. He thereby gain the possibility of naming four candidates who

⁵⁵ See JOSEPH MACKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, 1-12 (2002).

⁵⁶ See Epstein *et al.*, *supra* note 49.

sympathized with his public policy, and thus ending the important work that the Court had carried out in terms of human rights protection under ex-President Alfonsín. Another important and recent case is that of the Constitutional Court of Bolivia. According to Aníbal Pérez Liñán and Andrea Castagnola, the combination of feeble support from society, legislative limitations for nominating new justices to the Supreme Court, and incipient Constitutional Court activism led to the collapse of the 1998 model of constitutional review between 2006 and 2009. During this period the Constitutional Court lost all of its members with the exception of one who has retained her position.⁵⁷ Other similar experiences have occurred in Peru under President Fujimori in the 1990s, and today in Venezuela under President Chávez. In both cases the concentration of power in the hands of the president and the intent to advance public policy program with no opposition has constrained the Court intervention in these countries' public life.⁵⁸

Cases like these appear and reappear around the world.⁵⁹ These experiences have led courts with constitutional jurisdiction to be cautious in the use of their powers as there is the possibility of their being repressed. This in turn creates a judicial prudence that avoids any violent reaction from the political system, especially in authoritarian contexts.⁶⁰ An example of this can be found in the work of the second Constitutional Court of Russia, which has avoided direct confrontation with the political system.⁶¹ Another is found in the Chilean case. Prior to the present day incipient judicial activism described by Couso and Hilbink, Javier Couso had pointed out that the Chilean courts

⁵⁷ See Andrea Castagnola & Aníbal Pérez Liñán, *Bolivia: The Rise (and Fall) of Judicial Review*, in *COURTS IN LATIN AMERICA* (Gretchen Helmke & Julio Ríos Figueroa eds., Cambridge, 2011) ("The combination of weak public support for the judiciary, legislative deadlocks preventing the appointment of Supreme Court Justices, and fledgling activism on the part of the Constitutional Tribunal created an explosive mix that led to the downfall of the model of judicial review inaugurated in 1998 between 2006 and 2009. In just three years, the Constitutional Tribunal lost all of its members until only Justice Silvia Salame Farjat remained in office.").

⁵⁸ See Rogelio Pérez Perdomo, *Law and Legal Culture in Venezuela in Revolutionary Times (1999-2009)* (Stan. L. Sch. Papers, 2009); Domingo García Belaunde, *Sobre la problemática constitucional en el Perú de hoy (reflexiones al inicio de 2000)*, in DIEGO VALADÉS & MIGUEL CARBONELL, *CONSTITUCIONALISMO IBEROAMERICANO DEL SIGLO XXI* 195-209 (2002).

⁵⁹ One of the recent cases refers to the process of removing from the *Audiencia Nacional Española* Judge Baltazar Garzón, one of the most activist judges in the investigation of cases of genocide in various regions of the world in the last few decades, from office when Judge Garzón decided to review the abuses suffered during the Franquista dictatorship, he was subjected to a political trial to remove him from his position for violating the Law that prohibits investigating abuses occurring during Franquismo. As a result, the judge finds himself suspended while his case is being resolved, and self-exiled in the Court of The Hague.

⁶⁰ See Shapiro, *supra* note 5, at 17 ("Judges are acutely aware of their insecure position in the political system and their attenuated weakness vis-à-vis the executive, as well as the personal and political implications of rulings that impinge on the core interests of the regime.").

⁶¹ See Epstein *et al.*, *supra* note 49.

tribunals had followed a policy of moderation in their interventions in the field of human rights protection between 1990 and 2002, even before social demands for the reparation of harm done during the Pinochet's dictatorship, as a strategy to achieve its legitimacy.

The *Ninth Epoch* SCJN employed various types of legitimization strategies. First of all, there was the strategy of moderate increases in its activity.⁶² The SCJN did not challenge the political system by creating new criteria that would allow it to use its constitutional jurisdiction for a more involved participation in human rights protection. One clear example of this is the fact that the criteria legal standing and the *inter partes* clause in Amparo proceedings were not challenged, both of them key points in the institutional design proposed by the political system to limit the SCJN's involvement in the matter of human rights. The SCJN preferred not to challenge these issues via constitutional interpretation and maintained an attitude of moderation so as to avoid excessively disrupting the political system. The SCJN also moderated its interventions in other issues as well. For example in the power of investigation, the Court declined to assign responsibilities to high-level politicians or to provide means of restitution to the victims. In proceedings on ground of unconstitutionality, Court ministers desisted from providing definitions to rights and jurisprudence in cases of an ideological clash between the political left and right.

Other legitimization strategies observed are basically media-related. The SCJN works to establish an identity before society as a protector of human rights via the media. The *Canal Judicial* and the use of electronic media, besides aiding the Court's transparency and accountability, have been used to promote the legitimization of its work in human rights protection.⁶³ The SCJN aims at establishing a rapport with society to legitimize its work and, in this way, legitimize itself before the political system, avoiding violent reactions to its work and in this way gring about an in-depth institutional redesign in political system so as to provide the SCJN with the ideal means to intensify its involvement in human rights protection.

The reactions of the political system and society to the SCJN's behavioral change regarding its constitutional jurisdiction and increased participation in the area of human rights, are, usually, diverse and not very repressive. In a country with a long authoritarian tradition like Mexico, in which until 2011 there was no expressed intent to grant the SCJN an institutional design suitable for the protection of human rights, a negative reaction to the Court's greater involvement may be expected.

However, evidence shows that the reactions to the Court's work were not repressive enough so as to prevent the SCJN from continuing in this direc-

⁶² Another case of this moderation strategy is described in the Chilean judiciary by Couso, *supra* note 49.

