CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS

A Comparative Law Study

In all democratic states, constitutional courts, which are traditionally empowered to invalidate or to annul unconstitutional statutes, have the role of interpreting and applying the Constitution to preserve its supremacy and to ensure the prevalence of fundamental rights. In this sense, they were traditionally considered "negative legislators," unable to substitute for the legislators or to enact legislative provisions that could not be deduced from the Constitution. During the past decade, the role of constitutional courts has dramatically changed, as their role is no longer limited to declaring the unconstitutionality of statutes or annulling them. Today, constitutional courts condition their decisions on the presumption of constitutionality of statutes, opting to interpret them according to or in harmony with the Constitution to preserve them, instead of deciding their annulment or declaring them unconstitutional. More frequently, constitutional courts, instead of dealing with existing legislation, assume the role of assistants or auxiliaries to the legislator, creating provisions they deduce from the Constitution when controlling the absence of legislation or legislative omissions. In some cases, they act as "positive legislators," issuing temporary or provisional rules to be applied pending the enactment of legislation. This book analyzes this new role of the constitutional courts, conditioned by the principles of progressiveness and of prevalence of human rights, particularly regarding the important rediscovery of the right to equality and nondiscrimination.

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MEXICO

THE MEXICAN SUPREME COURT AS POSITIVE LEGISLATOR

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INTRODUCTION

From a material point of view, the Mexican Supreme Court of Justice of the Nation (hereinafter, SC) has evolved from an appeals court into a constitutional court, specifically since the constitutional reform of December 31, 1994. From that date, its composition decreased from twenty-six to eleven Justices, and it was empowered to pronounce the invalidity of norms with future *erga omnes* effects through two mechanisms: the abstract unconstitutionality cause of action and constitutional controversies.

These powers are exclusive to the SC. As such, the best doctrine has considered it a real constitutional court, although it still presides over matters inherent to a legality court, as it is at the top of the federal judicial branch. Because of its dual duties (constitutional and legal), it has been deemed that the system controlling constitutionality in Mexico has a mixed nature, to the extent that it has European or centralized control features and some aspects of the diffuse or American system, as the SC also presides over amparo

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proceedings[1] (on review),[2] in which it may declare only the inapplicability of an unconstitutional norm to a specific case.

The full exercise of these constitutional powers has led the SC to evolve the type of decisions it issues. In this manner, it has left behind the conceptualization of the famous Viennese jurist Kelsen because it has ceased to be a simple negative legislator, having progressed to what may be considered a true positive legislator in line with certain evolving constitutional court trends.[3]

To justify the foregoing, I herein briefly analyze the SC as a constitutional court, as well as the effects of its decisions and, specifically, the cases that allow us to observe its active and law-creating role.

I. THE SUPREME COURT AS A CONSTITUTIONAL COURT

1. *Brief Background*

The oldest background on the SC is found in the Real Audience of Mexico, established on November 29, 1527, as the highest judicial instance at the time of New Spain (1521–1821).

During the time of the fight for independence (1810–21), there operated what has been considered the first federal court: the Supreme Court of Justice of Mexican America, located in Ario de Rosales, Michoacán (1815).

However, the SC was formally regulated by the first Constitution in force in the independent Mexico. The Federal Constitution of the United Mexican States, enacted on October 4, 1824, organized the judicial branch in its article 123, which bestowed said power on the Supreme Court of Justice.

Subsequently, centralist constitutional codes (the Seven Laws of 1836 and the Organic Bases of the Mexican Republic of 1843) also regulated the SC.

Commencing with the enactment of the Federal Constitution dated February 5, 1857, the SC obtained constitutional control powers defined

[1] Under Mexican law, *amparo* literally means "shelter" and is legally defined as providing the complainant with shelter and protection of the Federal Justice System as the result of a favorable amparo proceeding. The amparo proceeding challenges the constitutionality of the act of a governmental authority, thereby forestalling the enforceability of the authority's act if the amparo court rules in the complainant's favor.

[2] The SC can act as a court of appeals when a first judgment is challenged and it regards the constitutionality of laws or other general rules, or when it comes to a very important case, using a sort of certiorari power.

[3] Cf. FERRER MAC-GREGOR, Eduardo (coord.), *Crónica de tribunales constitucionales en Iberoamérica*, Buenos Aires/Madrid, Marcial Pons, 2009.

through the amparo proceedings. This instrument over the course of the late nineteenth century evolved the particular nature that it has today, which was defined in the Federal Constitution of 1917 in force.

2. *Constitutional Evolution*

For the purposes here, the two most important constitutional judicial reforms, and specifically those regarding the SC transformation into a constitutional court, took place in the years 1987 and 1994.

(1) The purpose of the constitutional reform dated August 29, 1987, was to turn the Court into a specialized court of a constitutional nature, as expressly set forth in the reform's statutory purpose. In this manner, the mere legality control previously presided over by the SC transferred to the Collegiate Circuit Courts.

(2) Six years later, the most important constitutional judicial reform of the past years appeared. The reform of December 31, 1994, encompassed a total of twenty-seven substantive articles and twelve transitory provisions. The relevance of the same is divided into two fundamental aspects: the SC's organic composition (reduced from twenty-six members to eleven) and the creation of a complete constitutional control system, which considerably approaches the European constitutional courts.

3. *Powers*

A. Constitutional Control.

The SC presides essentially over three constitutional control instruments: (1) the abstract unconstitutionality cause of action, (2) constitutional controversies (jurisdictional or power conflicts between State bodies and branches), and (3) amparo proceedings.

(a) *Abstract unconstitutionality cause of action*. This power is exclusive to the SC by means of the unconstitutionality cause of action, a mechanism regulated by article 105, section II, of the Federal Constitution.

Those entitled to file the action are 33 percent of the members of (federal or state) legislative bodies; the Attorney General of the Republic; political parties; and the Human Rights Commissions (ombudsmen), whether at the National or State level.

