

The principle of the supremacy of the constitution in the construction of political pluralism in México: the *controversia constitucional* and the *acción de inconstitucionalidad*

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I. Introduction

The achievement of a more pluralistic political scenario in México is not only product of the presidential election of 2000, in which a party different from the Partido Revolucionario Institucional won the presidency.² Before the victory of the Partido Acción Nacional in this election, important reforms to the electoral legislation were made.

Nevertheless, one of the most important conditions for political pluralism in our country is not directly related to electoral legislation, but to the principle of supremacy of the Constitution. In December 31 of 1994, the article 105 of our Federal Constitution was amended to introduce the *controversia constitucional* and the *acción de inconstitucionalidad*.

Both, the *controversia constitucional* and the *acción de inconstitucionalidad*, are procedures by which the constitutionality of an action adopted by a branch or order of government might be challenged by legitimated actors (enumerated by the Federal Constitution) before the national Supreme Court (*Suprema Corte de Justicia de la Nación*).

Before the explanation of these judicial procedures, it is important to know the following characteristics of Mexico's political system:

- Mexico has a presidential system of government with a two chamber Legislative branch. This system is reproduced by the states and partially by the Federal District³, but with only one legislative chamber.
- Mexico is a federal State divided in four orders of government. These are: federation, states (31), municipalities (2,445⁴) and one Federal District (Mexico City).
- There is a dominant three party system: Partido Revolucionario Institucional (P.R.I.), Partido de la Revolución Democrática (P.R.D.) y Partido Acción Nacional (P.A.N.).

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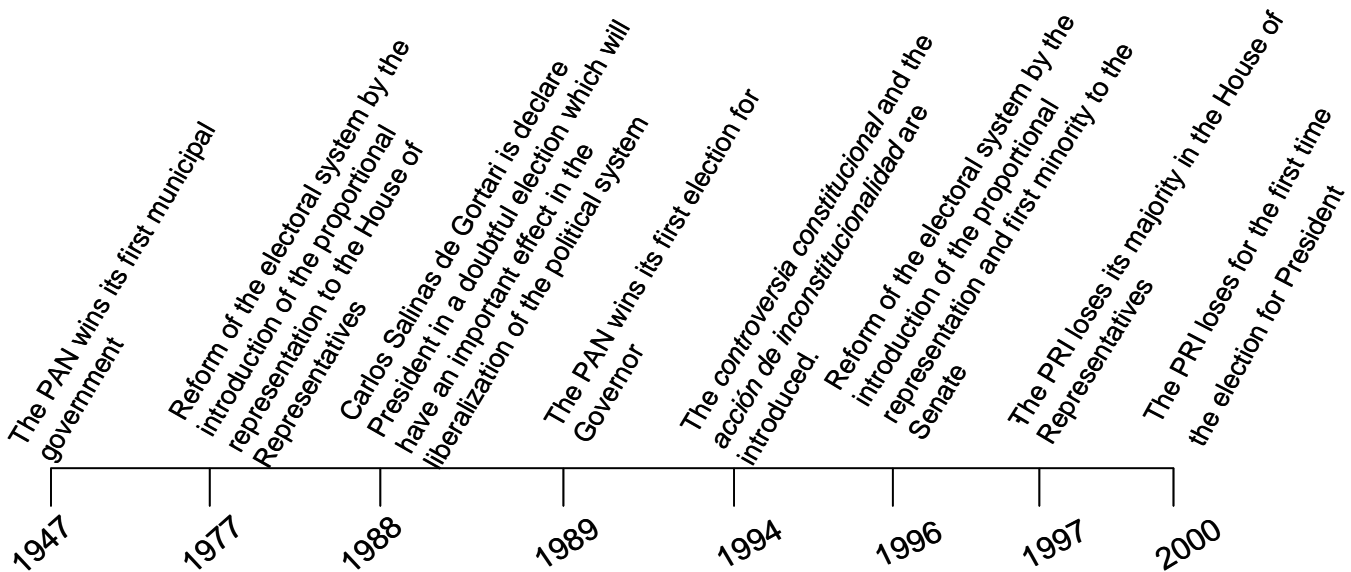
² Since its creation in 1929, the Partido Revolucionario Institucional – founded as Partido Nacional Revolucionario – had the presidency and almost the absolute control of local and national government.

³ Even though the Federal District has popularly elected authorities, it has a special political configuration regulated by article 122 of the Federal Constitution, in which it is stated that the President and the Federal Legislative branch have power over some important local issues.

⁴ <http://www.inegi.org.mx/inegi/contenidos/espanol/prensa/Contenidos/capsulas/2002/geografica/municipios.asp?s=inegi&c=813>

- The powers of the federation and the municipalities are enumerated by the Federal Constitution, while the residual powers are reserved for the states.

The following timeline might also help to contextualize the importance of the political changes and constitutional reforms made in the last 30 years:



The objective of this brief paper is to explain the mentioned constitutional guarantees, in order to understand how their incorporation is related to the achievement and safeguard of a more pluralistic political scenario, based on the respect of the limits and provisions imposed by the Federal Constitution.