⁶³ See STATION, *supra* note 44.

tion. The most hostile reaction from the political system to the SCJN's increase in its labor for the protection of human rights refers to the derogation of the constitutional power of investigation. The political system always denied granting legal content to the decisions connected to these proceedings, which in the best of the cases only established historical truth of the facts of serious violations.⁶⁴ In 2011, the legislative attempts to remove the *power of investigation* from the SCJN's sphere succeeded, and the power was transferred to the *Comisión Nacional de los Derechos Humanos*.⁶⁵

In contrast, the political system's reactions to proceedings on grounds of unconstitutionality have apparently been positive, a situation which could stem from the fact that the SCJN's control over abstract constitutionality was endorsed by the political power, leading to the political system's general approval of the SCJN's execution of this work. While this activity was limited at first, the number of proceedings initiated by elected individuals has increased, evidence of the usefulness of proceedings on grounds of unconstitutionality as perceived by political actors. Proceedings on grounds of unconstitutionality has been added to the catalog of proceedings that the public actors in the political system use for issues that go against their ideology or interests and in an attempt to promote their own agendas. The Office of the Attorney General (*Procuraduría General de la República*) in particular is making extensive use of proceedings on grounds of unconstitutionality as a means to control spending, while political parties use these proceedings as a way to control over political and electoral reforms.⁶⁶ Recently, proceedings on grounds of unconstitutionality were also used to vent to ideological confrontations on issues of right to life and family and sexual and reproductive rights. Furthermore with proceedings on grounds of unconstitutionality the political power has found a way to control the economic elites via the judiciary more efficiently than by other means.⁶⁷

The SCJN's policy of openness and communication in proceedings on grounds of unconstitutionality has sometimes led certain powerful groups, such as media executives or the Catholic Church, to more strongly reject the Court's actions, given that the Court has opened discussions that have limited these groups' influence over public policy making in Mexico in legisla-

⁶⁴ None of the processes followed by the SCJN in the power of investigation have led to sanctions against those responsables because of the inaction of the other governmental branches at local and federal levels.

⁶⁵ The Senate has approved a constitutional reform in this sense that recently was also approved in the lower chamber. The project is back at the Senate and there are high probabilities that will be approved in the following months.

⁶⁶ Almost half of them have been initiated by the Office of General Attorney.

⁶⁷ *Acción de inconstitucionalidad 26/2006* is the biggest example of this phenomenon. In this case the Court declared unconstitutional a law that allowed current media owners refrend their public concessions automatically.

tive processes.⁶⁸ In contrast SCJN communication and transparency policies have encouraged other types of actors, such as civil society organizations and academic centers, to participate in the great political discussions of Mexico therefore reacted favorably to their inclusion in this procedures.⁶⁹

In the case of *Amparo*, the reactions may be less apparent because the SCJN's activities in this area have been less noteworthy. But this is the proceeding in where the political power shows a better reaction to the increase or the SCJN human rights protection. In the same constitutional reform that derogated the power of investigation in 2011, a new set of constitutional rules for *Amparo* trial were adopted to expand the importance of this proceeding in the protection of human rights, situation that implies a greater involvement of the judicial branch and the SCJN in the matter. Specially changes in the legal standing rule leave the possibility to think in a better use of *Amparo* trial for protection human rights. Even more, the new constitutional drafting says explicitly that *Amparo* trial is the means to defend human rights.⁷⁰ Given the above, it can be concluded that the political system's reaction to the SCJN's greater intervention in the constitutional jurisdiction over human rights in the last years of the *Nine Epoch* has been varied but is generally not as repressive so as to reverse the trend of the Court's increased participation in matters dealing human rights. Even more, there is an explicit agreement with the 2011 constitutional reform, that the SCJN must have a greater participation in the human rights protection through *Amparo* trial. Hopes that the SCJN will extend its constitutional jurisdiction to better include human rights protection are starting to come true. After 16 years the SCJN has achieved its independence and gone from being a weak court when confronted with political power to enhance its involvement in the matter concerning human rights. The change it has undertaken has been gradual and is seen, changed interpretation and use of the Court's powers and in the way it compiles. These are some of many issues that allowed SCJN from the *Ninth Epoch* to assume greater role in the protection of human rights. This change should not be seen as a revolutionary change that mends all of the gaps in the SCJN's in this field. The day when the SCJN establishes its identity as a protector of

⁶⁸ Bishop of Guadalajara Juan Sandoval Íñiguez accused the SCJN ministers of have been bribed by the Mexico's City mayor in a case on same sex marriage which was validated by the SCJN. See Claudio Bañuelos *et al.*, *Ebrard maicéó a los ministros para que se permitieran bodas gays: Sandoval Íñiguez*, LA JORNADA, Aug. 16, 2010, <http://www.jornada.unam.mx/2010/08/16/sociedad/038n1soc>.

⁶⁹ Several scholars interviewed during 2008-2010 from different fields and universities in Mexico City expressed their pleasure in participating in some proceedings on grounds of Unconstitutionality regarding this a positive factor in the trials in which they participated.

⁷⁰ Mex. Const. Art. 103 [“The federal courts shall solve any dispute on: I. General norms, authority acts or omissions that violated human rights and there warranties recognized and given for their protection by this Constitution and by the International Treaties in which the Mexican state participates...”] (trans.)

human rights is still a long way off, but the Court of the late years of *Nine Epoch* (2007-2011) started to emit the first signs of this happening. Considering the the independence gained and that reactions from the policial system have not been repressive enough to put a stop to it, it is posible to say that in the SCJN's participation in the protection of human rights will continue to grow in the *Tenth Epoch*.⁷¹

⁷¹ The Tenth Epoch started October 4th, 2011.
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