

9-1-1989

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Carlos Santiago Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. Miami L. Rev. 129 (1989)

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Transition to Democracy, Corporatism and Constitutional Reform in Latin America

CARLOS SANTIAGO NINO*

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In this Article, I will attempt to relate the movement toward constitutional reform, perceptible in several Latin American countries, to some socio-structural variables that have a considerable impact on the process of consolidation of democracy in those countries, and which may be influenced by institutional design.

I. TRANSITION TO DEMOCRACY AND CORPORATISM

In the past decade, a wave of democratization spread through most of Latin America without reaching some isles of authoritarianism, such as Chile. This process is often described as the "transition to democracy."¹ But this terminology conceals an ambiguity because it may refer to two distinct situations. The first is the process of adjustments of norms or institutions towards the strictures of the full democratic rule of law—competition in free elections by different political parties, an independent judiciary able to enforce a bill of rights, and so forth. The second describes a situation where these liberal democratic institutions exist in full force, but their stability is not yet completely secured, and political action and other measures are being taken in order to achieve the necessary degree of consensus and social adhesion to those institutions.

In general, Latin American countries are in transit to democracy more in the second sense than in the first. In countries like Argentina and Uruguay, for instance, full liberal and democratic mechanisms are in place. Nevertheless, the idea that social tensions and conflicts

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1. For a characterization of the process of transition to democracy, see TRANSITIONS FROM AUTHORITARIAN RULE (G. O'Donnell, P. Schmitter & L. Whitehead eds. 1986); J. LINZ, THE BREAKDOWN OF DEMOCRATIC REGIMES (1978).

may find an escape valve through coercive interference with those mechanisms has not vanished completely from people's minds. On the other hand, there are countries where democratic institutions have yet to develop more fully, as in Brazil, which requires the expansion of elections to the office of President, or in Mexico, which awaits the rise of political parties constituting real alternatives to the official one. In both of these cases, however, decisive steps in this direction have been taken recently with the enactment of a new constitution in Brazil and the results of the last elections in Mexico.

There are several classifications of processes of transition to democracy that may be applied to the developments in Latin America. One of them considers the kind of factors which precipitate the process. These factors may be *endogenous* ones (for example, economic hardship, social unrest, or divisions among those holding power), or they may be *exogenous* factors (for example, foreign intervention or pressures of external wars, especially wars being lost). In most cases, such as Brazil, Uruguay and Bolivia, endogenous causes precipitated the conversion to democracy. In the case of Argentina, however, in addition to the internal social and economic factors which greatly discredited and isolated the military regime, one must take into account the loss of the Malvinas (Falkland Islands) War. This is analogous to the exogenous factors that came into play when the Greek colonels lost control of the government after their defeat in Cyprus, and the Portuguese dictatorship fell when forced to retreat from Angola.

Another classification of processes of transition takes into account the modality of transmission of power from the dictators to democratic authorities. The two main modes of transference of power are by *force*, as in Venezuela, or by *agreement* or *consent*, as in Uruguay. The case of Argentina is quite atypical in this respect because the transmission of power did not respond to either of these modes but to one that is deemed by *collapse*. This occurs when a regime loses control of a situation, leaving a vacuum that is then occupied by the democratic forces. Though in Argentina there was some element of consent from the military—they were the ones who called for elections under the historical Constitution of the country—the fact is that they were compelled to do so by circumstances and by the longing of the people to return to democratic rule. But there was also an element of *mistake* in the modality of transference of power in Argentina. It is not an irrelevant factor in the process of transition, for example, that the members of the military regime made obviously wrong calculations as to who would win the election. Indeed, the

presidential candidate whom everyone expected to win held firmly to the position that the amnesty law that the military had enacted made it legally impossible to prosecute human rights violations.

Whatever their origins or modes, however, the main obstacle that processes of transition must face in order to consolidate democratic institutions is the curtailment of the network of de facto power relationships which corporations weave by taking advantage of the vacuum left by representatives of popular sovereignty. Under the shadow of authoritarian rule, a number of social groups representing particular interests carve a place for themselves after a bargaining process which includes their offer of support for the regime. Such groups include the military, religious organizations, coalitions of entrepreneurs, trade unions, and even the press. Once democratic rule is established, of course, these groups resist relinquishing their power to the representatives of the people.

An ever expanding literature discusses the role of corporatism in the social and political structures of Latin American countries. It also analyzes its connection with modes of political regimes, such as the so-called bureaucratic-authoritarianism, and with ideologies like populism.² The concept of "corporatism," however, has been the source of much confusion and spurious theoretical differences. The problem arises from two distinct meanings attributed to the word, one more traditional and the other more technical. In the traditional sense, corporatism (or corporativism) refers to the control exercised by the state over organizations and interest groups such as prevailed in Hitler's Germany. The more technical meaning, and the one commonly used in the political arena, describes the apparently contrary phenomenon where those same organizations and interest groups acquire considerable influence and exert persistent pressures over state decisionmakers. While explicit definitions tend to emphasize one meaning to the exclusion of the other, the term should encompass both meanings when applied to Latin America.

Latin American corporatism does not rise to the level of the fascist institutional structure of legally-sanctioned exclusive organizations or interest groups, with the possible exception of Getulio Vargas' "Estado Novo." But neither does the phenomenon that theoreticians and politicians refer to when they speak of corporatism in Latin America reduce itself to the pressures that interest groups make on political entities in every pluralistic society, lobbying for or against

2. See generally *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* (J. Malloy ed. 1977) (discussing the concept of corporatism and its relationship to state and society in Latin America).

measures that affect them. The Latin American reality is much more complex. It includes, among others, both features mentioned above: There is some control by the State over interests groups and organizations, with mechanisms that affect in some measure their operation; at the same time, however, those organizations exert enormous pressures upon legislative and administrative agencies, and as a result, obtain privileges and favors of various kinds. Some of these privileges amount to a legal monopoly of the interests represented in a way that comes close to the fascist scheme. The monopoly, however, is not always accompanied by significant influence of the State over the organization. In some cases, alternative legal or even constitutional privileges short of monopoly may be granted that shield the organization from the raw competitive forces of a free market or similar mechanisms of expression of popular preference. In addition, there are informal ways of granting favors that in many cases amount to sheer corruption and illegality.

The complexity of corporatism in Latin America has been correctly captured by Guillermo O'Donnell's characterization of it as "bifrontal" and "segmentary."³ According to O'Donnell, the bifrontal label applies to Latin American corporatism since it has both "statizing"⁴ and "privatist"⁵ components: It is statizing insofar as there is an element of conquest and subordination by the State with regard to organizations of civil society; it is privatist insofar as sectors of the public institutions become "colonized" by private interest groups and organizations. Both processes are interrelated, leading to an interpenetration. In the words of O'Donnell: "[The] 'conquering state' is also a 'porous state,' open at numerous interstices—informal and institutionalized—to links which contain bidirectional processes of control and influence, especially with the dominant classes of civil society."⁶ Bifrontality is also described by José Nun in these terms:

Now we must no longer take into account only the influence that may exert the autonomous organizations of interests upon a fragmentary and basically passive State, but also the complex and dense practices through which the latter has a strong impact on those organizations This promotes a double dependency: from the State with respect to the main interest groups which define the social division of labor . . . and from such groups in relation to the State insofar as it decisively conditions their activi-

3. O'Donnell, *Corporatism and the Question of the State*, in *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* 47 (J. Malloy ed. 1977).

4. *Id.* at 48.

5. *Id.* at 64.

6. *Id.* at 79.

ties. This double dependency generates new networks of social interaction⁷

The segmentary aspect of Latin American corporatism referred to by O'Donnell is evident in that this mode of linkage between State and society operates differently and has a systematically diverse impact on social and institutional arrangements depending on the cleavages that are determined mainly by social class.

Further inquiry into the etiology of this complex phenomenon would take us beyond the scope of this paper. One of the curious features of this sort of social structure is the circular pattern of the causal relations involved. Often, effects are themselves the causes of similar, though deeper and broader, effects. Suffice it to suggest here that some of the cultural components described by Seymour Lipset⁸ do not seem alien to the structure of Latin American corporatism. One example is resistance to internalization of universal standards based on achievement and competition rather than on particular connections and status. The Castilians developed this trait through their several century long struggle to reconquer their territory from the Moors. Later, it was transplanted to Latin America through the Spanish Conquest. To this day, it is reflected in the prestige of two corporatist entities, the Church and the military, and in the pressures against general rules of behavior and evaluation that lead to the intricate system of privileges and special status within which corporatism flourishes.