II. The *Controversia Constitucional*

The *controversia constitucional* is a judicial guarantee for the preservation of the separation of powers principle. Through it, the branches of government of the federation – with the obvious exceptions of the national Supreme Court –, the states, and the Federal District, as well as the territorial orders of government, have the entitlement to denounce an intromission to their sphere of competence by another branch or order of government.

In a country where the exercise of presidential *metaconstitucional powers*⁵ was commonly understood as part of the political system – situating the figure of the President above the other branches and orders of government – and where this submission scheme was often

⁵ Carpizo, Jorge, *El presidencialismo mexicano*, 13a ed., México, Siglo XXI, 1996, p. 190 – 199.

reproduce by the Governors of the states against the local powers, the adoption of a mechanism exclusively created to protect the powers granted by the Constitution was a breakthrough for political pluralism.

Even before the constitutional amendment of 1994, article 105 provided a similar guarantee of protection, with the implicit exclusion of the municipalities. Nevertheless, the absence of a regulatory law that clearly stated the procedure for the *controversia constitucional*, made it quite useless. In this context, in May 11 of 1995 the regulatory law of article 105 was promulgated.⁶

To have an idea of the importance of the amendment, while from 1918 to 1994 33 demands were brought before the Supreme Court⁷, only in 2008 the number raised up to 230.⁸

Besides the relevant role played by the Supreme Court as a “referee” of a “constitutional fair play”, it’s important to highlight the construction of the constitution that’s made through its sentences.

III. The *Acciones de Inconstitucionalidad*

Unlike the *controversias constitucionales*, the purpose of the *acción de inconstitucionalidad* is not to protect the principle of separation of powers, but to enforce the principle of the supremacy of the constitution against any law or international treaty that might conflict with a constitutional provision.

In order to obtain this, the Constitution enumerates a series of legitimated actors that can bring an *acción de inconstitucionalidad* before the Supreme Court. These actors are:

1. A 33% of the members of the House of Representatives or the Senate, against a law approved by the Federal Congress or the Legislative branch of the Federal District.
2. A 33% of the members of the Senate against an international treaty.⁹
3. A 33% of the members of a state Legislative branch against a law approved by this branch.
4. A 33% of the members of the Federal District Legislative branch against a law approved by this branch.

⁶ The name of this law is *Ley reglamentaria de las fracciones I y II del artículo 105 de la Constitución Política de los Estados Unidos Mexicanos*.

⁷ <http://www.scjn.gob.mx/PortalSCJN/ActividadJur/ControversiasConstitucionales/ControversiasConstitucionales1917-1994.htm>

⁸ <http://www.scjn.gob.mx/PortalSCJN/Transparencia/InformesLabores/2008.htm>

⁹ Article 76 of the Constitution orders that the Senate has the power to analyze the foreign policy affairs and to ratify all international treaties signed by the Executive Power.

5. The national General Attorney against any law or international treaty.
6. The national political parties against federal and local electoral laws and state political parties only against the electoral laws approved by their state legislature.
7. The national *Ombudsman* against any law or international treaty that might affect a fundamental right recognized by the Constitution. Local *Ombudsmans* can also challenge the constitutionality of a law approved by their Legislative power.

The *acción de inconstitucionalidad* obeys to a specific countermajoritarian logic. There are two reasons that confirm this affirmation. First, because a non-popular elected branch of government such as the Supreme Court has the power to “derogate”¹⁰ a law approved by a majority of popular elected representatives, such as the members of the different Legislatures. And second, because as we can see, particularly in numbers 1 to 4, there are the parliamentary minorities the legitimated actors who can challenge the constitutionality of legislation.

The recognition of the national political parties as legitimated actors, specifically for electoral legislation is quite important, even more when they have the opportunity to challenge the constitutionality of a state law in which the party in question might not have enough members in the Legislative chamber to add the required 33%.

Only in 2008, 174 *acciones de inconstitucionalidad* were introduced. In that year, the Supreme Court determined the constitutionality of an amendment to the criminal code of the Federal District which decriminalized abortion when it is practiced before the 12 week of pregnancy. In this case, the *acción de inconstitucionalidad* before the Supreme Court was brought by the national *Ombudsman* and the national General Attorney.

IV. Conclusion

There is no doubt that the reforms to the electoral legislation were fundamental in the construction of political pluralism in México. Nevertheless, no democracy can be maintained without the certainty that all the political actors will respect the basic agreements contained in the Constitution. In this context, is fundamental to highlight the role that the Supreme Court has played in the enforcement of constitutional rules specifically since the reform of 1994.

¹⁰ As Kelsen said, the Constitutional Court acts as a “negative legislator” when it declares the unconstitutionality of a law, expelling it from the legal system. Kelsen, Hans, *La garantía jurisdiccional de la Constitución*, trad. Rolando Tamayo y Salmorán, México, UNAM, 2001, p. 56.