As I mention herein, a supramajority vote is necessary to declare generally effective invalidity, that is to say, when eight (of eleven) votes are obtained. Should there be a simple majority (five, six, or seven votes), the action is

held nonjusticiable (dismissed) and the action has no effect (*improcedente*). This supramajority requirement has been criticized by doctrinaires, and there exist proposals to withdraw it.

(b) *Specific control*. This takes place through two instruments: constitutional controversies and amparo proceedings. Unlike the abstract unconstitutionality cause of action, to have standing to sue in these proceedings, the plaintiff must have suffered some specific affectation of legal or legitimate interests; otherwise, the constitutional suit is inadmissible.

(i) *Constitutional controversies* (jurisdictional or power conflicts). Article 105, section I, provides eleven subsections that may be classified in three categories: (1) conflicts between different legal orders due to the legality or constitutionality of a general norm or an act (e.g., the Federation and a State and the Federal District, the Federation and a State); (2) conflicts between bodies of different legal orders due to the legality or constitutionality of general norms or of acts (e.g., the Executive Branch and the Congress of the Union); and (3) conflicts between bodies of the same legal order due to the constitutionality of general norms or of acts (e.g., between two branches of a state, between a state and a municipality of the same state).[4]

This constitutional process is exclusive to the SC. Resolutions may produce future general effects with the same supramajority vote requirement of eight justices. However, unlike the unconstitutionality cause of action, if there exists a relative majority, the resolution of the constitutional controversies produces *inter partes* effects.

(ii) *Amparo proceedings*. Regulated by constitutional articles 103 and 107, this is the most deeply rooted constitutional control mechanism in Mexico, not only because it has a centenarian tradition but also because it represented the sole effective constitutional protection mechanism up to the oft-cited 1994 constitutional reform.

One of its characteristics is that decisions pronounced in amparo proceedings provide protection only *inter partes*; that is, the challenged law is inapplicable to a specific case and to the amparo plaintiff (*quejoso*), although it is still valid for anyone else. Nevertheless, in December 2010, the Congress of the Union approved a constitutional amendment which allows a general declaration of unconstitutionality with *erga omnes* effects solely in the so called "Amparo against laws". In this case, when an indirect amparo trial deals for the second time with the unconstitutionality of a general norm,

[4] Cf. Cossío Díaz, José Ramón, "Artículo 105 constitucional," in Ferrer Mac-Gregor, Eduardo (coord.), 5th ed., Mexico City, Porrúa, 2006, Volume II, pp. 957–999, at p. 982.

the Supreme Court will inform the authoritative legislative body. If the problem persists for 90 calendar days, the Supreme Court will issue (if approved by at least 8 votes) the general declaration of unconstitutionality, in which the Court will determine its reach and the conditions in terms of the statutory law.

B. Other Jurisdiction and Powers

In addition to those three constitutional powers, the SC has other special constitutional jurisdiction as well as multiple jurisdictions of different kinds that are more like those of an appeals court, thus distancing itself as a constitutional court. Among the most important powers are the investigation procedure of the SC, which allows the SC to investigate possible serious individual rights violations, regulated by the second paragraph of article 97 of the Mexican Constitution; the power of preemption to preside over those amparo proceedings that originally correspond to Collegiate Circuit Courts or to Unitary Circuit Courts on appeal of ordinary trials in which the Federation is a party and when it is warranted due to the interest and relevance of the matter; the resolution of contradiction between precedents and of jurisdictional conflicts between Collegiate Circuit Courts; the presiding over of determined administrative claims remedies; and deciding on the removal of authorities as a result of violation of amparo decisions.

II. THE SUPREME COURT AS A POSITIVE LEGISLATOR

The nullification of a law is essentially produced by applying the norms of the Constitution. Free creation which is a characteristic of legislation is virtually absent in a nullification. While the legislator is not bound by the Constitution except in regards to procedure and only exceptionally in regards to the contents of laws that they shall enact – and this, only by general principles or directions – the activity of the negative legislator, that is, constitutional jurisdictional activity, to the contrary, is absolutely determined by the Constitution. Specifically for this reason, its duties are similar to those of any other court in general, and said duties mainly constitute application of the Law and, only to a lesser extent, creation of Law. Therefore, its duties are truly jurisdictional.[5]

[5] KELSEN, Hans, "La garantía jurisdiccional de la Constitución (la justicia constitucional)," *Revista Iberoamericana de Derecho Procesal Constitucional*, Mexico City, nº 10, July–December 2008, pp. 3–46, at p. 25.

The conception of the famous jurist Hans Kelsen was such that when he wrote the preliminary draft of the Constitution of Austria of 1920, he created for the first time a specialized constitutional regulatory control body: the Constitutional Court. This Court narrowed its duties to constitutionality analysis and, in the applicable case, proceeded to declare invalid the norm challenged.

As I illustrate herein, the tasks of the modern constitutional courts have surpassed the sole nullification of laws. Constitutional justice challenges are increasingly complex and need a much more participative intervention by constitutional judges. Thus, they have advanced into territory that, for Kelsen, was unthinkable and probably undesirable. Along these lines, problems of unconstitutionality incite the creative role of the constitutional judge, who must bring into action all the legal tools within his or her reach, combined with sensitivity, prudence, and self-control.

I hereafter discuss my ideas on the decisions issued by the SC acting as a Constitutional Court, and I then reflect on complex cases in which the constitutional response has gone beyond a simple negative legislator.

To determine the effects and contents of constitutional decisions issued by the SC (and to comment on exceptional cases), it is necessary to distinguish between the three constitutional control mechanisms, as each has different characteristics.