For our present purposes, rather than speculating about the etiology of corporatism, it is more important to analyze how it is linked with populist and authoritarian experiences in the context of Latin American political cycles. As James M. Malloy explains:

[I]t is now evident that populism was and is based on an implicit *corporatist* image of socio-political organization. With the exception of Vargas, the populist preference for a corporatist solution to the pressures of modernization was seldom stated explicitly, but there seems little gainsaying that populism has always shown a high affinity for corporatist principles of organizing the relations between state and society.⁹

Malloy adds that populism, in its first phases, emphasized mobiliza-

7. See Nun, *La Teoría Política y la Transición Democrática*, in ENSAYOS SOBRE LA TRANSICIÓN DEMOCRÁTICA EN LA ARGENTINA 15, 30 (1987).

8. See Lipset, *Values, Education and Entrepreneurship*, in PROMISE OF DEVELOPMENT, THEORIES OF CHANGE IN LATIN AMERICA 39, 41-43 (1986).

9. Malloy, *Authoritarianism and Corporatism in Latin America: The Modal Pattern*, in AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA 3, 12 (J. Malloy ed. 1977).

tion in an "inclusionary" way,¹⁰ trying to broaden the set of actors in the political process but at the same time controlling them through organizations "formed on sectoral and functional criteria, thereby fragmenting support groups into parallel primary organizational structures joined at the top by interlocking sectoral elites."¹¹

Distinct from the corporatism-populism formula or the relationship between corporatism and the bureaucratic-authoritarian State, scholars often mention a third modality, the social situation that Huntington called "praetorianism."¹² This is a system that combines a low degree of institutionalization with a high degree of participation by mobile social forces. These forces penetrate the political sphere, resulting in a confrontation among the new active social forces and between them and the traditional establishment.¹³ Malloy described the process as having occurred in several Latin American countries in the late 1950's and from the mid-1960's up to the early 1970's:

An important aspect of the praetorianization of Latin American politics during this period was the fact that although the formal state apparatuses in the region grew markedly, this was accompanied not by an increase in the power and efficiency of the states but rather by the reverse. The continuing reality of dependence was a critical factor in the development of states that were formerly large and powerful but in practice weak. Another factor was a kind of de facto disaggregation of the state as various particularistic interest blocs in a sense captured relevant pieces of the state which they manipulated to their own benefit.¹⁴

In the extreme configuration, this process of disaggregation of the State affects its monopoly of coercion in such a way that social confrontations are accompanied by violence.

Guillermo O'Donnell has lucidly shown how this praetorianization of Latin American politics has led to a "social impasse" in which no sector achieved a stable domination.¹⁵ The way out from this impasse has been, according to O'Donnell, "bureaucratic-authoritarianism," which is "a system of political and economic exclusion of the popular sector," and which "emerges after a substantial degree of industrialization has been achieved, and also after, and to a large extent as a consequence of, substantial political activation of the pop-

10. *Id.* at 13.

11. *Id.* at 14.

12. See S. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 195-98 (1968).

13. See O'Donnell, *supra* note 3, at 56.

14. Malloy, *supra* note 9, at 15.

15. See O'Donnell, *supra* note 3, at 56.

ular sector."¹⁶ The task of excluding the popular sector is achieved by abolishing its channels of participation and by controlling its organizations.¹⁷ The bureaucratic-authoritarian State is porous to penetration by other corporations, like the military, the Church in some cases, and an entrepreneurial bourgeoisie. The latter is partly tied to international capital and partly protected from it through privileges and shields afforded by association with the State. This interpenetration between the bureaucratic-authoritarian State and interest groups, with the exclusion of the popular sector, is so idiosyncratic that authors like O'Donnell have come to think of it as a special type of corporation.¹⁸

When this kind of bureaucratic-authoritarian regime flounders and is replaced by liberal democracies—as in the present processes of transition in Latin America—the groups whose interests were previously favored struggle to retain as much of their privileges as possible, competing hard with the popular sector, which has reentered the scene. The people's reentry overcomes their prior illegitimate exclusion, only to be reinstated by organizations claiming the privileges that the populist ideology ascribes to them.

An illustration of the challenge that corporative power poses to democracies in transition may be accomplished through a sketch of the way in which the present Argentinean government has to deal with various corporations. Obviously, one of the hardest tasks that President Alfonsín's government had to face was that of restoring the armed forces to their proper role under the Argentine constitutional framework. This process was made more difficult by the many decades of direct control through absolute power, varying degrees of association with populist governments, and longstanding enjoyment of privileges and special status, which distinguished the military from other public officials providing services within the State apparatus. This prominent role had been spawned by a deep-rooted ideology according to which the armed forces are the backbone of the nation and have as their mission the custody of the nation's being—its very essence—from birth. Since the Cold War, this feeling of mission had been reinforced by allegations of a permanent communist threat, personified in a variety of internal agents.

The redefinition of the role of the Argentinean armed forces in order to fit it within the constitutional framework was greatly advanced by the willingness of the majority of the military to limit

16. *Id.* at 60.

17. *Id.*

18. *See id.* at 79.

themselves to professional endeavors and to stop intervening in the political arena. They had come to realize that they too were the victims of the internal conflicts. Their assumption of governmental tasks and their participation in both the "dirty war against subversion" and the Malvinas War had diminished their professional efficiency and their social prestige. On the other hand, the reduced availability of resources due to general financial hardship, which made the professional improvement of the armed forces difficult, slowed down the process. Still, the biggest obstacle to reabsorption was the need to prosecute and punish those members of the military who had committed human rights violations during the 1976-1983 junta rule. Additionally, President Alfonsín faced the problem of prosecuting the military for the 1976 coup d'état as well as the Malvinas War.

The trials for the crimes committed in the context of the fight against subversion were, and still are, seen in a different light by society and the government on the one hand, and by the military and small ancillary groups on the other. From the societal and governmental points of view, though the phenomenon of left-wing terrorism was real and abhorrent, it should have been handled according to the rule of law. The need for suppressing terrorism in no way justified resorting to the atrocious method of massive disappearances, leading to widespread torture and killing, and the terrorizing of the general population. Even if one rejects, as I do,¹⁹ a retributive view of punishment, it is difficult to escape the conclusion that these atrocities deserve prosecution and conviction, after due process of law. This is required in order to inculcate in the collective conscience and in the consciences of the groups concerned that no sector of the population stands above the law and that under no circumstances may a human being be treated as a base object, a means to a goal, however valuable that goal might be. The military, on the other hand, were united in an opposite vision. In their eyes, the national essence was endangered by both external and internal enemies who, in attacking the State, relinquished the moral respect owed to human beings.

Given these different perceptions, and taking into account the attitudes of those whose loyalty to the democratic system was essential for preserving it, President Alfonsín's government designed a strategy directed toward a full investigation of the facts. It conducted trials of those mainly responsible for the atrocities, overcoming the difficult legal obstacles to those trials, while endeavoring to narrowly limit both the scope of the people brought to trial and the duration of the proceedings. A presidential commission (CONADEP) success-

19. See Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289 (1983).

fully carried out the investigation of the phenomenon of the disappeared people. The Commission's findings, published in the book *Nunca Mas*,²⁰ caused a great impact on the collective conscience. In order to overcome the legal obstacles against the trials, the government declared void the amnesty law previously enacted by the military, in accordance with a new definition of laws enacted by authoritarian regimes, whose validity was conditioned on the moral plausibility of their content. In addition, the government resolved a constitutional conundrum regarding the jurisdiction of military courts by establishing an obligatory appeal to civilian courts. Finally, an interpretive statute delimited the broad excuse of due obedience, found in the existing law.²¹ The government was less successful, however, in its attempt to limit prosecutions and the duration of the trials. Due to the modification of projected legislation by the Congress and the delay of the military courts as well as some civilian courts, an indefinite threat of prosecution loomed menacingly over a large number of officers, generating a climate of serious unrest. At first, the government unsuccessfully tried to overcome this negative mood by invoking the statute of limitations, which resulted in the opposite effect of indicting eight times more people than before. After the events of Easter 1987, officers' fears were successfully allayed through the law of due obedience. Though some members of the armed forces still insist that the twenty or so convictions and the remaining forty or fifty trials were unjust and politically motivated, the reduction in the threat of prosecution helped to create a feeling of tranquillity and confidence, which was evidenced by the positive reaction of the bulk of the forces against the rebellion of a fundamentalist group in January 1988. This relative calm pervaded the military echelons despite the fact that the government stood firm in its decision to uphold the judicial verdicts regarding those mainly responsible for human rights violations. Given the circumstances, this commitment is unprecedented in Latin America and, in relation to similar experiences, anywhere else in the world.

The Alfonsín government took other measures in order to achieve the democratization of the armed forces: the dismissals of many officials of high rank; the movement of some important garrisons out of Buenos Aires; a legally imposed promise of allegiance to the Constitution; the prospective abolition of military jurisdiction

20. COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, *NUNCA MAS* (9th ed. 1985).

21. See Nino, *The Human Rights Policy of the Argentine Constitutional Government: A Reply*, 11 *YALE J. INT'L L.* 217 (1985).

over common crimes committed by the military when acting within the scope of their duty; the transfer of control of the military-industrial complex to civil authorities; and the establishment of a law of defense defining the military mission only in relation to external attacks. Even though the possibility of military interference with democratic institutions has not been completely dispelled from people's minds, the process of making this threat increasingly remote has, with the collaboration of many military people, made considerable progress.

The constitutional government also had to face some issues raised by sectors connected with the Catholic Church, even though church members of various ranks were outspoken in their support of democratic institutions and in their attempts to attenuate social conflicts. During the military rule, these sectors exerted great influence over the regulation of matters of private life and the purity of social customs. When the democratic government assumed power, one of its first tasks was to abolish the censorship of publications, theater, cinema exhibitions, and so forth. This new policy derived considerable support from a notable clause in the Argentine Constitution, which states that the private actions of men that in no way harm third parties or offend the public order or morals are reserved only to God and exempted from the authority of the magistrates.²² Right-wing religious groups, however, harshly opposed these measures of liberalization, some of them labeling the system a "pornographic democracy." These groups also attacked the government because of the initiatives it took to equalize both the rights of parents towards their children and the status of children born in and out of wedlock. Overall, the greatest source of tension was the introduction of divorce through the country's legislation. The Church launched a vast campaign against this change and succeeded in delaying the approval of the law in the Senate after the Chamber of Deputies had already enacted it. Meanwhile, the Supreme Court intervened by declaring that the ancient law prohibiting divorce was unconstitutional, thereby causing the expedited approval of the new divorce law. The Supreme Court also declared unconstitutional the law criminalizing the possession of drugs for the consumption of the agent.²³ The conservative sectors of the Church also struggled to preserve a clause in the Constitution that obligated the State to subscribe to the Catholic cult,

22. CONSTITUCIÓN NACIONAL art. 19 (Argen.), reprinted in ARGENTINE CIVIL CODE xxxviii (F. Joannini trans. 1917).

23. I defended the same solution adopted by the Court in C. NINO, *ETICA Y DERECHOS HUMANOS* 255-75 (1984).

thereby guaranteeing financial support for the Catholic educational system.

Some members of the oral and written press who had flourished during the military rule also confronted the government in a corporative way. They had been exceedingly soft in their criticisms, if any, of the military takeover and human rights violations. These same press organizations, which had varied connections with groups in the opposition, became severe critics of the government. They reacted indignantly, for example, when the government presented to Congress a draft of a law granting the right of reply to false and offensive comments. They balked when a judge temporarily prohibited the publication of a paid advertisement in which five thousand people praised the crimes committed by the military junta. They even suggested legislation²⁴ that attempted to limit to some degree the possibility of written press owners having total control of radio and television channels and that attempted to establish a public network which would coexist with an expanded private system.

The trade union organization was, without question, one of the strongest pressure groups that confronted the government. Under the principle of unique representation, the General Confederation of Work (CGT) monopolizes Argentina's trade unions. The Peronist Party, in turn, almost totally controls the CGT. Mr. Alfonsín had attracted considerable support when, in his presidential campaign, he denounced a pact between the unions and the military to help the Peronists win the election. Once in office, President Alfonsín sent to Congress a proposed law regulating the trade unions. The law attempted to control the possible diversion of affiliates' funds, insure the integrity of internal elections, and allow for the representation of minorities in union boards. The government also sent to Congress a national health insurance project designed to provide the population with uniform medical services. The new plan would have replaced the present scattered and unequal system provided by the unions, who exert almost absolute discretion over the huge funds generated by compulsive deductions from the workers' wages. But the Senate, dominated by Peronist right-wing representatives of the poorest and least populated provinces, rejected the trade union law by one vote. To attain passage, the law had to be redrafted into a much weaker regulation of the trade unions' internal life. In the same way, the Peronist Party achieved a number of relevant concessions with regard to

24. See CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA, *RADIODIFUSIÓN: PROYECTO Y DICTAMEN DEL CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA* (1987).

the law establishing national health insurance. The trade union movement is adamantly opposed to the economic policies of the government, having declared approximately twelve general strikes since December 1983, and numerous local strikes, some of them for indefinite periods, which mainly affected the public sectors.

The entrepreneurial sector constitutes another source of constant pressures directed at the government. It sought to obtain a variety of privileges or protective measures and preserve those previously secured. It also tried to boycott measures designed to achieve the higher and more progressive levels of taxation that were required to reduce the state deficit and to contain inflation. It orchestrated a vitriolic campaign against a compulsory saving plan imposed by the government and against the maintenance of retentions of partial export earnings, which mainly affect the rural sector. In fact, industrial, commercial, and agricultural companies and organizations have carried out an unflagging struggle to maintain privileges against open competition in different areas.

The foregoing instances of corporative interaction with public power are the remnants of decades of privileged status that the authoritarian and populist governments of Argentina granted to different corporations through formal and informal means. The traditional legal system combines general rules with a patchwork of exceptions that implicitly grant special status to some interests and to some illegal and corrupt practices. As a result, some groups and organizations are shielded from the mechanisms by which the general public expresses its preferences. Corporatism of this kind is especially dangerous during the economic crises presently endured by Argentina and other Latin American countries, crises arising from external debt, foreign protectionism against exports, lack of investments, and other similar problems. Increasing levels of inflation are fueled by savage competition among economic agents who seek to increase their representative portions of a diminishing pie. A "prisoners' dilemma" situation ensues where each participant's self-interested behavior consists of pressing for higher nominal prices and salaries. Once this pattern is generalized, it affects everyone's interests adversely. At the same time, various corporations strongly oppose structural transformations of the productive apparatus (like privatizations of public enterprises) which are needed in order to make the economy more efficient and competitive. As Daniel Poneman argues, this confrontation among the corporations through the state is one of the causes of Argentinean political instability.²⁵

25. See D. PONEMAN, *ARGENTINA, DEMOCRACY ON TRIAL* (1987).

The long struggle by democratic forces in Argentina to wrest political power from the corporative structure exemplifies similar endeavors that almost all Latin American countries are facing or will face in their respective processes of transition to democracy. The actors are not always the same; for instance, the Church does not have the same role in Chile as it does in Argentina, and the trade unions in Argentina have a different position than those in Brazil. But the script is repeated in each country because the formal reestablishment of democratic rule is not sufficient to break down the citadels of power relationships built up during the dictatorship periods.

Corporative pressures are an important factor underlying the prevalence in Latin America of two schemes of distribution of political power. According to the first model, there is a *cyclic instability* that generally exists during populist, praetorian, authoritarian, and sometimes liberal democratic periods. These political cycles coincide with economic cycles of expansion and recession and allow different corporative sectors to achieve power successively and to obtain privileges that are later curtailed but not altogether abolished. The second scheme is one of *conditioned democracies*. Democracies in this scheme achieve stability through an enduring truce with corporative powers. Preservation of corporative privileges, however, limits the full workings of democratic mechanisms such as broad public discussion, widespread and alert public participation and representation, and complete independence of Congress and the judiciary.

II. CORPORATISM, POPULAR PARTICIPATION, AND POLITICAL PARTIES

The rather extended foregoing discussion has provided an overview of corporatism in Latin America. Its purpose has been to advance the first premise of my argument—that the main obstacle that the process of transition to a consolidated democracy in Latin American countries must overcome is the interpenetration of corporative power relations, which are remnants of previous populist and authoritarian stages, within the political structure of a liberal democracy. This Section will be brief because my second premise requires far less empirical support and instead appeals to the understanding of the foundations of the democratic process. I propose that the strengthening of the workings of democracy against corporative powers requires broadening direct popular participation in the decision-making and control of governmental action. The best method for achieving this goal is to perfect the mechanisms of representation and

strengthen political parties, which are themselves internally democratic and open, disciplined, and ideologically defined.

The phenomenon of corporatism in Latin America is an indication that the task of the French Revolution was not completed in these remote lands. The famous words of Le Chapelier in the Constitutional Assembly of 1791 are still significant in this context:

There must be no more guilds in the State, but only the individual interest of each citizen and the general interest. No one shall be allowed to arouse in any citizen any kind of intermediate interest and to separate him from the public weal through the medium of corporate interests.²⁶

Of course, this ideal vision of the individual standing alone before the State has, over time, proven disastrous. The lone individual was left unprotected from other individuals who were all too powerful because of natural or social circumstances, particularly if the status quo remained intact. This led to a process of reassessment of the value of associations as shields for individuals in the process of private negotiation. Still, the ideal of the French Revolution, that those associations should not intermediate between the individual and the State, is of great value. The notion of the *citizen*, who is not identified with any interest but is free to choose and has an equal voice in expressing his choice, is one of the hallmarks of liberal democracy.