1. *Amparo Proceedings (Specific Effects)*

Beginning with the 1847 Constitution, the rulings issued by the Supreme Court of Justice in amparo matters have been limited to protection in a specific case, in compliance with the traditional principle of relativity of decisions. I deem that this situation must be overcome to include the general declaration of unconstitutionality, at least in the "amparo against laws" sector.

This has caused the result that "favorable"[6] amparo constitutional decisions are limited to solely protecting the petitioner, even though their effects, unlike other constitutional proceedings, are retroactive to the time the violation was committed (*ex tunc*), in compliance with article 80 of the Amparo Law: "The purpose of a decision granting amparo is that of restoring to the petitioner full entitlement of the individual right violated,

[6] The original Spanish uses the words *estimatoria* and *desestimatoria* to denote those decisions that have been upheld and those decisions that have been overruled, respectively. For the purpose of clarity and emphasis, I use *favorable* and *unfavorable* as approximations to those.

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reestablishing the state of things as they were before the violation, when the act challenged is positive in nature; and if act is negative in nature, the effect of the amparo shall be to obligate the challenged authority to act so as to respect the right in question and to itself comply with what the right demands."

As a matter of fact, the Amparo Law provides that the effects of decisions under this constitutional right are retroactive; however, SC jurisprudence has advanced to also granting future or *ex nunc* effects to favorable *amparo* decisions and not only retroactive or *ex tunc* effects. This advancement is meaningful because it breaks the authority's practice of reapplying the same provision that had been the object of protection, thereby preventing the petitioner from bearing the burden of lodging new amparo proceedings against future application of similar acts of the authority. In keeping with the *res judicata* principle, the temporary effects of a favorable decision consist not only of restoring the petitioner's rights to the state in which they were found before contravention of their fundamental rights took place, by acting backward by destroying application of the act that resulted in the amparo proceeding lodged, but also of the application acts that, in the applicable case, have arisen during the integration of the proceeding – but said effects also act forward, which implies that the effect of the amparo is to prevent the norm that has been declared unconstitutional from being subsequently applied to the petitioner or offended party.[7]

In jurisprudential terms, the limited specific effects of amparo decisions have been broadening in such a manner that, in determined cases, protection has been extended to individuals other than the amparo petitioner. This happens, for instance, when the effects are extended to the petitioner's codefendants, which without filing the corresponding constitutional action, if the procedural record proves that there exists necessary joinder of defendants between said codefendants or that the situation of the joint defendants is identical, similar or common to that of the individual who did lodge the amparo proceedings, as the effects of the aforementioned joinder of defendants are produced only within the corresponding proceeding; thus, they may be transferred to the constitutional proceeding.[8]

Regarding the binding effects of jurisprudence, it should be highlighted that administrative authorities are not yet bound to apply them in the grounds

[7] Cf. the following jurisprudence theses: *GSJF*, 8th Epoch, Plenary, April–June 1989; *SJFG*, Plenary, Volume IV, November 1996, p. 135; and *SJFG*, Plenary, Volume X, November 1999, p. 19.

[8] Cf. P.J.9/96, *SJFG*, Plenary, Volume III, February 1996, p. 78.

and reason for their resolutions (this aspect should be changed in the future). However, the Federal Court of Tax and Administrative Justice, though a formally administrative body, performs materially jurisdictional duties and is obligated to apply jurisprudence declaring a law unconstitutional. The latter does not imply a pronouncement of a constitutional nature because it is restricted to the application of the jurisprudence; that is, it should only verify the appropriateness of its application to the specific case, as inferred from the criteria upheld in jurisprudential theses 2a./J. 38/2002 and P./J. 38/2002.[9]

In addition to the foregoing jurisprudence, it must be pointed out that the Second Chamber of the SC established its criterion, also of jurisprudential nature, stating that, even though the administrative authorities are not bound to apply jurisprudence declaring a law unconstitutional, they must comply with decisions issued by the Federal Court of Tax and Administrative Justice that declare a resolution null and void on the basis of such type of jurisprudence.[10]

The obligatory nature of jurisprudence declaring a law unconstitutional has a wider scope if one abides by the principle of amendment of defects in the complaint contained in article 76 *bis*, section I, of the Amparo Law. The purpose of the amendment of defects in the complaint is to efficiently control the constitutionality of the laws so that the Constitution prevails as the Supreme Law, which does not imply avoiding the appropriateness of amparo proceedings, as expressed in the jurisprudential thesis P./J. 7/2006 of the Plenary Court.[11] Therefore, the amendment of the complaint applies to questions of legal merits once the amparo proceeding is appropriate regarding the law or act challenged.

The amendment of the complaint on such terms is appropriate and is not hindered by a claim against the first or subsequent application acts of the laws that have been declared unconstitutional by jurisprudence of the Highest Court, as learned from jurisprudence P./J. 8/2006.[12] The foregoing does not mean that the causes of inappropriateness derived from the express or tacit consent of the law referred to by sections XI and XII of article 73 of the Amparo Law are invalid. This is so because, if these causes take place, they shall operate to the extent permitted by law; however, the dismissal of the proceedings regarding the application acts is not admissible but, instead

[9] 2nd./J. 38/2002, *SGFG*, Ninth Epoch, Volume. XV, May 2002, p. 175; and P./J. 38/2002, *SJFG*, Ninth Epoch, Volume XVI, August 2002, p. 5.

[10] 2a./J. 89/2004, *SJFG*, Ninth Epoch, Volume XX, July 2004, p. 281.

[11] T. XXIII, Plenary, *SGFJ*, February 2006, p. 7.