This ideal is conditioned on a concept of democracy that rejects its reduction to a conglomeration of interests working similarly to the market or as a mechanism for replacing elites.²⁷ I have elsewhere attempted to explain the moral superiority of democracy as a regimented mode of the practice of moral discourse by which we try to solve conflicts in the light of universal, general, and public principles that would be accepted in ideal conditions of impartiality, rationality, and knowledge.²⁸ Democracy substitutes simple majoritarian decisions for the requirement of a unanimous consensus in the common and non-regimented practice of moral discourse. This substitution weakens the force of the presumption that the result of the procedure is morally valid because it would be accepted under ideal conditions (given the functional equivalence between unanimity and impartiality). Still, democracy preserves some epistemological value, because it is to be presumed that the need to justify one's decision to others and to get as much support as possible for one's position generates a ten-

26. See R. BENDIX, *NATION BUILDING AND CITIZENSHIP* (1964) (quoting Le Chapelier).

27. For an account of these theories, see W. NELSON, *ON JUSTIFYING DEMOCRACY* (1980).

28. See C. NINO, *supra* note 23, at 225-54.

dency towards impartiality which makes it more reliable than other decision processes.

This view of democracy presupposes that individuals, who are the basic moral persons, are its natural agents and that the freedom and equality of their intervention in the democratic process should be preserved and expanded, which is not the case when corporations intermediate. Besides, this conception of democracy as a substitute for moral discourse presupposes that the primary objects of decision in the democratic process are not *crude interests*, but *principles* that legitimize a certain balance of interests from an impartial point of view. Therefore, corporations that agglutinate people around common interests and not around moral views about how to deal with interests cannot be the protagonists of the democratic process.

Corporations prosper whenever democracy departs more than is necessary from the strictures of the original practice of moral discourse in such a way that public debate becomes restricted and debased, the power of participants actually to influence decisions becomes too unequal, and participation of interested people becomes narrow and weaker. Therefore, in order to strengthen the democratic power of common citizens against that of corporations, it is crucial to broaden and deepen popular participation in discussion and decision-making, even by imposing compulsory voting. I believe this measure to be justified as legitimate paternalism, given the coordination problems that arise when many individuals belonging to specific sectors of society think that their particular vote is not essential for their group's interests to be taken into account.²⁹ Furthermore, the mechanisms of representation, necessary in large and complex societies, are prone to be subverted by corporative power. There is the possibility of corruption of the representatives, their blindness regarding the interests of the people they represent when noisily opposed by corporations, and the apathy of the people represented. For these reasons, it is essential to widen the ways of *direct* participation by the people whose interests are at stake, be it through general procedures like referenda or popular consultations or through decentralized decisions that allow the people concerned to participate directly.

José Nun correctly points out that one of the ways of channelling corporative power is by confronting it with a *democratic unity*, which must be articulated through multiple forms of direct or participative

29. See Nino, *El Voto Obligatorio*, in CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA, REFORMA CONSTITUCIONAL: SEGUNDO DICTAMEN DEL CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA 219 (1987).

democracy.³⁰ This should attenuate the confiscation of spheres of influence by representative democracy in favor of elites. In the same sense, but referring mainly to business corporations, Benjamin Barber asserts:

If the corporation is not to defeat democracy, then democracy must defeat the corporation—which is to say that the curbing of monopoly and the transformation of corporatism is a political, not an economic, task. Democracy proclaims the priority of the political over the economic; the modern corporation rebuts that claim by its very existence. But unitary democracy [meaning one that seeks consensus by a process of a cohesive identification with the community] is too easily assimilated to the unitary aspects of corporatism, with possible results that can only be called fascistic. And liberal democracy is too vulnerable—its citizens too passive and its ideas of freedom and individualism too illusory—to recognize, let alone to battle with, the mammoth modern corporation that has assumed the identity and ideology of the traditional family firm.

Strong democracy [that is participative democracy] has no qualms about inventing and transforming society in the name of a democratically achieved vision, and it may be able to engage the multinational corporation in a meaningful struggle. Yet the corporate society and the corporate mentality themselves stand in the way of the idea of active citizenship that is indispensable to strong democracy.³¹

Moreover, direct participation by the population in the decisions that affect them may help overcome the social tension associated with the so called “crisis of democracy” which arises from increasingly unsatisfied demands fueled in part by corporative struggles. In opposition to the recommendation of the Trilateral Commission, which advocated countering such crises by restraining discussion and participation, and faithful to the idea that “the evils of democracy are cured with more democracy,” I think such crises call for the broadening of direct participation.³² This provides an escape valve for social pressures and contributes to limit them insofar as the people come to understand the reasons for the scarcity of the resources available to satisfy competing demands.

The vision of democracy as a regimented modality of discussion over moral principles to regulate conflicts allows us to qualify the lib-

30. *Id.*

31. B. BARBER, *STRONG DEMOCRACY* 257 (1984).

32. See Nino, *La Participación Como Remedio a la Llamada “Crisis de la Democracia,”* in ALFONSIN: *DISCURSOS SOBRE EL DISCURSO* 123, 133 (1986).

eral rejection of any intermediaries between the individual and the State. It is obvious that there is an exception exemplified by organizations which agglutinate people not on the basis of crude interests, but because of principles, ideologies, and moral outlooks. *Political parties* are such exceptions when they are the standard bearers of programs for the organization of society on the basis of fundamental principles of political morality. They are indispensable in a modern and large society, not only because they nurture those principles in professional politicians, who purport to put them into practice if duly elected, but also because they exempt individuals from the task of justifying their votes before each other on the basis of principles, stated or otherwise; it is enough to vote for a party which organizes its proposals on the basis of public and general principles. Political parties are the antibodies that protect democratic health against corporative power because the respective *raison d'être* of political parties and corporative power are exactly antithetic. Political parties defend principles which legitimize a certain composition of interests from an impartial viewpoint, while corporations represent crude particular interests. For example, Juan Carlos Portantiero describes how inflation leads to, and is obviously caused by, a displacement of political parties by corporations:

Perhaps the most evident institutional effect of inflationary practices consists in the perverse dialectics—for democratic stability—which it establishes between corporations and parties. Carrying on the hypothesis further away, we would say that, in a vicious circle which reproduces itself, the relation between strong corporations and a weak system of parties, the institutional cause of inflation, is in its turn producer of the ungovernability of the social mechanism of accumulation insofar as it blocks the possibility of elaborating consensus and replacing it by perverse and momentaneous equilibria³³

This deterioration of the role of political parties in favor of corporations also involves the erosion of the importance of the natural arena for those parties—Parliament. Corporations prefer to exert pressures and eventually achieve agreements in the quiet offices of the administration rather than in the noisy, pluralistic, and more public parliamentary corridors. In addition, there is the tendency of administrations to preserve some of the practices inherited from previous authoritarian governments. For instance, the Central Bank in Argentina has powers which are equivalent to those that the Constitution reserves for Congress, such as granting special lines of credit that, in

33. Portantiero, *La Crisis de un Régimen: Una Mirada Retrospectiva*, in *ENSAYOS SOBRE LA TRANSICIÓN DEMOCRÁTICA EN LA ARGENTINA* 57, 76 (1987).

essence, are subsidies. These powers, taken away from Parliament by the administration, come with a vengeance. They become subject to corporatist pressures, yet lack the protective shield of a consensus previously worked out with other political sectors.

It must be kept in mind, however, that fortifying political parties and the parliamentary institutions in order to protect the democratic system from corporative power will work only to the extent that these entities do not become transformed into corporations themselves, developing elites with distinctive interests and prone to compromise with members of traditional corporative groups. This transformation occurs when parties weaken their ideological commitment, do not promote debates on essential questions of political morality, block channels of participation, operate through methods of patronage and clientelism, or resort to personalism and caudillism. When parties become corporations, Parliament becomes weakened by the lack of representativity, by a discourse that is both ideologically vacuous and detached from the experiences and interests of the people represented, and by a general appearance of opacity and self-service.

To avoid this danger, the strengthening of the political parties and Parliament in order to curtail corporative power requires opening the parties to broad popular participation, promoting permanent political debates within them, perfecting the internal democratic mechanisms for choosing party leaders and candidates, and giving a public accounting of the management of funds. It is also important that the electoral system combine the need for promoting party cohesion and ideological identity with the need for the voter to identify with individual deputies, rather than voting for the party slate. A mixed electoral system incorporating proportional representation with individual candidate selection may satisfy both needs. This concept can be extended to parliamentary procedures, which should combine party discipline with a degree of autonomy for individual deputies.

III. STRONG DEMOCRACY AND PRESIDENTIALISM

To summarize, my first premise is that corporative political power is one of the greatest obstacles to the consolidation of democracy in Latin America. My second premise is that one of the most important contributive factors to the curtailment of corporatism is broad and deep popular participation in decisionmaking and control led by strong participative and ideologically committed political parties and parliamentary bodies. This, following Barber, may be deemed "strong democracy." My final premise is this: Strong

democracy is functionally incompatible with the extreme forms of presidentialism typical of Latin American constitutions; when presidentialism is not accompanied by limited or conditioned forms of democracy,³⁴ tensions are generated which often lead to the breakdown of the institutional system.

Before arguing in support of this premise, it is necessary to comment on a methodological point of great importance. There is a long-standing disagreement among philosophers, jurists, sociologists, and political scientists regarding the capacity of law and institutional design to influence social changes and affect patterns of social behavior. In the field of law, this disagreement can be illustrated by the paradigmatic positions of two great jurists: Friedrich Karl von Savigny and Jeremy Bentham. Savigny professed an historicist conception of law, whereby the true law is found and not made; it is found in the spirit of the people and in social customs.³⁵ Thus, under Savigny's view, legislation and institutional design should be extremely cautious and follow, rather than promote, social development. Bentham, on the other hand, was a fervent believer in law as an instrument of social engineering, devoting his life to writing codes for different nations.³⁶ His preaching, for example, had influence in the modern conception of Parliament as an active body which can achieve social reforms through legislation.³⁷

In the field of political science, there is basically the same disagreement. On the one hand, there are the currents of thought that O'Donnell calls "societalist," which are in part influenced by Marxist assumptions and which, according to him, "deny or ignore the specificity of the problem of the state as a societal factor endowed with varying, but rarely insignificant, capabilities for autonomous impulse and initiative."³⁸ At the other extreme, there are "politician" conceptions which ascribe to the state a disproportionate weight in the causation of observed and recommended social changes. Reality appears to lie somewhere between the two extremes. Indeed, it is undeniable both that the law and institutional design have on many occasions considerable impact on social developments and that society is not a

34. I differentiate the two forms because the limitation of democracy does not always give place to its conditioning by corporations.

35. See generally SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* (W. Holloway trans. 1862) (discussing the nature and origin of law).

36. See generally L. HUME, *BENTHAM AND BUREAUCRACY* (1981) (discussing Bentham's jurisprudence and theories of codification).

37. For an account of this controversy, see C. NINO, *INTRODUCCIÓN AL ANÁLISIS DEL DERECHO* 299-305 (1983).

38. See *id.* at 51-52 (quoting G. O'Donnell).

malleable subject which adapts plastically to deliberate legislation, being subject to many other causal factors besides the legal component.

The very subject of my last premise affirms the above eclectic methodological position. On the one hand, the way in which it was stated left room for the intervention of factors besides the legal and political, such as cultural factors, because even when it may be true that a strong democracy is contributive to the containment of corporative power, a limited democracy does not always lead to corporatism, and hence to conditioned democracy, in the Latin American way. This is obviously the case of the United States in which the power of corporations is a complex phenomenon, but the phenomenon is not assimilable to Latin America. On the other hand, the adoption of the presidentialist system of government is undoubtedly correlated, when joined with some conditions to be studied, to the recurrence of some social effects leading to institutional disruptions.

In this respect, a study by Professor Fred W. Riggs, which is prefaced by these remarks, is extremely revealing:

One starting point for analysis might be the proposition that some 33 Third World countries (but only one in the First or Second!) have adopted presidentialist constitutions. Almost universally these polities have endured disruptive catastrophes, usually in the form of one or more coups d'état whereby conspiratorial groups of military officers seize power, suspend the constitution, displace elected officials, impose martial law and promote authoritarian rule: recent examples in Korea, South Vietnam, Liberia and many Latin American countries come to mind. . . .

By contrast, almost two-thirds of the Third World countries which adopted parliamentary constitutions, usually based on British or French models, have maintained their regimes and avoided the disruptions typical of all American-type systems . . . ³⁹

Riggs undertakes to explain this connection between presidentialism and instability in Third World countries, as contrasted with the only stable presidentialist democracy (the United States), by taking into account not environmental or contextual features but systemic ones. These are features of the institutional design and practices that, because not written into the Constitution itself, he deems "para-constitutional." Riggs mentions several problems that a presidentialist regime has to face—executive-legislative confrontations, paralysis of the assembly, weakness of the party system, and the

39. Riggs, *The Survival of Presidentialism in America: Para-constitutional Practices*, 9 INT'L POL. SCI. REV. 247, 249 (1988).

politics of the courts—all of which have led to collapse in more than thirty of such regimes outside the United States. He analyzes a number of para-constitutional variables that differ between the United States and those countries, thereby explaining their diverse stability. Let us mention first those variables that have a direct connection with the existence of a strong democracy, as characterized in the previous section.

Riggs refers to different factors which determine that political parties in a presidential system both tend to be weak and are required to be weak for the system to work smoothly. One factor is that parties in a presidential system are difficult to organize and perpetuate in a cohesive way because they must try to form coalitions prior to elections in order to have some chance of achieving a majority. In a parliamentary system, by contrast, the parties can go into the elections following well-defined programs and then try to form coalitions in Parliament after the elections are over. A second factor which allows presidentialism to work in the United States and which involves a weakening of parties is the lack of party discipline, which according to Riggs may be “a necessary condition for the success of a presidentialist regime, whereas if party discipline were enforced, the capacity of government to govern would be severely impaired whenever the president belonged to one party and the opposition party had a congressional majority.”⁴⁰ This is connected with another para-constitutional feature of the American system, the electoral system based on uninominal constituencies, which affects party discipline, especially insofar as it combines with a decentralized pattern of party organization. Another factor that weakens political parties within a presidentialist system is the effect that being defeated in elections has upon the parties. Many of the nonpolitical functions that parties perform in a parliamentary system cannot be carried out in a presidentialist system because parties are not tied to a more or less stable representation in Parliament, but they are instead largely affected by the fate of their presidential candidate; when he loses, there is little incentive to remain faithful to the party. This is connected with a final feature noted by Riggs: Because parties in a presidential system cannot be very ideologically committed but must present wide and vague stances and must make many compromises in order to win support for their presidential candidates from many social sectors, they awaken little enthusiasm from voters, most of whom do not identify themselves with any party but simply choose the lesser evil. In sum, the presidential system faces the following dilemma with regard to

40. *Id.* at 260.

political parties: The parties become weaker and weaker as a result of the nature of political competition under this system that, given some other social and cultural conditions, may make ample room for the corporative exercise of their political muscle; otherwise, if some other factors operate to preserve their strength, as in the case of Argentina, the parties contribute to the generation of the tensions which are typical of the presidentialist system, such as blockages between the powers and exhaustion of the figure of the President.

The other variable in which the American system differs from most of the rest of the presidentialist regimes, and which is directly connected with the previous characterization of a strong democracy, is popular participation, mainly through the exercise of the right to vote. Riggs is very explicit about this point:

One of the paradoxes and limitations of a presidentialist system of government appears to be voter apathy. Despite its long history and the apparent commitment of Americans to representative democracy, voting turnout is notably less in the USA than in virtually all parliamentary governments. We normally assume, of course, that popular participation in elections is necessary for the health of democratic institutions. However, sad to say, a low voter turnout seems to be a cost entailed by various para-constitutional aspects of a presidentialist system. In addition, it could even be a para-constitutional feature. . . .

. . . .

. . . The higher the level of popular participation in voting, the greater would be the contradiction between the interests that finance political campaigns and the interests of the voting majority. The presidentialist system, therefore, works most smoothly when voting participation remains fairly low

A conspicuous reason for the skewed distribution of voters can be found in the substance of party platforms. In order to secure the support of a majority of voters—a majority required by the arithmetic of a winner-take-all presidential competition—these platforms have to take ambiguous stands on many issues that divide public opinion. But such issues are also likely to attract the greatest interest, especially that of poor people

. . . The price for high voter turnout is lively and divisive political controversy, whereas low turnout is linked to apathy and indifference [T]o put the negative case, mass participation is less threatening to the survival of parliamentary than of presidentialist regimes.⁴¹

These words from Professor Riggs underscore a point of great

41. *Id.* at 263-64 (footnotes omitted).

importance to the comparative study of the almost uniquely successful American presidential system and the unsuccessful ones, like the Argentinean system. In the United States, the low voter turnout, mainly among the poor and less educated, has a refeeding effect. The presidential candidates concentrate their efforts on luring potential voters by taking into account the common interests of those expected to vote, which are possibly contradictory to those of most traditional nonvoters. This is done in very general and vague terms, however, in order to avoid stressing the differences among voters. This non-specificity reduces the candidates' appeal to nonvoters. There is little reason to choose among apparently similar platforms. In any event, the nonvoters undergo a typical "prisoner's dilemma" line of reasoning, balancing the cost of voting—higher for poorer people—against the perception that their vote will not make a difference. By contrast, compulsory voting in Argentina was introduced by law in 1912. In the ensuing election of 1916 and until the present, the voting turnout more than tripled in comparison with elections held under voluntary voting. This forced electoral participation—first, by the middle class, mainly through the Radical Party, and later by the working class, mainly through the Peronist Party—has resulted in those parties successively being the only winners of free elections, thereby causing a permanent displacement of the conservative parties, which had held power prior to 1916. In spite of the vagueness of the candidates' proposals and the need for compromise in order to achieve a wider basis of support, a relatively high level of interest and even enthusiasm has been preserved through emotional factors, like that surrounding the controversy between Peronists and anti-Peronists. Riggs' suggestion regarding the threatening effect of high levels of participation on a presidentialist system seems to be confirmed by the considerable political stability in Argentina prior to 1916 (from the enactment of the Constitution in 1853/60) and the extreme instability afterwards. Obviously, those displaced by the results of massive voting sought other channels to power.