[12] T. XXIII, Ninth Epoch, *SJFG*, February 2006, p. 9.

in regard to the acts, the amparo shall be appropriately granted if said acts are grounded in any law that has been declared unconstitutional by jurisprudence. It should be taken into consideration that, on the terms of article 80 of the aforementioned law, amparo has restitution with nonretroactive effects; therefore, the granting of the amparo may not include prior acts but only present and future acts, as specified in the resolution issued by the Plenary Court upon resolving jurisprudential thesis 54/2004-PL.[13] The benefit of the amendment of complaint defects is applicable not only to direct amparo proceedings but also to indirect amparo proceedings, at the trial or review stages, as determined by plenary jurisprudence P./J. 6/2006.[14]

The expansive strength of jurisprudence is made clear with the Plenary's determination to create jurisprudence in generic or thematic matters, which implies their mandatory application by Federal Judicial Branch judges and courts in amparo proceedings for all the cases encompassed by the same or analogous cases even though different legal norms are involved (but have identical or similar content). The preceding is set forth in plenary jurisprudence P./J. 104/2007.[15]

Using as a point of departure the greater strength of jurisprudence by establishing general or thematic jurisprudence, the jurisprudential thesis established by the Plenary Session of the Highest Court acquires special relevance. This precedent states that, what is important for setting jurisprudence by reiteration, is that there is a common criterion applicable to various cases even though the specific circumstances of the analyzed norms vary (e.g., enforceability, issuing authorities, article number). Thus, the possibility of establishing thematic jurisprudence eases and expedites the definition of jurisprudential guidelines that must be obligatorily applied, because, regardless of whether the cases are identical, there may be defined therein the criterion that reestablishes constitutional order to similar cases, thereby increasing its effectiveness.[16]

Last, it is important to emphasize that in some decisions that grant amparo, directly related to unjust treatment under the norm, it has been determined that their effect is to recognize the petitioner's incorrectly denied right. The preceding makes evident the broadening of the protective mantle.[17]

[13] Decision published in the *SJFG*, Ninth Epoch, Volume XXIII, February 2006.

[14] T XXIII, Ninth Epoch, *SJFG*, February 2006, p. 7.

[15] T. XXVI, Ninth Epoch, *SJFG*, December 2007, p. 14.

[16] Thesis P. XVI/94, published in the *GSJF*, Eighth Epoch, 77, May 1994, p. 38.

[17] Thesis P. 93/2009, CT. 61/2009, *SJFG*, XXX, Ninth Epoch, August 2009, p. 175.

Aside from these jurisprudential criteria, which in some way attempt to broaden the efficacy of favorable amparo decisions for the effects of time and personal scope, it is recommendable that the constitutional and legal reforms that have been submitted since 2001 to the Congress of the Union be approved. Specifically, the draft of the constitutional reform and the new Amparo Law, which among its relevant aspects are the following: surpassing the individual effect of amparo decisions through a general statement of unconstitutionality in cases of amparo proceedings against laws; the substitution of the antiquated concept of legal standing that is still being applied in this area by a broader legitimation concept, defined as legitimate interest; the extension of the scope of protection to those human rights provided for in international treaties duly incorporated into the Mexican system; the restriction of the so-called *amparo para efectos* so as to avoid unnecessary returns to lower courts as a result of violations of form; and progress toward new conceptions of what constitutes an authority so that an amparo is appropriate, overcoming a formalistic criteria, as there exists a clear comparative law trend toward horizontal protection of fundamental rights (*drittwirkung*).

2. *Abstract Unconstitutionality Cause of Action against General Norms (Laws and International Treaties) and Constitutional Controversies (*Erga Omnes *Effect)*

The subject of the effects of constitutional decisions attains greater dynamism when it deals with abstract unconstitutionality cause of actions and constitutional controversies referred to in sections I and II of constitutional article 105. This is so because the decisions issued in the constitutional proceedings may be generally applicable, that is, *erga omnes*, in those predicates established in the same Constitution and its regulatory law. This means that, in those cases of supramajority favorable decisions (voting by at least eight of the eleven Justices who make up the full SC bench), it is sometimes necessary to attenuate the effects of the ruling. In these instances, the constitutional control body has flexible powers to determine the date and application conditions of the constitutional decisions, as it is necessary to mitigate the possible negative effects of the legislative vacuum produced by nullification of the legal norm, the text of which has been declared unconstitutional. Hence, the SC possesses broad powers to determine the effects and other conditions of enforceability of the favorable decisions it issues, as article 41, section IV, of the Regulatory Law referring to the contents that should be expressed in the decisions states as a requirement that a decision must demarcate "The scope and effect of the

decision, precisely expressing, if applicable, the bodies obligated to abide by the decision, the general norms or acts regarding which it applies and all of those elements necessary for its full effect within the corresponding scope."[18]

This broad power granted to the SC enables it to determine in each case the scope and effect of favorable decisions, especially when a supramajority vote is obtained so as to declare invalidity in general terms, extending the effects of the decision to others norms whose validity depends on the very norm invalidated, regardless of whether the norm in question has an identical or lesser hierarchy as the challenged norm. The interdependency relationship existing between the norms determines, because of the same invalidating defect, their contraposition with the prevailing constitutional order.[19] Moreover, recently, on the basis of these broad powers, not only have the normative portions directly affected by unconstitutionality been declared invalid but also invalidity has been extended to all the challenged normative system. The preceding is the result of considering the challenged provision as a piece of an integrated normative system in which each part is indissolubly logically related to the whole and, as such, the expulsion of only one of the relevant portions of the system would result in the disconfiguration or redesign of the system. This, in turn, leads to necessarily establishing the revival of the norms in force before those that were declared invalid.[20]

An example of the preceding is unconstitutionality cause of action 47/2006 and actions joined thereto, which determined the validity of transitory articles 3 and 5 of Decree 419, which respectively extended the legislative mandate of the Deputies of the Sixty-second Congressional Legislature for the State of Chiapas and of the present Town Council members. This declaration of invalidity had the effect that the aforementioned legislators and Town Council members concluded their term in office as foreseen before the issuance of the challenged Decree 419. Consequently, the new election of deputies and constitutional and municipal town councils was done in conformity with the legislation in force, before the later reform; that is, the enforceability of the norms previously enforceable was revived.[21]

[18] By interpreting this precept and its constitutional powers by issuing the favorable decisions, the Supreme Tribunal has established jurisprudential thesis P./J. 84/2007, *SJFG*, volume XXVI, December 2007, p. 777.