In other words, the two features which characterize strong democracy and which serve to protect it against the phenomenon of corporativism that has arisen in Latin America, due to different and complex factors, are absent in the most successful presidentialist system in the world, thereby contributing to its success. Furthermore, the existence of strong parties and widespread popular participation may be largely responsible for the functional difficulties that are currently encountered by the presidentialist system.

First, the presidential system of government works, as Juan Linz

says, as a zero-sum game in which all that one party gains the other loses.⁴² The parties are trapped in a dynamic of confrontation to win the presidency. This is an indivisible, unipersonal position, lasting for a rigidly fixed and usually long period of time and concentrating in the holder of the position an enormous amount of power, particularly the ability to fill numerous public posts. This pits parties against each other in a savage competition for power that may lead to heavy bloodshed, as happened in Colombia thirty years ago, before the liberal-conservative pact. This is not surprising given the fact that a large political party needs access to power in order to preserve its cadres of professional politicians, and two or three presidential periods outside the main center of power may easily prove fatal for the preservation of a party.

Second, the presidential system implies the division of the expression of popular sovereignty between the President and Parliament, each of whom may exercise a sort of veto power over some decisions of the other. When each of these expressions is controlled by a different political party, usually as a result of majorities established over time, the dynamics of confrontation between the parties is escalated to the relation between the powers of the State, leading to fights and stalemates. This danger is avoided in the United States through the weakness of the parties and the help of the electoral system. The President collects majorities from outside his own party and is able to govern even when supported only by a minority faction in one or both houses of Congress. The situation is quite different in countries like Argentina where the discipline promoted by proportional representation enhances the traditional strength of the parties. For example, opposition parties blocked or delayed several important initiatives advanced by the ruling Radical Party. Even when they could not gather a majority vote against a given proposal, they utilized dilatory parliamentary maneuvers, such as lack of a quorum for holding a session. To meet the quorum requirements, the ruling party sometimes had to yield unrelated advantages. Similarly, the Peronist administrations of the provinces suffered legislative blockages. The worst effect of these confrontations between the administration and Parliament in a presidential system is that the antagonism leads to a complete stalemate because Parliament lacks the power to influence the course of the administration.

42. See Linz, *Democracia Presidencial o Parlamentaria, Hay Alguna Diferencia?*, in CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA, *PRESIDENCIALISMO VS. PARLAMENTARISMO: MATERIALES PARA EL ESTUDIO DE LA REFORMA CONSTITUCIONAL* 19, 26 (1988).

Third, even when the parties are not seriously antagonistic, the presidential system makes it very difficult for them to collaborate in the same government. This collaboration is often needed in the face of a national crisis, an internal or external war, or threats of corporative power. If all the major parties support the same presidential candidate, the working of the system is affected because there is no real opposition remaining and no prospect of genuine debate. If, on the other hand, the President of the victorious party invites the others to collaborate in his cabinet, the vote of the people who brought that party to power seems to be somehow denaturalized.

Fourth, the confrontation between the parties often leads to the political exhaustion of the President long before the expiration of his term. This weakening usually coincides with the point of retraction of the economic cycles of expansion and recession typical of Latin American economies. The rigidity of the presidential term of government makes the political crisis boil over, rather than channelling the discontent through some legitimate escape valve. The President often reaches a point at which he still has an enormous set of formal powers, but he has lost credibility, popularity, and parliamentary support. The only way of replacing him, other than by his voluntary resignation, would be through impeachment. This process is almost impossible to carry out since it requires an accusation of misconduct and the vote of a qualified majority, including members of the President's party. The latter, of course, are usually not willing to commit such political suicide. The President himself is not usually inclined to resign because he feels that he has a mandate for the whole period and he does not want to end his political career as a historical failure. Argentina went through this experience in 1976. According to some observers, the military coup could have been avoided, or at least delayed, if Isabel Peron had been replaced by resignation or impeachment. Alternatively, had there been another system of government, she could have been confined to more circumscribed functions and an acceptable head of government could have been appointed.

The foregoing discussion offers support for my third premise: The elements which may make democracy strong against corporatist pressures—wide popular participation and ideologically disciplined and broadly participative political parties—are ill-suited to a presidentialist system because they generate tensions which are difficult to handle and therefore aggravate the inherent difficulties of democracy.

The line of reasoning which I have expounded may be summarized as follows:

(1) One of the main challenges faced in the process of transition to a fully consolidated democracy in Latin America is the need to overcome the network of power relations and privileges that different corporations have established during previous periods—generally bureaucratic-authoritarian and, sometimes, populist periods. The corporations try to preserve these power relations and privileges through the transition, generating distortions and inflationary crises, which exert pressures upon the democratic system.

(2) The best means for countering this corporative power is by returning to a polity governed by universal and impersonal principles where individual citizens, who are not identified with any particular interests but preserve the capacity of adopting different ones, make choices in a process of public justification and dialogue. In practical terms, this requires promoting broad popular participation in voting, discussion, and direct decisions and including political parties organized on the basis of principles and programs, with active and participative members, and with an internal democracy whose results are then enforced in a disciplined way.

(3) A strong democracy thus characterized, however, is functionally incompatible with a presidentialist system of government, which tends to weaken political parties. When political parties remain strong due to diverse historical and cultural factors, the difficulties which are inherent in the presidentialist system—the erosion of the presidential figure, blockages between powers, difficulties in forming coalitions—are seriously aggravated, thereby jeopardizing the stability of the system.

The conclusion that one may derive from these premises is obvious: The presidentialist system of government under present conditions in Latin America, which include the phenomenon of corporatism, is an obstacle for the consolidation of democratic institutions. The transition to democracy would be considerably facilitated by constitutional reforms which substitute relevant parliamentary mechanisms for the existing presidentialist schemes.

In the last section of this Article, I shall briefly survey the debate over this kind of constitutional reform in Latin America, the previous and present attempts to carry it out, and the obstacles found along the way.

IV. IDEAS AND ATTEMPTS AT REFORMING THE PRESIDENTIALIST SYSTEM OF GOVERNMENT IN LATIN AMERICA

Despite the setbacks mentioned above, many people and groups are deeply attached to the presidential system of government in Latin America. Some right-wing adherents, for example, argue in favor of the presidential system on the basis of tradition and the widespread desire to seek strong leaders supposedly imbedded in the Hispanic mentality. I find these arguments weak because traditions are not unchangeable and have no inherent value, especially when they have led to obviously evil results over a long stretch of history. Furthermore, the tradition in Latin America is more reflective of the coup d'état than of the presidential system. As for the alleged Hispanic preference for strong leaders, this tendency should be institutionally counteracted rather than promoted. In fact, the postulation is rather dubious, given the easy adaptation of countries like Spain to a parliamentary system (after forty years of a caudillo's rule), and the adoption of strong leaders by non-Hispanic nations.

Some conservatives advance a stronger argument—that a parliamentary or mixed system of government would lead to very unstable administrations in Latin America, given the climate of economic crisis, social strife, and political tensions. The answer to these arguments is that there are mechanisms, such as constructive censure, that strongly limit the downfall of governments, as has been shown in the countries where they are in force, such as Germany and Spain. Besides, and more importantly, very often the circumstances that lead to a change of government in a parliamentary system are the same ones that in a presidential system lead to the exhaustion of the presidential figure, to a stalemate between the administration and parliament, to a harsh confrontation between the parties; moreover, they are often the circumstances that create the vacuum that is filled by corporative power indirectly or through military rule.