[19] Cf. P./J. 32/2006, *SJFG*, volume XXIII, February 2006, p. 1169.

[20] Cf. P/J. 85/2007 and 86/2007, *SJFG*, volume XXVI, December 2007, pp. 849 and 778, respectively.

[21] The reasons posed to revive the aforementioned regulation are substantially the following: "The revival of electoral legislation that has not yet been reformed, has the purpose of providing the

In a similar case, the SC determined that all provisions contained in Decrees 353, 354, and 355, published in the Official Gazette of the State of Colima on August 31, 2008, including the transitory articles regulating the decrees' entry into force, were unconstitutional. The High Court, taking into account that the decrees reformed the Electoral Code of the State of Colima and the State Electoral Challenge System Law, subject area wherein the paramount principle is certainty, determined that the subsequent elections process in the State of Colima would be governed by the laws before Decrees 353 and 354 that had been declared invalid. However, the Court clarified that the aforementioned revival would take effect only for the following electoral process, as it would be necessary to issue new legislation for future elections. Furthermore, it determined that the revived legislation could not be reformed during the electoral proceeding, as is provided for in article 105, section II, penultimate paragraph, of the Federal Constitution.[22]

It is convenient to remember Kelsen's thoughts regarding the revival of norms:

> It is possible, in this regard, to think of another means: to empower the Constitutional Court to stipulate – jointly with the resolution that annuls the general norm – that the general norms that regulated the subject prior to the annulled law may enter into effect. Then it would be prudent to entrust to the selfsame Court the decision in which case this power to re-establish the previous legal situation should be used. It would be lamentable if the Constitution made the reappearance of this previous state an imperative general rule whenever general norms are annulled. . . . The power thus conferred on the Constitutional Court to make norms positively enforceable would greatly accentuate the legislative nature of its duties, furthermore it would only encompass the norms which had been made enforceable, previously, by the common legislator.[23]

The Supreme Court's previously described broad powers are also related to the principle of *iura novit curia* governing the two relevant constitutional proceedings, to the extent that the SC when issuing its rulings should correct

voters, political parties and the organizations that participate in the election with legal certainty, pursuant to the principle of certainty that rules this subject and which impedes that, due to the pending proximity of the renewal of the of the bodies of popular representation, the transcendental regulations which shall regulate this form of access by citizens to public power be unknown, as for example, amongst other, the terms related to the preparation of the elections." Cf. A.I. 47/2006 and its accumulated 49/2006, 50/2006 and 51/2006, dated December 7, 2006.

22 Cf. A.I. 107/2008 and its accumulated 108/2008 and 109/2008, dated November 20, 2008.

23 KELSER, HANS, "La garantía jurisdiccional de la Constitución (la justicia constitucional)," *op. cit*., p. 37.

the errors that it observes upon citing the invoked provisions and amend the grounds for invalidity expressed in the complaint. It may also base a declaration of unconstitutionality on any constitutional provision without necessarily invoking the provision in question, except in the case of electoral unconstitutionality causes of action (article 71 of the regulatory law).[24]

Another relevant aspect in these two constitutional proceedings is the binding character of the reasoning contained in the grounds that form the basis for the decision, if these are approved by at least eight justices of the SC. The *ratio decidendi* is binding on all the national courts, whether federal or state, on the terms of article 43 of the Regulatory Law, and because this provision does not makes a distinction between favorable or appropriate decisions and unfavorable decisions or denials, it should be understood that it applies to both types of rulings. It makes reference to the reasons containing the *thema decidendum* and not to *obiter dictum*, that is, an element isolated from the argumentative discourse – these are so frequent in our world that occasionally they materialize in jurisprudential thesis, when they should not be obligatorily binding because they are not part of the principal argument.[25]

That is why it is important, in order to determine the effects and effectiveness of constitutional decisions in those proceedings, to distinguish between the decisions of acceptance (*acogimiento*) or non-supramajority invalidating decision from those that are characterized as supramajority invalidating decisions. The first are those decisions that, even though there is a majority vote, do not meet the necessary constitutional and legal requirement to be fully effective. This distinction even includes different consequences if they are unconstitutionality causes of actions or constitutional controversies. This supramajority voting requirement lacks practical sense, considering that, at times, the plenary of our Highest Court convenes without all of its members (the quorum necessary is eight), so that on occasion a unanimous vote is necessary or it would suffice for one or two minority votes would prevail over the majority, thus causing the ruling's lack of generally enforceability. It is desirable to do away with this requirement in the future, as it has no reason to exist in such complex and technical questions such as allegations of the unconstitutionality of general provisions.

[24] Cf. P,/J. 6/2003, *SJFG*, volume XX, September 2004, p. 437.

[25] Cf. 1st./J.2/2004, *SJFG*, volume XIX, March 2004, p. 130.