The left has also defended the presidential system. Quite recently, the Brazilian Harvard Law School Professor, Roberto Mangabeira Unger, who is tied to the leadership of the Brazilian Working Party (PDT), argued in a series of articles⁴³ for the preservation of the presidential system in his country. He did so, however, with some important variations, particularly the ability of the President to dissolve Congress and the ability of Congress to call for new presidential

43. See, e.g., Unger, *La Forma de Gobierno Que Conviene al Brasil*, in CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA, *PRESIDENCIALISMO VS. PARLAMENTARISMO: MATERIALES PARA EL ESTUDIO DE LA REFORMA CONSTITUCIONAL* 95 (1988).

elections. The essence of his argument is that the only process apt to break the network of power relations of conservative party leaders and to mobilize the masses after a program of structural transformation is a presidential election. But this same argument brings out one of the main weaknesses of the presidential system. When a wide consensus exists over a certain program and who should carry it out, any system would work. The presidential system would add only the risk of abuses against unrepresented minorities. But problems arise when, as often happens in Latin America, there is no such consensus. The presidential system is the least capable of promoting its formation. On the contrary, it promotes dissent, even between parties holding similar views, because of the struggle required to win the presidency. If a president with a narrow electoral base tries to enforce a program of deep structural transformation, as President Allende tried to do in Chile, he will be confronted by powerful forces of the opposition and corporative groups. As Professor Lijphart has argued, a parliamentary system is more apt to govern societies in which there are no definite majorities in support of a program, but a consensus has to be worked out.⁴⁴ I can predict that in the case of Argentina, for example, any program of deep structural transformation cannot be carried out without the support of the two majoritarian parties, who confront the corporative pressures seeking to maintain the status quo. This combined support is impossible to obtain, however, within a presidential system. On the other hand, the progressive sector of each party might well reach an agreement in Parliament to support a program of transformation through a collaborative government if the struggle for the presidency were to cease.

Nevertheless, a third alternative is available: a mixed system which preserves some of the advantages of presidentialism, thereby avoiding a deep break with tradition, and at the same time, neutralizing its major handicaps. A mixed system of government is one that combines a popularly elected president and his cabinet with some parliamentary responsibility. Mixed systems may be graded along a continuum that depends on the extent of the powers of the President vis-a-vis those of the Prime Minister and the degree of intervention of Parliament in the formation of government. Furthermore, it is possible to conceive a *dynamic* mixed system where the comparative real powers of the President and the Prime Minister would vary according to such factors as the support that the President has in Parliament

44. Lijphart, *Democratización y Modelos Democráticos Alternativos*, in CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA, PRESIDENCIALISMO VS. PARLAMENTARISMO: MATERIALES PARA EL ESTUDIO DE LA REFORMA CONSTITUCIONAL 5, 17 (1988).

and in the electorate at large, the cohesiveness of his party, his personality, and so forth. This is achieved if the elected President is assigned only narrowly defined powers: the dissolution of the lower house of Parliament, limited veto power, the appointment of high, nonpolitical positions—judges, ambassadors, and generals—and the discretion to appoint and remove the Prime Minister, who is the chief of government. The lower house would retain some restricted power to censure the Prime Minister. Under this system, when the President has a majority in the House of Representatives or in the electorate, despite the fact that all the normal functions of government are centered in the Prime Minister, the President can exercise considerable control over the main policies of government through the threat of removal of the Prime Minister. But once the President loses the majoritarian support of the lower house or the electorate, he must step backward into his circumscribed but important duties, negotiating with the House for the formation of a new government that would have considerable independence from him and yet would not interfere with his figurehead role.

This versatile form of government may be suited to Latin America's well-known political cycles—somewhat connected with economic cycles—because it is flexible enough to handle widely different situations. When the President is backed by a strong consensus in the earlier part of the cycle, the system works like a presidential one. When the consensus breaks down, or if it was never achieved by the President, the system avoids wearing out the presidential figure and brings the opposition under the control of Congress, thereby operating in a parliamentary fashion.

Among the approximately 200 constitutions with which Latin American countries have experimented—indeed an overproduction in this branch of industry—there have been some relevant variations and some different approaches to parliamentarism within a general presidentialist trend. In general, the first constitutional movement in the region consisted of adopting the United States' system with certain modifications addressed at giving the presidency even more strength. To put it another way, the trend was to ascribe more powers to the President with less parliamentary control and to extend the term of office, though with a prohibition on reelection. Afterwards, a contrary movement for attenuating the strength of the President evolved in different countries at various times.

Brazil provides a remarkable case. Its first republican constitution dates from 1891. According to Afonso Arinos de Melo Franco, American presidentialism clearly exerted an influence on the constitu-

tional assembly.⁴⁵ Hence, the 1891 Constitution introduced "constitutional presidentialism" in Brazil. It included a neat presidentialist system, with a four-year term for Parliament. The Movement of 1930 led to the Constitution of 1934. Its most remarkable change was to adopt the principles of the so-called "social constitutionalism." In 1937, Getulio Vargas promoted a new constitution to establish his "Estado Novo." This constitution granted to the President a very extensive list of powers which even included numerous alternatives for intervening in the provincial states.

In 1946, after the military coup which overthrew Getulio Vargas, Brazil enacted a new constitution. In the constitutional convention there was some support for the introduction of a parliamentary system, but it was not enough for the proposal to succeed. In the end, a classical presidentialist system was adopted, though it greatly curtailed the powers granted to the President by the previous constitution. Even the procedure for impeachment was considerably facilitated, requiring only an absolute majority of the House of Deputies for the accusation, a trial before the Supreme Court of the Senate according to the case and following a procedure to be established by law, and rather broad motives for the impeachment.

As is well documented by Jorge Vanossi,⁴⁶ in August 1961, a crisis occurred at the end of President Kubitschek's term and upon the untimely resignation of newly elected President Janio Quadros. The military vetoed the possibility of Vice President Joao Goulart, who was abroad at the time, assuming the presidency. The President of the House of Deputies, Ranieri Mazzilli, assumed it temporarily. He communicated to Congress the demands of the armed forces and the possibility of a compromise, accepted by Goulart himself, which consisted of amending the Constitution in order to introduce a parliamentary form of government. This form of government was based on ideas discussed upon the enactment of previous constitutions and on a project which Deputy Raul Pilla had presented only a month before. With the support of the influential Senator Afonso Arinos de Melo Franco (a previous defender of presidentialism), the assembly of both houses of Congress adopted a specially expeditious procedure for discussing the amendment. A special committee produced a dispatch. Deputy Pilla proposed an amendment. The assembly ultimately approved a regime which was markedly parliamentary: The President was not elected directly by the people but by the Congress in a

45. See A. DE MELO FRANCO, *THE CHAMBER OF DEPUTIES OF BRAZIL: HISTORICAL SYNTHESIS* (1977).

46. J. VANOSS, *PRESIDENCIALISMO Y PARLAMENTARISMO, EN EL BRAZIL* (1964).

joint session of both houses, and he lost traditional powers, such as the position of chief of the armed forces, the ability to determine the internal and external policies of government that related to legislative initiative, and the powers granted in a state of siege concerning the intervention in the provincial states. Power was vested in the President of the Council of Ministers, who had both political responsibility over the government and federal administration. The President proposed to the House of Deputies the candidate for President of the Council of Ministers. The House could accept or reject the proposal of the President, but if more than three proposals were rejected, the next one had to come from an absolute majority of the Senate. This body could also oppose the nomination of the President by a two-thirds vote, which could in turn be reversed by an absolute majority of the House of Deputies. If the House overthrew three successive Councils of Ministers, the President was to dissolve the House and call for new elections. This system lasted for 495 days. President Goulart launched a vocal campaign for the return to presidentialism, and in 1962, Congress enacted a law, "Capanema-Valadares," calling for a referendum to decide whether the parliamentary regime would stay. The results of the referendum were decisively favorable to the return of presidentialism, and on January 24, 1963, after the revocation of the previous amendment to the Constitution, President Goulart assumed full powers. He was deposed in the following year, however, by a military coup that established an authoritarian government that lasted for approximately twenty years.

Once a democratic government was established in 1985, the idea of enacting a new constitution emerged. The constitutional convention went to work in 1986. A project, approved by the Committee of Consolidation, would have established a semi-parliamentarian regime. According to this plan, the President of the Republic had the power to appoint and to remove the Prime Minister and, pursuant to the latter's proposal, the ministers of the Cabinet. The President also had the following powers: to appoint the members of the Supreme Federal Court and of the superior courts; to dissolve the Council of the Republic; to enact, promulgate, publish, and veto, totally or partially, the laws, or to ask Congress to reconsider them; and to declare war and to enter into peace treaties. The Council of the Republic was a superior body of consultation to the President and had the authority, in certain cases, to appoint and to remove the Prime Minister, to dissolve the House of Deputies, and to intervene in all the issues that were relevant to institutional stability. The Council of Defense advised the President on all the issues related to national sovereignty and the defense of democracy. The plan vested government functions

in a Prime Minister and the members of the Council of Ministers, all of whom could be removed by the House of Deputies. The Prime Minister had ten days to present a program of government to the House of Deputies, and he was to resign if the plan was rejected. The Council of Ministers had some powers, including preparing the program of government.