This may become an obstacle to real effectivity, as has been demonstrated by events in other constitutional courts in comparative law.[26]

Some doctrinal sectors have deemed that conditioning constitutional control on a minority is inappropriate for courts. And, as frequently expressed, this cannot be justified as protection of the presumed constitutionality of laws, as the preceding derives its existential justification from other aspects that are no applicable to the body entrusted with the definitive interpretation of the Constitution, if there exist a simple majority that finds unconstitutional the challenged norm (which implies in reality that no conforming interpretation is possible). This characteristic of supramajority voting to declare invalid challenged general norms has been broadly criticized and described by an author as "the greatest defect of the Mexican Federal unconstitutionality cause of action."[27]

Non-supramajority favorable decisions in cases of an abstract cause of action challenging the constitutionality of a law imply that, despite the existence of a simple majority (five, six, or seven votes)[28] that admit the constitutional claim and deem unconstitutional the challenged norm, they do not produce the norm's nullity or its expulsion from the legal order because the eight-vote requirement for a general decision of unconstitutionality is not satisfied. In this situation, the Plenary Court, confronted with this insurmountable procedural obstacle, should unfavorably rule on the cause of action and order the matter filed, as provided for in the second paragraph of article 72 of the applicable Regulatory Law and expressly make said declaration in the grounds for decision pertaining to the ruling. In the decision, reference should be made only to the lack of supramajority vote, and the considerations of the majority should not become part of the ruling; however, in the applicable case, they may be incorporated as non-

[26] Few constitutional courts set forth supramajority voting as a requirement to invest constitutional decisions with general effectivity. One of the most representative examples of the futility of this requirement is found in Peru, where the Court of Constitutional Rights (1979) and the Constitutional Court (1993) faced serious operational problems due to the high percentage of required votes. The new Constitutional Procedural Code, in force since December 1, 2004, retains supramajority voting but with fewer requirements. Regarding this legislation, see ABAD YUPANQUI, Samuel B., DANOS ORDÓÑEZ, Jorge, EGUIGUREN PRAELI, Francisco J., GARCÍA BELAUNDE, Domingo, MONROY GÁLVEZ, Juan, and ORE GUARDIA, Arsenio, *Código Procesal Constitucional. Estudio introductorio, exposición de motivos, dictámenes e índice analítico*, 2nd ed., Lima, Palestra, 2005.

[27] BRAGE CAMAZANO, Joaquín, *La acción abstracta de inconstitucionalidad*, Mexico City, UNAM, 2005, p. 347; especially on this topic, see his criticisms to the presumed constitutionality of the law, pp. 347–352.

[28] If the necessary quorum for the Plenary is at least eight Supreme Court justices, the non-supramajority could be only five, six, or seven.

supramajority votes. The SC itself has interpreted the phenomenon of the non-supramajority decision in the following manner:

> If there exists a majority, but there are less than eight votes finding the norm unconstitutional, then there shall be a plenary declaration of the impossibility (non-subsistence) to decide the action and there will be no holding issued neither in regards to the constitutionality which is implicitly reached, since the validity of the challenged norm is respected by applying a technical rule protecting the respective presumption that the legislative body obeyed the Constitution. That this was the result reached due to the lack of a supramajority vote is reflected by the absence of legal arguments by the Supreme Court supporting and strengthening the expression of the legislature. In accordance to the judicial system, it is also logical that in the eventuality of an unfavorable declaration on the unconstitutionality cause of action, even though there does not exist a pronouncement by the Supreme Court on a related subject, the Justices in the non-supramajority and the minority votes may draft votes giving the arguments which support the said opinion.[29]

This resolution does not imply a declaration of the constitutionality of the challenged norm, as it does not resolve the constitutional controversy because of a procedural impediment that is indispensable and necessary to nullify the challenged provision and so expel it from the legal order. Therefore, the ruling really produces similar effects to a proceeding dismissal, leaving unadjudicated the merits of the matter as a result of an insurmountable procedural obstacle leading to the dismissal of the constitutional cause of action.[30]

In contrast, when the favorable non-supramajority decision is the result of a constitutional controversy proceeding, the action will not be dismissed as in the preceding case but the decision is binding only between the parties.[31] In general, the reach of the effects of constitutional controversies is subordinated to the categorical relations existing between the plaintiff and the defendant.[32] The decision is only generally enforceable – *erga omnes* – if it is a challenge to generally applicable provisions (not acts) and if the constitutional controversy sentence was approved by a majority of at least

[29] Sixth whereas clause of the decision of the unconstitutionality cause of action 10/2000, decided on January 29 and 30, 2002.

[30] Cf. P./J. 15/2002, *SJFG*, vol. XV, February 2002, p. 419.

[31] Cf. P. 14/3007, as well as jurisprudential thesis P.J.72/96 and P.J. 108/2001, *SJFG*, volume XXV, May, 2007, p. 1533; *SJFG*, volume IV, November 1996, p. 249; *SJFG*, volume XIV, September 2001, p. 1024.

[32] Cf. P.J. 9/1999, *SJFG*, volume IX, April 1999, p. 281.

eight votes and is a controversy involving States or municipalities that have been challenged by the Federal Government, or of municipalities challenged by the States, or in those cases referred to in clauses (c), (h) and (k) of section I of constitutional article 105.[33]

In regards to the temporal effects of decisions on both abstract unconstitutionality causes of action and constitutional controversies, two general rules are provided. The first rule consists of leaving up to the Supreme Court's discretion the setting of the date that the decision will enter into force,[34] which on many occasions is the day following publication of the final decision in the *Federal Official Gazette*. This delay of the temporal enforceability of rulings allows the SC the flexibility to consider the particularities of each case and, by this means, mitigate the possible consequences of the legislative vacuum produced by the expulsion of the general provision declared unconstitutional. A maximum term for this delay is not provided for as in Austria, where it may never exceed eighteen months after the publication of constitutional ruling.

In contrast, following the criterion that normally governs challenges to general norms pursuant to the European system, the effects of the ruling are future (*ex nunc*), and it may have retroactive effect only in criminal cases benefitting the accused (*ex tunc*).[35] However, the SC has sustained that, regardless of subject matter, it may stipulate extraordinarily that the declaration of invalidity becomes effective from the date on which the complaint is presented, if due to suspension of the challenged acts things have remained in the state in which they were at the moment the controversy was presented or from the moment in which the precautionary measure was conceded, if the aforementioned concession occurred after the complaint was presented.[36]

Although the previously referenced retroactivity is exceptionally decreed, it should be stated that in Latin American legal orders and jurisprudences a moderate retroactivity is accepted. The original Austrian conception of effects into the future has undergone important exceptions, to the degree that frequently European constitutional courts (e.g., Austria, Germany, Italy,

[33] These sections establish: "c) The Executive Branch and the Congress of the Union; the former and any of the Chambers of the latter or in its case the Permanent Commission, whether as federal institutions or of the Federal District; . . . h) Two branches of the same State, regarding the constitutionality of their acts or general provisions; . . . k) two Federal District governmental bodies regarding the constitutionality of their acts or general norms."