Congress finally rejected the project on March 23, 1988 by the vote of approximately half of the members of both the right- and left-wing parties. There were strong military pressures for preserving the presidentialist regime. The system which Congress approved is actually of this kind, providing a presidential term of five years without reelection. However, the House of Deputies may censure the ministers of the cabinet by a vote of two-thirds of its members.

Venezuela also adopted a similar attenuation of the presidentialist system. The Constitution currently in force, adopted in 1961, calls for many of the powers of the President, such as declaring a state of emergency or negotiating loans, to be exerted in the Council of Ministers. In actual practice, however, the functions of that Council have not been very relevant because the alternation between the two main parties (ADECA and COPEI) has coincided with a similar change in parliamentary majority. Thus, the President was never limited by ministers that were independent from him because of their parliamentary connections. In the reform of 1983, another element of parliamentarism was introduced requiring that the President present in the first year of his term of office a program of social and economic development to be approved by both Houses in a joint session.

A weak system of censure also exists in Costa Rica, whose Constitution of 1949 establishes that the ministers may be interpellated by the legislative assembly and may even be censured by two-thirds of the votes of the members who are present if they are found guilty of illegal or unconstitutional acts or acts which cause manifest harm to public powers.

In Uruguay, the Constitution of 1966, which has returned to the essentials of the Constitution of 1942 after abandoning the collegiate system of government which was in force since 1952, also includes some elements of parliamentarism. The President exercises his executive power with the agreement of the Council of Ministers, or he may delegate to the appropriate minister. The House may interpellate the ministers, and the General Assembly may censure them. Parliament may be dissolved if it affirms by three-fifths of its votes the censure of a minister that the President opposed. In such a case, the President

may call for new parliamentary elections so that the electorate arbitrates the conflict.

The system established in Peru by the 1979 Constitution goes even further in the parliamentary direction. The President is the chief of state and personifies the nation. He has the power to formulate the general political direction of government, but he must appoint a chief of cabinet who serves as the President of the Council of Ministers. This species of prime minister proposes to the President the names of the other ministers and presides over meetings of the Council of Ministers. He has few other relevant powers, however, because most executive functions, including control of the administration, are concentrated in the President. The Council of Ministers has the functions, among others granted by law, of approving the projects that the President sends to Congress, approving legislative decrees, and deliberating over public issues. The House of Deputies may affect the political responsibility of the Council of Ministers or of individual ministers through a vote of censure or no confidence by more than half of the members. The President of the Republic may dissolve the House of Deputies if it has censured three councils of ministers. In such cases, the President must hold elections within thirty days.

In Chile, a kind of parliamentary system was in force from 1891 to 1924. The precedent for this system was found in the Constitution of 1833, which granted to Congress the power to approve periodically some acts of the executive, particularly with regard to expenditures and taxes. Successive reforms led to more limitations of the administration in favor of Congress. In 1891, after a conflict over the budget, Parliament deposed President Balmaceda, and imposed a parliamentary system simply by full enforcement of all the previous reforms. For instance, the impeachment of ministers by accusation of the House of Representatives before the Senate was greatly facilitated. This period of Chilean parliamentarianism was characterized by a strong tendency of the plurality of political parties to conciliate and negotiate. It was also a period of stability and respect for legal guarantees of individual rights.

But in 1925, after the forceful termination of Congress, a new constitution was enacted establishing a presidentialist system. According to this Constitution, the President is elected by the people if he is favored by more than fifty percent of the votes, otherwise Congress chooses between the two candidates achieving the highest number of votes. The President assumed a large number of powers which were further expanded by the reforms of 1934 and 1970. Indeed, they even granted him the ability to enact decrees with the

force of law and to take most economic measures on his own. It is obvious that this plethora of powers and the attempts to exert them might collide with the existing consensus, as occurred under President Allende.

Quite recently, most Chilean political parties formed a commission of constitutional lawyers which analyzed the defects of the Chilean presidentialist system—blockages between the parties, the inability of Parliament to control the executive, lack of representation due to the multiplicity of parties, and so forth. The commission proposed a plan which would establish a mixed system with a president as chief of state and a prime minister as chief of government, with the latter acting in conformance to a program approved by the House of Deputies. The House may also censure the ministers in a constructive modality. The proposed system also differentiates the functions of both Houses of Congress so that the Senate functions as a review chamber.

A mixed system of government was adopted by Haiti in 1987, closely following the scheme of the French Constitution. Most other Latin American countries have strong presidentialist regimes. One extreme version, established by the Mexican Constitution of 1917, is still in force.

In the case of Argentina, the Constitution presently in force, enacted in 1853, also established a strong presidentialist regime modeled after the United States. But it went even further by providing a rather long term for the President—six years without reelection—excluding the requirement that cabinet members be confirmed by the Senate and granting to the President wide powers, which have been much abused, concerning declaration of a state of siege and intervention in the provinces.

President Peron promoted the enactment of a new constitution in 1949 through a process whose legitimacy was contested by the opposition. This Constitution, which amply recognized social rights, further accentuated the presidentialist system, providing for the direct election of the President, allowing the possibility of his reelection and granting to him certain powers, such as declaring a state of alarm and emergency without the intervention of Congress. The ensuing military regime annulled Peron's Constitution and reestablished the 1853 Constitution. In 1957, a constitutional convention was elected, with the proscription of the Peronist Party. Its only contribution was the introduction of a clause concerning social rights, which is still in force.

In 1972, a military government decreed reforms to the Constitu-

tion that remained in force during the constitutional government, which lasted from 1973 to 1976. Among other things, it shortened the presidential term to four years, allowed reelection, unified all the electoral processes, and improved some parliamentary mechanisms. During that Peronist government, an official proposal for reforming the Constitution, including the introduction of a prime minister, was never carried out.

In 1986, President Alfonsín requested an advisory body, the Council for the Consolidation of Democracy, to study a possible revision to the 1853 Constitution. The Council issued two reports, one in 1982 and one in 1987, proposing, among other things, the adoption of a mixed system of government as described above.⁴⁷ The reports also sought to differentiate further the functions of both houses of Congress, to adopt mechanisms of direct popular participation, to strengthen federalism, and to recognize some social rights. The ruling Radical Party adopted these proposals, and they engaged in conversations with opposition parties, mainly the Peronist, to achieve the necessary consensus for initiating the formal procedures of constitutional reform. The electoral confrontation which occurred during the presidential elections of May 14, 1989 prevented the achievement of a consensus among the parties on this issue. Thus, the same factors which contribute to the weakness of the presidential system—particularly political competition among parties—have stopped its reform.

Carlos Saul Menem, the Peronist Party candidate, won the presidential election. He assumed office on July 8, 1989. Mr. Alfonsín had to resign before the expiration of his term when he realized that he lacked the consensus needed to undertake the severe measures that the economic crisis of the country requires. Critics of the Peronist Party imply that the Peronists will try to carry out a model of democracy that is conditioned by explicit or implicit agreements with different corporative groups. Peronist defenders claim otherwise. They argue that their approach is consistent with a conception of democracy that is attuned to different expressions of interests and ideas. They claim that the sources of those expressions are not limited solely to those conveyed by political parties and formal institutions. They argue further that their approach has the added advantage of preventing the democratic government from becoming as powerless as that of Alfonsín's during the last period of his rule. Only time will provide a

47. See CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA, REFORMA CONSTITUCIONAL: DICTAMEN PRELIMINAR DEL CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA (1986); CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA, REFORMA CONSTITUCIONAL: SEGUNDO DICTAMEN DEL CONSEJO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA (1987).

perspective from which to judge this new phase of Argentine democracy.

In the meantime, the issue of constitutional reform will remain viable through the forum of public discussion. The Peronist leaders themselves, including President Menem, have repeatedly declared that they will promote that reform. They claim that it may come as early as 1990. It is not clear, however, what sort of reform they would advocate. Some of their representatives support only minor modifications in the system of government—mainly reducing the presidential term from six to four years and allowing the President to seek reelection for one additional term. Moreover, they seem genuinely concerned with emphasizing a wider recognition of social rights.

Nevertheless, experience in government may teach the new leaders that it is impossible to be sensitive to the interests and rights of the people without containing corporative power. Such containment can only be achieved through strong political parties and direct citizen participation. This requires a more flexible mechanism for the succession of power—the mixed parliamentary presidential system recommended in this Article.