[34] Cf. P. /J. 11/2001, *SJFG*, volume XIV, September 2001, p. 1098.

[35] Cf. P./J. 74/97, *SJFG*, volume VI, September 1997, p. 548.

[36] Cf. P./J. 71/2006, p. 1377, *SJFG*, volume XXIII, May 2006, p. 1377.

Spain) allow certain retroactive effects (*ex tunc*) in their constitutionality rulings. This means that the typical rights-creating decisions (which imply invalidity of the norm) inherent to decisions of unconstitutionality of general provision are substituted for in some instances by declaratory decisions (nullification), which imply granting retroactive effects. This also occurs in the North American system, in which rulings exceptionally may have future effects, as occurs with the decisions issued by the Supreme Court of the United States from the second half of the past century in determined cases.

3. *Legislative Omissions*

Another topic that warrants comment is legislative omissions. At the federal level, there does not exist any specific cause of action to challenge legislative omissions; therefore, the challenges are channeled through three existing constitutional control mechanisms. The jurisprudential criterion in effect is that the remedies of amparo proceedings[37] and the abstract unconstitutionality cause of action[38] are inappropriate to challenge this type of unconstitutionality. Nevertheless, the constitutional controversy has been jurisprudentially accepted as means to challenge legislative omissions.[39] Using as a point of departure the premise that legislative bodies have powers or authority that may either be facultative or obligatory in keeping with the principle of the functional division of the branches of government,[40] four distinct types of legislative omissions have been differentiated: (1) absolute in jurisdiction that must be exercised obligatorily, when the legislative body has the obligation or mandate to issue a determined law and has not done so; (2) relative to jurisdiction that must be exercised obligatorily when the legislative body has the obligation or mandate to issue a determined law but does so incompletely or deficiently; (3) absolute in jurisdiction that may be exercised at will when the legislative body decides not to act because it does not have any mandate or obligation imposed on it; and (4) relative in legislative jurisdiction, but when it issues the law, it does so incompletely or deficiently.[41]

[37] Cf. P. CLXVIII/97*SJFG*, volume VI, December 1997, p. 180.

[38] Cf. P./J. 16/2002 and P./J. 23/2005, *SJFG*, volume XV, March 2002, p. 995; and *SJFG*, volume XXI, May 2005, p. 781.

[39] Cf. P./J. 82/99, *SJFG*, volume X, August 1999, p. 568.

[40] Cf. P./J. 10/2006, *SJFG*, volume XXIII, February 2005, p. 1528.

[41] P./J. 11/2005, *SJFG*, volume XXIII, February 2006, p. 1527.

This concept rests on the comparative law trend accepting challenges to the unconstitutionality of legislative omissions as either relative or absolute in nature.[42] Nonetheless, this criterion was modified beginning with the constitutional controversies resolved on October 15, 2007,[43] related to the challenge to the federal legislature's failure to issue the norms establishing the legal conditions so that indigenous towns and communities may purchase, operate, and manage communications media. A majority of five votes against four determined the inappropriateness of a constitutional controversy to challenge legislative omissions.

Without prejudice to the foregoing, recently the Plenary Supreme Court declared a legal basis for the constitutional controversy filed against the legislative omission of the State Congress of Jalisco. The controversy consisted of challenging the lack of regulation for voluntary retirement of the State Supreme Court of Justice Magistrates, and as a consequence of the preceding, it was decided that the Jalisco state legislature would legislate in the following ordinary congressional session period to correct the noted defect.[44] Similarly, a decision was issued in a different controversy on a closely related topic, declaring its appropriateness, as we shall see here.

The previous comments show that the SC has had to preside over diverse proceedings in which legislative omissions were challenged, without following a uniform jurisprudential line in this regard. Furthermore, it should be said in analyzing these matters that some of the SC's members have doubted precisely whether the High Court has sufficient powers to resolve these matters, so as to exhort the legislator to act and even to issue guidelines to the legislative bodies. These vacillations make evident that there exist specific subject matters and areas in which the SC has not fully exercised its role of Constitutional Court and where it has been overly cautious, precisely by not transforming itself into a positive legislator. Notwithstanding the preceding, there are voices inside the Court that opine otherwise.

In effect, on April 22, 2010, the Supreme Court resolved constitutional controversy 25/2008, which alleged lack of retirement regulation, provided for by article 61 of the Political Constitution of Jalisco, in favor of the magistrates and judges who were forced to retire or did so voluntarily. With a six-vote majority, it declared that a legal basis existed for the allegations and the state congress was granted a term to issue the corresponding norm.

[42] Cf. P./J. 12/2006, 13/2006 and 14/2006, *SJFG*, volume XXIII, February 2006, pp. 1532, 1365 and 1250, respectively.

[43] Constitutional Controversy 59/2006 and other forty-four controversies with identical themes.

[44] Cf. decision made May 10, 2010, issued in Constitutional Controversy 49/2008.

The minority considered that the rights of retiring judges and magistrates should be protected during the time that the legislative omission persisted, and to this end, the minority based its considerations precisely on the possibility that the SC acting as a Constitutional Court should adopt a more protective solution, and as such it held:

> From this perspective, it seems to us that within the effects possible for this Supreme Court to establish in its ruling when it observes that a legislative omission produces unconstitutionality, is the possibility of making applicable, within the scope of a determined federal entity, a different legislation – existing or repealed, federal or from any other state – temporarily, until the state legislature remedies the respective omission, if the preceding is necessary to reestablish the infringed constitutional order and avoid consummation of the consequences of the violation.
>
> All constitutional courts have a law-creating function, acting at the constitutional level, above federal and state ordinances, so that derived from article 41 of the regulatory law, it is possible for this Supreme Court to reconstruct through judicial decisions portions of the legal order.
>
> This may be done by establishing guidelines that must be obeyed by judicial officials in the absence of legislation remedying the unconstitutional omission or, whenever it is more convenient, by remitting to other legal ordinances, including those that have been repealed or that belong to other partial ordinances. However, the preceding does not imply substituting the legislative function, since it is a transitional measure that, for the purpose of giving full effect to a favorable decision, fills a vacuum by applying a valid alternative, subject to the legislature's acting in full use of its power, only being limited by the text of the Constitution.
>
> The preceding does not presuppose invading the sphere of the state legislator because the constitutional court does not operate at the federal level but instead at the constitutional, total or national level, which empowers it to act, on the terms of the selfsame article 41 of the regulatory law "in its corresponding scope," so as to ensure the effects of its rulings.[45]

The preceding makes patent that at least four Justices are convinced that the SC act as more than a simple negative legislator, adopting such measures as those proposed. Although it is still a minority position, it does indicate the level of deliberation present in the Highest Mexican Court.

[45] Concurring votes formulated by Justices Arturo Zaldívar Lelo de Larrea, Olga María Sánchez Cordero de García Villegas, José Ramón Cossío Díaz, and Guillermo I. Ortiz Mayagoitia in the decision issued by the Plenary Court in Constitutional Controversy 25/2008, presented by the Judicial Branch of the State of Jalisco.

CONCLUSIONS

(1) The SC, as the limiting body of the Federal Judicial Branch, is based on a solid historical background; however, since February 5, 1857, it started to have constitutional control powers, specifically amparo proceedings, which began profiling its new role.

(2) The SC has ceased being only an appeals court to materially become a constitutional court. This has been the trend observed through various constitutional reforms, in which the intention of the constitutional congress has been expressed, particularly in the relevant 1994 constitutional reforms.

(3) The constitutional court nature of the SC is observed both in its organic structure and in the fact that it has powers over amparo proceedings, and it concentrates two constitutional rights, the abstract unconstitutionality cause of action (against general norms) and constitutional controversies, in which the SC may declare norms invalid, with future *erga omnes* effects.

(4) The accurate exercise of the aforementioned powers has positioned the SC as the body that guarantees the rule of the Constitution in our country, which, given the increasingly complex and demanding nature of conflicts brought under its jurisdiction, has had to use the techniques and tools of other Constitutional Courts in comparative law, such as interpretation according to the Constitution, weighing, new constitutional pleading trends, and of course the modalities and effects of its resolution, which are increasingly complex.

(5) Constitutional decisions issued in amparo proceedings have traditionally been effectively limited to the petitioner. However, jurisdictional practice reflects an expansive strength derived from jurisprudence declaring a law unconstitutional, which has mainly arisen by upholding the following criteria:

(a) The obligatory nature of jurisprudence application not only by all jurisdictional bodies under the Federal Judicial Branch but also by the Federal Court of Tax and Administrative Justice, which, though constituted as a formally administrative body, performs materially jurisdictional duties.

(b) The obligation of administrative authorities to comply with the decisions issued by the Federal Court of Tax and Administrative Justice, which pronounce the nullification of a resolution or an act challenged on the basis of the jurisprudence that determines that the law on which said resolution or act is unconstitutional.

(c) The amendment of defects in the complaint if dealing with the second or subsequent application acts under the law that was jurisprudentially declared unconstitutional. The latter does not imply evading questions of the inappropriateness of amparo proceedings but only

preventing that procedural technical issues hinder the rule of the higher constitutional order.

(d) The formulation of thematic jurisprudence applicable to analogous cases even when the specific circumstances of the norms or cases analyzed vary, which exclusively binds judges and court, pertaining to the Federal Judicial Branch, not those courts under a separate Branch, as the jurisprudence cannot grant them the constitutional control jurisdiction that they lack.

(6) Contrary to amparo proceedings, the decisions issued in unconstitutionality causes of action and constitutional controversies may have general, or *erga omnes*, effects in the predicates established in the Constitution and its regulatory law, provided that a supramajority of eight votes (of eleven) exists, as mandated by the Constitution. Furthermore, the SC has broad powers to determine the effects and other conditions of enforceability for the favorable decisions that it issues.

(7) In using the previously mentioned powers, the SC has extended the effects of the declaration of invalidity to other norms for which validity depends on the very norm invalidated, given the interdependency existing between the norms; likewise, it has extended the declaration of invalidity to all of the challenged normative system, as it deems that an integrated and indissolubly normative system has been composed; when this has occurred, it has even decreed the revival of the norms in force prior to those that were declared invalid.

(8) Another relevant aspect of the decisions issued in unconstitutionality causes of action and constitutional controversies consists of the jurisprudentially binding nature of the *ratio decidendi*, that is, the reasoning contained in the grounds that form the basis of the grounds for the decision, if these are approved by at least eight of the eleven justices of the SC. This binding effect includes favorable and unfavorable decisions that meet the aforementioned supramajority voting requirement.

(9) The prior examples confirm the SC's increasing activity as a constitutional court, conscious of its law-creating function.

(10) Contrary to the SC trend observed in unconstitutionality causes of action and constitutional controversies, and even in amparo proceedings, broadening the scope of application, modalities, and effects of its rulings, in the subject area of legislative omission, it has been doubtful and inconsistent. Here, I have observed changes in criterion and vacillations regarding the scope of the Supreme Court's powers; however, this has not been an impediment to issuance of important opinions related to the progressive and constitutional nature of the Highest Court.